United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 21-0366**
	)	**Issued: October 26, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Bayonne, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On January 8, 2021 appellant, through counsel, filed a timely appeal from an August 25, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] The Board notes that appellant also requested an appeal from a June 23, 2020 overpayment determination. However, as more than 180 days has elapsed since the merit decision dated June 23, 2020, to the filing of this appeal, pursuant to the 5 U.S.C. § 8101 *et seq.* and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the June 23, 2020 overpayment determination.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective August 26, 2020, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 14, 2009 appellant, then a 59-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained head and neck injuries when a box fell off the top of a postal container striking the back of her head and her right shoulder. She stopped work on the date of injury. OWCP accepted the claim for right shoulder contusion and right cervical strain/sprain. It authorized anterior cervical discectomy and fusion at C3-4, C4-5, C5-6, and C6-7, which was performed on April 1, 2010 and additional spinal fusion, which was performed on September 26, 2011. OWCP paid her wage-loss compensation on the supplemental rolls, effective January 29, 2010, and on the periodic rolls, effective March 14, 2010.

On January 20, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Lynne Carmickle a Board-certified neurologist, for a second opinion evaluation regarding the status of appellant's accepted right shoulder and cervical conditions and ability to work. In a February 7, 2020 report, Dr. Carmickle reviewed the SOAF and the medical record, noting that the claim had been accepted for right shoulder contusion and cervical strain/sprain. A physical examination revealed no pain on palpation of the cervical elements, lumbar flexibility was within normal limits, no lumbar spasm or tenderness on palpation, negative bilateral straight leg raising. A sensory examination was normal. With respect to whether appellant's headaches were employment related, Dr. Carmickle was unable to offer an opinion on causal relationship as she did not have any records prior to 2016 pertaining to treatment for appellant's headaches. She opined that appellant's subjective complaints were not supported by the objective evidence and her disability was due to a nonwork-related lumbar condition. Dr. Carmickle found appellant was not capable of performing her date-of-injury job, but was capable of working within restrictions. She determined that appellant was capable of working eight hours per day in a sedentary position and that she had reached maximum medical improvement. In an attached work capacity evaluation (Form OWCP-5c), Dr. Carmickle detailed work restrictions, which allowed up to six hours of sitting, up to four hours of walking and standing, up to two hours of reaching, no reaching above the shoulder, twisting, or

[3] 5 U.S.C. § 8101 *et seq*.

[4] The Board notes that, following the August 25, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

bending/stooping, up to two hours of pushing, pulling, and lifting up to 10 pounds, a 10-minute break four times per day; and a 20-minute break twice a day.

On May 7, 2020 the employing establishment offered appellant a modified mail processing clerk position. The duties of the position included two to three hours of manual letters/flats, three to four hours of scanning packages, one and one-half hours of mark-ups, and one and one-half hours of "CFS/RFS." The physical requirements of the position involved three to six hours of sitting, three to four hours of standing, two hours of lifting up to 10 pounds, and two hours of reaching. The regular work hours were 5:00 a.m. to 1:30 p.m., with scheduled days off on Saturday and Sunday. The position was located at the Bayonne Post Office. The position description also noted Dr. Carmickle's restrictions and indicated that it was the responsibility of the employee and the employing establishment to ensure that the physician's restrictions were not exceeded. The employing establishment also noted that the job offer was permanent and would remain available until medical documentation compelled a change.

Appellant refused the job offer on May 11, 2020, asserting that she could not perform any of the duties of the position.

OWCP thereafter received an April 2, 2020 report from Dr. Ravi Tikoo, a Board-certified neurologist, detailing medical history and treatment and providing examination findings. Appellant stated that her pain was the same and she continued to have headaches and migraines. Dr. Tikoo reported appellant's headaches and migraines were responding to treatment as they were less severe.

In a June 3, 2020 addendum, Dr. Carmickle detailed the additional evidence provided by OWCP pertaining to treatment prior to 2016 for appellant's headaches. Based on the new evidence provided by OWCP, she concluded that appellant's headache and complaints of cervical pain were causally related to the accepted work accident. Dr. Carmickle indicated that her opinion regarding the lack of objective evidence supporting appellant's subjective complaints was unchanged. According to Dr. Carmickle, appellant's nonwork-related lumbar condition precluded a return to her date-of-injury job. She concluded that appellant was capable of performing sedentary work and her restrictions had been provided in her prior Form OWCP-5c.

On June 10 and 12, 2020 the employing establishment advised that the May 7, 2020 job offer remained available to appellant as long as her restrictions remained unchanged.

On June 15, 2020 OWCP received a March 23, 2020 report from Dr. Hiral Patel, a Board-certified physiatrist, noting appellant's December 4, 2009 employment injury and medical history. Dr. Patel diagnosed cervical disc displacement, lumbar intervertebral disc displacement, cervicalgia, right hip trochanteric bursitis, postlaminectomy syndrome, right hip and right shoulder pain, headache, cervical spine fusion, and lumbar and cervical spondylosis without radiculopathy or myelopathy.

By letter dated June 16, 2020, OWCP advised appellant that the position offered on May 7, 2020 was suitable in accordance with the medical limitations provided by Dr. Carmickle in her February 7, 2020 report and June 3, 2020 addendum. It noted the April 2, 2020 report from Dr. Tikoo offered no opinion regarding whether appellant was capable of work and was based on

appellant's subjective complaints. Thus, OWCP found the weight of the medical opinion evidence rested with Dr. Carmickle regarding appellant's work restrictions. It notified her that, if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to 5 U.S.C. § 8106(c)(2), her right to compensation for wage loss or a schedule award would be terminated. OWCP afforded appellant 30 days to respond.

In a June 19, 2020 report by Dr. Giovanni Ramundo, a Board-certified anesthesiologist specializing in pain medicine, noted appellant's December 4, 2009 employment injury and medical history. Dr. Ramundo diagnosed cervical disc displacement, lumbar intervertebral disc displacement, cervicalgia, right hip trochanteric bursitis, postlaminectomy syndrome, right hip and right shoulder pain, headache, cervical spine fusion, and lumbar and cervical spondylosis without radiculopathy or myelopathy.

In a June 29, 2020 letter, appellant again stated that she was unable to perform any of the duties listed in the offered position due to her pain and complications from her surgery and injury. She stated that her condition and pain would be aggravated by grasping, sitting, trying to lift objects, and standing. In addition, appellant stated her balance was unstable after standing or sitting for short periods of time.

A June 29, 2020 report by Dr. Tikoo noted that appellant was seen that day for a neurological examination. The report repeated the findings outlined in his prior report.

On July 17, 2020 the employing establishment advised that the offered position remained available.

On July 23, 2020 OWCP received a May 7, 2020 report from Dr. Tikoo, noting that appellant was seen for a neurological evaluation that day and was unchanged from his May 2, 2020 report.

By letter dated July 23, 2020, OWCP notified appellant that her reasons for refusing the position was not valid and the medical evidence submitted insufficient to support refusal as it did not address whether appellant was capable of performing the offer position. It provided her 15 days to accept the position or have her entitlement to wage-loss compensation benefits terminated. OWCP advised appellant that the offered position remained available.

By decision dated August 25, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective August 26, 2020, as she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It noted that she had not accepted the offered position or resumed work following its 15-day letter. OWCP determined that the opinion of Dr. Carmickle as provided in her February 7, 2020 report and June 3, 2020 addendum constituted the weight of the evidence and established that appellant could perform the duties of the offered position.

LEGAL PRECEDENT

Under FECA,[5] once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[6] Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[7]

Section 10.517 of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of proof to show that such refusal or failure to work was reasonable or justified.[8] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[9]

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.[10] Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[11]

ANALYSIS

The Board finds that OWCP met it burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective October 3, 2019, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On May 7, 2011 the employing establishment offered appellant a position as a modified mail processing clerk position and on August 25, 2020 OWCP determined that the position was suitable. The duties of the position included two to three hours of manual letters/flats, three to four hours of scanning packages, one and one-half hours of mark ups, and one and one-half hours

[5] *Supra* note 3.

[6] *M.S.*, Docket No. 20-0676 (issued May 6, 2021); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[7] *Supra* note 3 at § 8106(c)(2); *see also M.S., id.*; *M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

[8] 20 C.F.R. § 10.517.

[9] *Id.* at § 10.516; *see M.S., supra* note 6; *Ronald M. Jones*, 52 ECAB 406 (2003).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013). *See also M.S., id.*; *R.A.*, Docket No. 19-0065 (issued May 14, 2019).

[11] *M.S., id.*; *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *see also Joan F. Burke*, 54 ECAB 406 (2003).

of "CFS/RFS." The physical requirements of the position included three to six hours of sitting, three to four hours of standing, two hours of lifting up to 10 pounds, and two hours of reaching.

The Board finds that the May 11, 2020 job offer was within the restrictions as prescribed by the second opinion physician, Dr. Carmickle. In a June 7, 2020 addendum, Dr. Carmickle determined that appellant's headache and cervical pain were causally related to her accepted December 14, 2009 employment injury and that work restrictions were unchanged from her prior report. She reported that appellant could perform sedentary work including up to six hours of sitting, up to four hours of walking and standing, up to two hours of reaching, no reaching above the shoulder, twisting, or bending/stooping, two hours of pushing, pulling and lifting up to 10 pounds, a 10-minute break four times per day, and a 20-minute break twice a day. Dr. Carmickle attributed the work restrictions to appellant's nonwork-related lumbar condition. The Board notes that the actual duties of the modified mail processing clerk position were within the restrictions found by Dr. Carmickle in her February 7, 2020 report and June 3, 2020 addendum.

The Board finds that OWCP properly accorded the weight of medical opinion to the reports of Dr. Carmickle who opined that, while appellant required work restrictions, she was capable of returning to sedentary work. Dr. Carmickle based her opinion on a proper factual and medical history. She also provided appropriate physical examination findings. OWCP properly relied on her reports to determine that the offered position was suitable.[12]

Subsequent to the suitable work offer, appellant submitted a number of medical reports from Drs. Ramundo and Tikoo. Neither physician, however, addressed the relevant issue of whether appellant was capable of performing the duties of the offered position. Therefore, their opinions are of little probative value.[13]

The Board finds that OWCP properly followed its established procedures prior to the termination of appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2), including providing her with an opportunity to accept the position offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid.[14]

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss compensation and entitlement to a schedule award, effective August 26, 2020, because she refused an offer of suitable work.[15]

[12] *M.S., id.; S.V.*, Docket No. 19-0349 (issued October 18, 2019).

[13] *M.S., id.*; *R.R.*, Docket No. 19-0173 (issued May 2, 2019).

[14] *K.S.*, Docket No. 19-1650 (issued April 28, 2020); *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

[15] *See M.H.*, Docket No. 17-0210 (issued July 3, 2018).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective August 25, 2020, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board