

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 February 22, 2018, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On February 9, 2015 appellant, then a 39-year-old letter carrier, filed a notice of recurrence of disability (Form CA-2a) alleging that on February 4, 2015 she sustained a recurrence of disability due to a July 17, 2000 injury accepted under OWCP File No. xxxxxx578.⁴ By letter dated May 13, 2015, OWCP advised her that it had converted her notice of recurrence of disability to an occupational disease claim as she had attributed her condition to repetitive work. It assigned OWCP File No. xxxxxx519 and accepted the claim for lumbar radiculopathy. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls commencing March 16, 2015 and on the periodic rolls commencing November 12, 2017.

On March 31, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF), medical record, and a series of questions for a second opinion evaluation with Dr. Leon Sultan, a Board-certified orthopedic surgeon, to determine whether she continued to have residuals or disability causally related to her accepted February 4, 2015 recurrence of disability.

By report dated April 20, 2017, Dr. Sultan noted his review of the SOAF, the medical record, and appellant's complaints of lower back pain radiating into both lower extremities. Appellant's physical examination revealed no active parathoracic or paralumbar muscle spasm, negative bilateral Trendelenburg test, nontender bilateral sacroiliac joints on palpation, and steady walking pattern. Dr. Sultan opined that she was not capable of performing her date-of-injury position, but was capable of working a modified job for eight hours. He advised that appellant's restrictions included no carrying or lifting more than 15 pounds with both hands, and no prolonged stooping, walking, bending, or squatting. In a work capacity evaluation form (Form OWCP-5c), Dr. Sultan advised that she had permanent work restrictions. He provided restrictions indicating that appellant could not twist, bend or stoop, that she could walk, sit, and stand up to eight hours a day, and that she could push, pull, and lift up to 15 pounds.

On June 23, 2017 the employing establishment offered appellant a modified city carrier position. The duties of the position included: one to eight hours of casing mail/sorting mail pull down route, one to eight hours of delivering park and loop route, one to eight hours of collections/delivering parcels, and one to eight hours of driving postal vehicle. The physical requirements of the position involved one to eight hours of pushing/pulling/lifting up to 15 pounds and no bending, stooping, or twisting. The position was located at the Westbury Post Office.

On June 28, 2017 appellant refused the June 23, 2017 job offer, asserting that it was not within the work restrictions provided by Dr. Sultan.

⁴ OWCP previously accepted that appellant sustained low back strain on July 17, 2000 under OWCP File No xxxxxx578. It administratively combined OWCP File Nos. xxxxxx519 and xxxxxx578, with the latter serving as the master file.

In a July 19, 2017 addendum report, Dr. Sultan reviewed the June 23, 2017 modified job offer and found that was within his restrictions as it did not require any twisting, bending, or stooping. He opined that appellant was capable of performing the offered position.

On August 3, 2017 the employing establishment advised that the June 23, 2017 job offer remained available to appellant.

By letter dated August 3, 2017, OWCP advised appellant that the position offered on June 23, 2017 was suitable in accordance with the medical limitations provided by Dr. Sultan in his April 20, 2017 report and July 19, 2017 addendum. 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 an August 11, 2017 report, Dr. Christopher Burrei, an osteopath specializing in pain medicine, diagnosed chronic low back pain, chronic radiculopathy, and lumbar facet syndrome. On examination, he found positive bilateral lumbar facet, chronic lumbar pain and spasm, gluteal region tenderness, mildly positive right left raise, and full bilateral hip, knee, and ankle range of motion. Dr. Burrei advised that appellant was only capable of performing sedentary work. He noted that he had reviewed the offered job and determined that she was incapable of performing the offered job.

In a report dated August 14, 2017, Dr. Laura Schoenberg, an osteopath Board-certified in neurology, related that appellant was under her neurological care and was last seen on August 7, 2017 for a work-related injury of February 4, 2015, with an initial work injury of July 17, 2000. She related that she had reviewed appellant's magnetic resonance imaging (MRI) scan dated April 4, 2017 and that it confirmed that appellant had a disc herniation at L4-5, with mild central stenosis, L5-S1 protrusion with nerve root impingement, degenerative disc disease, as well as osteoarthritis at the L4-5 facet joints. Dr. Schoenberg noted that appellant's symptoms had been worsening. She further related that she had discussed appellant's duties as a letter carrier with appellant and found that it was a physically demanding job which involved prolonged standing, walking, bending, reaching, heavy lifting, and carrying. To effectively sort, case, rack, and deliver mail, appellant would have to bend, twist, stoop, and carry heavy items as well as a mailbag on her shoulder. Dr. Schoenberg related that she disagreed with the offered modified-duty assignment as appellant should not deliver, park, loop routes, case, or sort mail, as these activities would require constant prolonged standing, walking, squatting, bending, twisting, and stooping as well as bending.

In a report dated August 23, 2017, Dr. Paul Lerner related that appellant was seen again for radicular pain in both legs. He diagnosed lumbar strain and radiculopathy, with disc herniations. Dr. Lerner related that appellant could not return to work, even in the offered modified-duty position, which required bending, standing, twisting, and carrying a bag. He noted that she could also not stand for prolonged periods of time or walk a mail route.

In a statement dated August 30, 2017, appellant asserted that the offered position was not within the work restrictions set by Dr. Sultan which included no lifting or carrying more than 15 pounds at a single time using both hands and no prolonged, standing, bending, walking, squatting, crawling, or walking. She asserted that duties of the position were outside her restrictions as they required prolonged standing, walking, carrying in excess of 15 pounds, and constant standing and twisting, bending and stooping. Appellant also asserted that the current modified job offer required more physical activity than her prior modified job.

On September 6, 2017 the employing establishment informed OWCP that appellant had not returned to work.

On December 21, 2017 the employing establishment confirmed that the offered position remained available.

By letter dated December 21, 2017, 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 explain why she was not capable of performing the offered position. It also found that her statement regarding the offered position was contrary to the actual description of job restrictions which included no stooping, bending or twisting and limited lifting, pushing, and pulling to 15 pounds. OWCP provided appellant 15 days to accept the position or have her entitlement to wage-loss compensation benefits terminated. It advised her that the offered position remained available.

In a duty status reports (Form OWCP 17) dated October 4, November 6, and December 4, 2017, and January 3 and 15, 2018, Dr. Schoenberg related that appellant was disabled from work.

In a January 2, 2018 report, Dr. Schoenberg reviewed the offered modified job and opined that appellant was unable to perform the duties of the position. She related that delivering park and loop routes would place further strain on appellant's existing injuries. Dr. Schoenberg explained that the duties described were repetitive and physically demanding and would worsen appellant's symptoms. Thus, she opined, that due to a worsening of appellant's lower back over the past few years, appellant was unable to perform any physical work.

On January 3, 2018 appellant accepted the offered position under protest. She reiterated that work restrictions of the offered modified job were outside the restrictions set by Dr. Sultan.

In a letter dated January 5, 2018, the employing establishment advised OWCP that appellant reported for work that day. However, in light of a duty status report (Form CA-17) completed by appellant's neurologist, indicating that appellant was not to return to work, the postmaster did not allow appellant to work.

In email correspondence dated January 8, 2018, E.R., appellant's postmaster, related that appellant could not perform the core duties listed in the job offer and had a Form CA-17 from appellant's treating physician finding her totally disabled from work. She had, therefore, informed appellant that she "needs to get better before [appellant] can return to work" and that she did not want appellant to injure herself.

In a report dated January 15, 2018, Dr. Burrei diagnosed chronic low back pain with radicular symptoms and exacerbation of thoracic myofascial pain and provided examination findings. He noted that appellant was seeking disability retirement in light of the employing establishment's mail carrier job offer, which was contrary to work restrictions from her treating physician. Dr. Burrei noted that his work restrictions were unchanged and opined that the offered position would result in further injury and exacerbations of her pain and disability.

In a report dated February 9, 2018, Dr. Schoenberg attributed appellant's current condition to her letter carrier duties. Physical examination findings were reported. Dr. Schoenberg opined that appellant was totally disabled from performing a letter carrier position due to the physical requirements of the job. She indicated that the letter carrier duties performed by appellant contributed to her condition. Dr. Schoenberg explained that appellant's spine was exposed to

extreme physical flexibility and extreme range of motion positions while performing her job duties. For these reasons, she concluded that appellant was totally disabled from performing a letter carrier position as the physical requirements of the modified position placed appellant at greater risk for additional injury and disability. Furthermore, Dr. Schoenberg opined that it would be unsafe for appellant to perform the letter carrier position even on a modified basis due to her L4-5 disc herniation with nerve root impingement.

On February 9 and 13, 2018 OWCP received undated reports from Dr. Schoenberg diagnosing L4-5 disc herniation, lumbar radiculopathy, and degenerative disc disease. Dr. Schoenberg opined that appellant was unable to perform any full or part-time letter carrier modified duties. She noted that appellant should avoid twisting, prolonged standing, bending, turning, stooping, heavy lifting, and carrying a mail bag on her shoulder. Dr. Schoenberg opined that the modified position of letter carrier at any level was too physical and the activities outside the restrictions for appellant's injured back. Additionally, she explained that the job functions and requirement of the position were a contributing factor to appellant's worsening condition as documented in a 2017 MRI scan.

In a record of a telephone conversation Form CA-110 dated February 22, 2018, the employing establishment confirmed that the light-duty job remained open and available for appellant.

By decision dated February 22, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 22, 2018, pursuant to 5 U.S.C. § 8106(c)(2) as she refused to accept an offer of suitable work. It found that the job offer was suitable based on the work restrictions provided by Dr. Sultan on April 20 and July 19, 2017.

On March 15, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings & Review. A telephonic hearing was held on October 1, 2018.

On March 16, 2018 appellant accepted the June 23, 2017 modified letter carrier job offer.⁵

In an OWCP Form 17 dated April 24, 2018, Dr. Schoenberg indicated that appellant was disabled from work.

In a report dated May 4, 2018, Dr. Schoenberg summarized appellant's employment injury history and provided examination findings. She noted that appellant returned to a modified job, which she found unsuitable, by report March 16, 2018. Appellant stated that her job duties required constant standing for 2½ hours and sorting, casing, and pulling down mail for someone to deliver. She stated that she had to ask for help with pulling and lifting full trays of mail and had to separate and reband heavy banded newspapers. Dr. Schoenberg observed an increase in lumbar radiculopathy, L4-5 disc herniation symptoms, stenosis, and nerve root impingements. Dr. Schoenberg opined that appellant's lumbar radiculopathy had been aggravated by her modified job duties including prolonged standing. She concluded that appellant was totally disabled from performing the duties of her modified letter carrier job.

⁵ Appellant filed an occupational disease claim on April 20, 2018 alleging that on April 19, 2018 she first realized that her lumbar conditions had been aggravated by her return to work in a modified job on March 16, 2018.

By decision dated November 9, 2018, OWCP's hearing representative affirmed the February 22, 2018 decision. The hearing representative instructed OWCP to administratively combine OWCP File Nos. xxxxxx578 and xxxxxx519 upon return of the case record.

On February 20, 2019 appellant, through a representative, requested reconsideration.

OWCP also received a report dated May 29, 2018, from Dr. Grace Forde, a Board-certified psychiatrist and neurologist. Dr. Forde noted appellant history of injury, provided examination findings, and diagnosed lumbosacral radiculopathy. In a physician's initial report form of even date, she diagnosed lumbar region radiculopathy. Dr. Forde checked a box marked "yes" to indicating that appellant missed work due to injury/illness.

By decision dated May 21, 2019, OWCP denied modification.

Following the May 21, 2019 decision, OWCP received Form CA-17s dated March 20, June 19, July 24, August 28, and October 25, 2018 from Dr. Schoenberg, wherein she related that appellant was totally disabled from work.

In reports dated August 7, 2017 through September 26, 2019, Dr. Schoenberg noted an injury history and provided examination findings. Diagnoses included: abnormal gait, back muscle spasm, lumbar radiculopathy, lumbosacral radiculopathy, dorsalgia, anesthesia of skin, and other physical and mental strain related to work.

Dr. Michael A. Lefkowitz, a Board-certified neurosurgeon, in a June 15, 2018 report, noted a history of injury, detailed examination findings, and diagnoses of low back pain, herniated lumbar disc without myelopathy, and cervical radiculitis.

On May 19, 2020 appellant requested reconsideration and submitted additional evidence.

In reports dated February 1 and August 23, 2017 and January 3, 2018, Dr. Paul Lerner, a Board-certified neurologist, noted an injury date of February 4, 2015, provided examination findings, and diagnosed lumbar strain and radiculopathy with disc herniation, due to the July 17, 2000 employment injury, which was aggravated on February 5, 2015.

In reports dated April 23, 2018 and progress notes dated May 11 and 18, 2018, Dr. Andrew C. Hecht, a Board-certified orthopedic surgeon, diagnosed left L5-S1 disc herniation. He, in the April 23, 2018 report, noted an injury history starting in 2000, reviewed diagnostic studies, and detailed examination findings.

The record contains reports dated July 9 and August 20, 2018 from Dr. Sachin Shah, a Board-certified neurosurgeon. In a July 9, 2018 report, he noted appellant's work injuries of July 17, 2000 and April 19, 2018, that she was off work from 2003 to 2011, and that in April 2018 she went off work again due a sharp pain when moving from sitting to standing position. Examination findings were detailed, and diagnoses included: lumbar stenosis, L5-S1 disc herniation, and spondylosis.

Dr. Schoenberg, in an August 3, 2018 report, noted that appellant sustained an aggravation of her work injury on April 18, 2018 and had not returned to work since then.

By decision dated June 5, 2020, OWCP denied modification.

In a report dated September 17, 2020, Dr. Schoenberg provided appellant's examination findings and diagnosed lumbar radiculopathy, dorsalgia, and anesthesia of skin.

On June 3, 2021 appellant's representative requested reconsideration.

By decision dated July 7, 2021, OWCP denied modification.

LEGAL PRECEDENT

Under FECA,⁶ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁷ 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.⁸

Section 10.517 of FECA's implementing regulations further provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of proof to show that such refusal or failure to work was reasonable or justified, and 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 or submit evidence or provide reasons why the position is not suitable.¹⁰ Section 8106(c) 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

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹² The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.¹³ In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an

⁶ *Supra* note 2.

⁷ *K.P.*, Docket No. 19-1917 (issued October 5, 2021); *W.L.*, Docket No. 18-1192 (issued August 14, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁸ 5 U.S.C. § 8106(c)(2); *see also K.P., id.*; *Geraldine Foster*, 54 ECAB 435 (2003).

⁹ 20 C.F.R. § 10.517(a); *see B.H.*, Docket No. 21-0366 (issued October 21, 2021); *S.M.*, Docket No. 19-1227 (issued August 28, 2020); *Ronald M. Jones*, 52 ECAB 406 (2003).

¹⁰ *K.P.*, *supra* note 7; *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

¹¹ *K.P., id.*; *L.L.*, *supra* note 7; *see also Joan F. Burke*, 54 ECAB 406 (2003).

¹² 20 C.F.R. § 10.517(a); *see L.A.*, Docket No. 20-0946 (issued June 25, 2021).

¹³ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

employee's work capacity.¹⁴ Its procedures provide that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹⁵

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁶ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁷ When there exist opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁸

ANALYSIS

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 February 22, 2018.

In his April 20, 2017 report, Dr. Sultan related, in part, that appellant could not perform prolonged standing, walking, stooping, bending, crawling, or squatting. In a Form OWCP-5c of the same date, however, he related that she could not perform twisting, bending, or stooping. In a July 19, 2017 addendum report, Dr. Sultane reviewed the June 23, 2017 modified job offer, and found that it was within appellant's restrictions as it did not require any twisting, bending, and stooping. He opined that she was capable of performing the offered job.

Appellant's treating physician, Dr. Burrei, in an August 11, 2017 report, diagnosed chronic low back pain, chronic radiculopathy, and lumbar facet syndrome, and advised that appellant was only capable of performing sedentary work. He reviewed the offered job and opined that she was incapable of performing the offered job.

In a report dated August 14, 2017, Dr. Schoenberg noted that she had reviewed appellant's April 4, 2017 MRI scan and found that it confirmed appellant had a disc herniation at L4-5, with mild central stenosis, L5-S1 protrusion with nerve root impingement, degenerative disc disease, as well as osteoarthritis at the L4-5 facet joints. She noted that she had discussed appellant's duties as a letter carrier with appellant and that it was a physically demanding job which involved prolonged standing, walking, bending, reaching, heavy lifting, and carrying. To effectively sort, case, rack, and deliver mail, appellant would have to bend, twist, stoop, and carry heavy items as well as a mailbag on her shoulder. Dr. Schoenberg related that she disagreed with the modified assignment

¹⁴ *K.P.*, *supra* note 8; *P.S.*, Docket No. 18-1789 (issued April 11, 2019).

¹⁵ *Supra* note 10 at Chapter 2.814.5(a)(4) (June 2013).

¹⁶ 5 U.S.C. § 8123(a); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹⁷ 20 C.F.R. § 10.321; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

¹⁸ *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *A.E.*, *supra* note 16; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

as appellant should not deliver, park, loop routes, case, or sort mail, as these activities would require constant prolonged standing, walking, squatting, bending, twisting, stooping as well as bending.

In a report dated August 23, 2017, Dr. Lerner related that appellant was seen again for radicular pain in both legs. He diagnosed lumbar strain and radiculopathy, with disc herniations. Dr. Lerner related that appellant could not return to work, even in the suggested modified position, which required bending, standing, twisting, and carrying a bag. He noted that she could also not stand for prolonged periods of time or walk a mail route.

The Board, therefore, finds that a conflict in the medical opinion evidence exists as to whether the June 23, 2017 job offer was suitable. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.¹⁹ As it failed to resolve the conflict of medical opinion evidence, the Board finds that it failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

CONCLUSION

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 February 22, 2018.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 13, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁹ *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).