United States Department of Labor
Employees' Compensation Appeals Board

R.O., Appellant	)	
and	)	**Docket No. 20-1670**
	)	**Issued: September 15, 2021**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, San Juan, PR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 29, 2020 appellant filed a timely appeal from an April 2, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On February 22, 1999 appellant, then a 42-year-old contact representative/veterans benefits counselor, filed an occupational disease claim (Form CA-2) alleging that factors of her federal employment, including repetitive writing and entering data into the computer, caused bilateral hand and back conditions. OWCP accepted the claim for left carpal tunnel syndrome. The record reflects that OWCP paid appellant wage-loss compensation on the periodic rolls as of June 16, 2002. Appellant relocated to Virginia from Puerto Rico prior to September 2003. On May 28, 2009 appellant notified OWCP that she had relocated to Killeen, Texas.

On February 4, 2019 OWCP referred appellant for a second opinion examination with Dr. James Butler, a Board-certified orthopedic surgeon. It provided Dr. Butler with appellant's medical records and a statement of accepted facts (SOAF). OWCP asked him to address appellant's disability status and her limitations resulting from both her work-related and nonwork-related conditions.

In a March 19, 2019 report, Dr. Butler noted appellant's history of injury and medical treatment. He noted that appellant's accepted condition was left carpal tunnel syndrome. Dr. Butler related that an electromyography (EMG) scan from 2004 showed severe bilateral median neuropathies and that appellant currently had subjective complaints of pain in both wrists, numbness, and tingling in both hands and fingers. He advised that the residuals on examination revealed persistent tenderness and decreased range of motion of both wrists, decreased sensation in the right hand and fingers in median nerve distribution, and positive Tinel's sign and Phalen's test at the right wrist. Dr. Butler explained that the accepted condition had not completely resolved, but had been stable for several years. He opined that, due to the lack of improvement from prior treatment and her decision not to have surgery, no further treatment was warranted and appellant had reached maximum medical improvement (MMI). Dr. Butler noted that appellant failed to attend a scheduled functional capacity evaluation (FCE) and he opined that, based on his examination, appellant was able to perform modified duties. He provided an April 30, 2019 work capacity evaluation (Form OWCP-5c), indicating that appellant could perform sedentary work. Dr. Butler noted appellant's restrictions, indicating that appellant could perform repetitive movements of the wrists for two hours per day and no pushing/pulling/lifting of more than 10 pounds for more than two hours per day.

On July 9, 2019 the employing establishment offered appellant a position as a Program Support Worker in Guaynabo, Puerto Rico. The duties and physical requirements of the offered position included no repetitive fine motor skills more than two hours per day and no heavy lifting/pushing/pulling of more than 10 pounds per day.

On July 23, August 26, September 21, and December 20, 2019, the employing establishment noted that appellant did not report to the position.

On January 14, 2020 the employing establishment confirmed that the position remained available.

On January 14, 2020 OWCP informed appellant that it found the job offer suitable and in accordance with the work restrictions provided by Dr. Butler. It noted that the employing

establishment confirmed that the position remained open and available to her. OWCP allowed appellant 30 days to accept the position or provide her reasons for refusal. It advised that, pursuant to 5 U.S.C. § 8106(c)(2), an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for wage loss or a schedule award.

In a letter dated February 12, 2020, appellant responded to OWCP regarding her refusal to return to work. She indicated that she was still totally disabled, that her physician had found her totally disabled, and that Dr. Butler's examination was incomplete because the FCE was not performed. Appellant further argued that the job offer was not suitable because she had lived in Texas for the past 12 years and the job offer was located in Puerto Rico. She further noted that the job offer had a report by date of less than two weeks from the initial offer, which was not feasible.

On February 27, 2020 the employing establishment confirmed that the position remained available.

By notice dated March 3, 2020, OWCP advised appellant that her refusal of the offered position was not justified. It afforded her an additional 15 days to accept the offered position.

In response to the 15-day notice, OWCP received letters from appellant relating to her requests for documentation regarding Dr. Butler's selection as a second opinion physician, and letters explaining her inability to attend scheduled medical appointments.

On April 2, 2020 the employing establishment confirmed that the position remained available.

By decision dated April 2, 2020, OWCP terminated appellant's wage-loss and entitlement to schedule award compensation benefits, effective that date, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It found that Dr. Butler's report constituted the weight of the medical evidence regarding appellant's work limitations.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[2] It has authority under 5 U.S.C. § 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of the refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or

[2] *See T.M.*, Docket No. 20-0401 (issued February 26, 2021); *E.W,* Docket No. 19-1711 (issued July 29, 2020); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

submit evidence or provide reasons why the position is not suitable.[3] In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.[4]

OWCP's procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[5] Its regulations provide that the employing establishment, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employing establishment may offer suitable reemployment at the employee's former duty station or other location.[6]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 2, 2020, for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The employing establishment offered appellant a modified position in Guaynabo, Puerto Rico. However, the record reflects that she had relocated and had lived in Texas for the past 12 years. OWCP did not explain why the location of the offered position was in Puerto Rico and it did not indicate that it made an attempt to determine whether suitable employment was available in Texas where appellant resides.

The Board has previously recognized that OWCP procedures require that, if the job offer is for a site outside of the claimant's residential area, the employing establishment must document that it first searched for suitable employment in the claimant's current geographic area.[7]

The evidence of record indicates that the offered position in Guaynabo, Puerto Rico is located approximately 2,000 miles from appellant's residence in Killeen, Texas. OWCP should have developed this aspect of the case before finding the offer suitable. Its regulations provide

[3] 5 U.S.C. § 8106(c)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.2e. (June 2013) (the claims examiner (CE) must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2), and allow the claimant 30 days to submit his or her reasons for refusing or abandoning the position. If the claimant submits evidence and/or reasons for refusing or abandoning the position, the CE must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid. *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

[4] 20 C.F.R. § 10.500(b).

[5] *Supra* note 3 at Chapter 2.814.5a (June 2013).

[6] 20 C.F.R. § 10.508; *see S.W.*, Docket No. 18-0857 (issued November 26, 2018); *D.C.*, Docket No. 17-0582 (issued September 6, 2017); *Sharon L. Dean*, 56 ECAB 175 (2004).

[7] *See A.P.*, Docket No. 17-1135 (issued February 12, 2018); *W.D.*, Docket No. 15-1297 (issued August 23, 2016); *supra* note 3 at Chapter 2.814.4a.(2) (June 2013).

that the employing establishment should offer suitable reemployment where the employee currently resides, if possible.[8] The Board also noted in *Sharon L. Dean*[9] that the employing establishment should offer suitable reemployment where the employee currently resides, and found that it was reversible error for OWCP to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical in appellant's geographic location. In *W.D.*,[10] the Board reaffirmed that, if the job offer is for a site outside of the employee's residential area, the employing establishment must document that it first searched for suitable employment in the employee's current geographic area.

The Board finds that OWCP did not substantiate that the employing establishment performed a current and proper search for suitable employment in appellant's geographic area. OWCP, therefore, did not properly determine that the offered position was suitable. The April 2, 2020 termination decision is reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 2, 2020, for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

[8] *Id*.

[9] 56 ECAB 175 (2004).

[10] Docket No. 15-1297 (issued August 23, 2016).

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 15, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board