

**United States Department of Labor  
Employees' Compensation Appeals Board**

S.W., Appellant	)	
	)	
and	)	<b>Docket No. 22-0154</b>
	)	<b>Issued: August 23, 2022</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
City of Industry, CA, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On November 11, 2021 appellant, through counsel, filed a timely appeal from an October 21, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the October 21, 2021 decision, appellant submitted additional evidence to OWCP. 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.*

## **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 27, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

## **FACTUAL HISTORY**

On January 17, 2020 appellant, then a 32-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date her right knee became swollen and bruised when she crashed while riding a mule (utility vehicle) to drop off mail while in the performance of duty. She stopped work on January 18, 2020. OWCP accepted appellant's claim for right knee contusion.

On March 7, 2020 appellant returned to full-time, limited duty. OWCP subsequently expanded acceptance of her claim to include complex tear of the medial meniscus of the right knee. On March 28, 2020 appellant stopped work again because work was not available within her restrictions. OWCP paid her wage-loss compensation on the supplemental rolls effective March 3, 2020 and placed her on the periodic rolls, effective December 6, 2020.

On November 23, 2020 appellant underwent right knee arthroscopy with synovectomy and partial meniscectomy.

Appellant continued to receive medical treatment. In a duty status report (Form CA-17) dated February 23, 2021, Dr. Charles L. Herring, a Board-certified orthopedic surgeon who specializes in sports medicine, noted a diagnosis of status-post right knee surgery. He indicated that appellant could return to work on March 2, 2021 with restrictions of lifting/carrying up to 10 pounds continuously and 15 pounds intermittently, standing and walking up to two hours each, bending/stooping up to four hours, and pushing/pulling up to 30 pounds on wheels. Dr. Herring also indicated "sedentary-work recommended."

In a letter dated March 2, 2021, the employing establishment informed appellant that she was eligible for a limited-duty assignment of a modified mail handler based on a medical report dated February 23, 2021. It instructed her to report to work on March 8, 2021.

OWCP received an offer of a modified limited-duty assignment dated February 26, 2021 for a modified mail handler position. The job offer noted that the position was full time with an annual salary of \$43,654.00 and available on March 2, 2021. The duties of the job position required surface visibility scanning, dock/surface dispatch, and double stacker for eight hours. The physical requirements of the modified-duty position included simple grasping/fine manipulation/reaching above the shoulder for eight hours intermittently, standing/walking for two hours each, sitting/climbing/twisting intermittently, bending/stooping for four hours, pushing/pulling up to 30 pounds on wheels, and lifting/carrying up to 15 pounds intermittently.

In a March 8, 2021 letter, the employing establishment informed OWCP that it had issued a temporary modified assignment on February 26, 2021 which notified appellant to report to work on March 8, 2021. It indicated that she did not report to work. The employing establishment noted that the modified assignment remained available for appellant.

In a March 8, 2021 routing slip note, appellant indicated that she was notified by OWCP that the employing establishment had provided her with a modified job offer and that she was to start on March 8, 2021 at 10:00 p.m. She explained that she reported to work, but a supervisor was unavailable, and no one was aware of the modified job offer.

On March 9, 2021 OWCP issued appellant a notice of proposed termination. It informed her that she had been provided with a temporary light-duty assignment as a modified mail handler by the employing establishment on March 2, 2021. OWCP noted that it had been advised that appellant had refused to accept or report to the job assignment provided. It indicated that it had reviewed the temporary light-duty assignment and determined that it comported with the work restrictions provided by Dr. Herring in his February 23, 2021 report. OWCP also informed appellant of the provisions of 20 C.F.R. § 10.500(a) and further advised that her entitlement to wage-loss compensation would be terminated under this provision if she did not accept the offered temporary assignment or provide a written explanation with justification for her refusal within 30 days. It noted that the actual earnings “in the assignment provided would meet or exceed the current wages of the job held when injured. Therefore, you would not be entitled to ongoing wage[-]loss compensation.”

In a memorandum of telephone call (Form CA-110) dated March 10, 2021, appellant informed OWCP that she had reported to work, but no one was there to give her the job offer.

OWCP received a report dated February 23, 2021 by Dr. Herring who recounted appellant’s complaints of right knee pain. Upon examination of his right knee, Dr. Herring observed mild and medial joint line tenderness and mild patellofemoral crepitus. He diagnosed right knee contusion, right knee partial tear of the medial meniscus, and status-post right knee arthroscopy with synovectomy and partial meniscectomy.

In a Form CA-110 dated April 22, 2021, the employing establishment confirmed that the job position remained available and that appellant had not yet contacted the employing establishment about returning to work.

By decision dated April 27, 2021, OWCP finalized the notice of proposed termination of appellant’s wage-loss compensation benefits, effective that date, pursuant to 20 C.F.R. § 10.500(a). It informed her that her claim remained open for medical benefits.

On May 10, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on August 4, 2021.

OWCP received an employing establishment investigative interview report dated April 17, 2021. Appellant indicated that she failed to report to work from March 19 through 23, 2021 because the job offer did not meet her work restrictions.

Appellant continued to receive medical treatment from Dr. Herring. In reports dated April 20 through September 21, 2021, Dr. Herring noted right knee examination findings of mild effusion, mild tenderness over the medial and lateral joint lines, and mild patellofemoral crepitus. He diagnosed right knee contusion, right knee partial tear of the medial meniscus, and status-post right knee arthroscopy.

In an April 28, 2021 report and Form CA-17, Dr. Edward Mittleman, a family medicine specialist, indicated that he evaluated appellant for right knee sensation of pulling, pinching, and stiffness. Upon examination of the right knee, he observed bilateral joint tenderness and positive patellofemoral compression and patellar grind test. Dr. Mittleman diagnosed right knee contusion, right knee medial meniscus tear, and status-post knee arthroscopy. He indicated that appellant could work full time with restrictions.

Appellant submitted a May 3, 2021 letter from Dr. Hosea Brown, a Board-certified internist, who opined that appellant needed a sedentary job offer. He reported that the job offer dated February 26, 2021 was not a sedentary job offer.

In progress reports and CA-17 forms dated June 30 and August 13, 2021, Dr. Mittleman noted appellant's complaints of right knee sharpness, pulling, tightness, and stiffness. He provided examination findings and diagnosed right knee contusion, right knee medial meniscus complex tear, and status-post left knee arthroscopy. Dr. Mittleman indicated that appellant could return to full-time, modified duty.

In a brief dated July 2, 2021, appellant, through counsel, argued that appellant was justified in refusing the temporary light-duty assignment because it exceeded her medical restrictions. Counsel noted that Dr. Herring authorized sedentary duty and explained that the Department of Labor, *Dictionary of Occupational Titles* defined "sedentary duty" as 10 pounds of force occasionally, sitting most of the time, and walking or standing for brief periods.

In an August 27, 2021 letter, P.W., an occupational health processing specialist for the employing establishment, explained that an employee performing double stacker duties would not need to do any lifting because the automatic double stacker did the lifting for the employee. She alleged that the assigned duties as listed on the February 26, 2021 job offer were within the work restrictions provided by Dr. Herring in the February 23, 2021 Form CA-17.

By decision dated October 21, 2021, OWCP's hearing representative affirmed the April 27, 2021 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup>

OWCP regulations at 20 C.F.R. § 10.500(a) provides in relevant part:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a

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<sup>4</sup> *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee's work restrictions. (The penalty provision of 5 U.S.C. § 8106(c)(2) will not be imposed on such assignments under this paragraph)."<sup>5</sup>

When it is determined that, an employee is no longer totally disabled from work and is on the periodic rolls, OWCP's procedures provide that the claims examiner should evaluate whether the evidence of record establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.<sup>6</sup> When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.<sup>7</sup>

OWCP's procedures further advise: "If there still would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based upon the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment)."<sup>8</sup>

### ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 27, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

The physical requirements of the offered temporary light-duty assignment were within appellant's medical restrictions provided by Dr. Herring. In a report and Form CA-17 dated February 23, 2021, Dr. Herring provided examination findings and diagnosed right knee contusion, right knee partial tear of the medial meniscus, and status-post right knee arthroscopy. He indicated that appellant could return to work on March 2, 2021 with restrictions of lifting/carrying 10 pounds continuously and 15 pounds intermittently, standing and walking up to two hours, bending/stooping up to four hours, and pushing/pulling up to 30 pounds on wheels. Dr. Herring also reported "sedentary-work recommended." Although he did not review the February 26, 2021 temporary, light-duty modified mail handler job offer in question, the

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<sup>5</sup> 20 C.F.R. § 10.500(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1) (June 2013).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at Chapter 2.814.9c(10).

employing establishment indicated that it offered appellant the position based on the restrictions set forth by him.

The February 26, 2021 job offer noted that the modified mail handler position involved job duties such as surface visibility scanning, dock/surface dispatch, and double stacker for eight hours. The physical requirements of the modified-duty position included simple grasping/fine manipulation/reaching above the shoulder for eight hours intermittently, standing/walking for two hours each, sitting/climbing/twisting intermittently, bending/stooping for four hours, pushing/pulling up to 30 pounds on wheels, and lifting/carrying up to 15 pounds intermittently. The Board thus finds that appellant had temporary, light-duty work available within her work restrictions.

Appellant submitted a May 3, 2021 letter from Dr. Brown, who noted that February 26, 2021 job offer was not a sedentary job offer. Dr. Brown's report is of no probative value, however, because he did not provide any medical rationale or explanation to support his opinion regarding her ability to work nor did he attribute her work restrictions to the accepted January 17, 2020 employment injury.<sup>9</sup>

In light of the foregoing, the Board finds that OWCP met its burden of proof to terminate her wage-loss compensation, effective April 27, 2021, pursuant to 20 C.F.R. § 10.500(a).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 27, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

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<sup>9</sup> *F.S.*, Docket No. 18-0098 (issued August 13, 2018); *P.W.*, Docket No. 17-0514 (issued June 9, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board