

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

_____)	
L.M., Appellant)	
)	
and)	Docket No. 22-0174
)	Issued: July 1, 2022
U.S. POSTAL SERVICE, BURBANK POST)	
OFFICE, Burbank, CA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 15, 2021 appellant, through counsel, filed a timely appeal from a November 1, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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 5 U.S.C. § 8101 *et seq.*

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 April 25, 2021, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 17, 2019 appellant, then a 53-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 17, 2019 she sustained injuries to her right foot, back, and right shoulder when she tripped over a temporary truck ramp while in the performance of duty. She stopped work on the date of the claimed injury. OWCP accepted appellant's claim for right foot contusion; strain of unspecified muscle, fascia, and tendon of the right shoulder/arm; and strain of muscle, fascia, and tendon of the lower back. It paid appellant wage-loss compensation for disability from work on the supplemental rolls commencing June 2, 2019 and on the periodic rolls commencing June 23, 2019. Appellant moved from California to Tennessee after sustaining the April 17, 2019 employment injury.

On June 24, 2019 appellant began participating in vocational rehabilitation efforts designed to return her to work. Vocational testing from August 2019 revealed that she had transferrable skills related to clerical work. The testing demonstrated that appellant had above average reading comprehension and average-to-above average speed and accuracy in performing tasks related to clerical work.

In a December 14, 2020 report, Dr. Charles Kaelin, a Board-certified orthopedic surgeon, indicated that appellant could return to sedentary, modified-duty work with restrictions of lifting and carrying up to 10 pounds. Dr. Kaelin also noted that appellant was capable of standing for periods of 10 minutes an hour.

On January 12, 2021 the employing establishment formally offered appellant a full-time position as a modified sales and services distribution associate in Pasadena, California.³ The position was sedentary in nature and involved the performance of clerical duties, including use of a computer to handle and process undeliverable mail. The physical requirements of the position included lifting and carrying up to two pounds, engaging in fine manipulation, and simple grasping for up to eight hours per day, as well as occasionally standing for 10 minutes an hour. Appellant did not accept the position.

In a January 13, 2021 report, Dr. John Stanton, a Board-certified orthopedic surgeon serving as an OWCP referral physician, discussed appellant's factual and medical history and reported the findings of his physical examination. He determined that appellant's disability with regard to her shoulder and back appeared to have resolved or have become stable after a period of one year. Dr. Stanton found that appellant was able to return to sedentary and light-duty work on a full-time basis and was capable of lifting up to 15 pounds on a regular basis. Appellant was not capable of bending, stooping, or engaging in overhead activities. Dr. Stanton explained that this

³ The job description in the case record is dated December 28, 2020, but the case record indicates that the position was not offered to appellant until January 12, 2021.

was in part due to her morbid obesity and deconditioned state, but also due to her shoulder impingement and rotator cuff tendinitis. He concluded that appellant's back condition had resolved.

On January 22, 2021 the employing establishment confirmed that the position of modified sales and services distribution associate remained available to appellant in Pasadena, California. It also confirmed that no suitable work was available in appellant's current commuting area in Tennessee.

In a January 25, 2021 letter, OWCP advised appellant that the position of modified sales and services distribution associate offered by the employing establishment was in accordance with the medical restrictions of Dr. Stanton and it had determined that it was suitable. Pursuant to 5 U.S.C § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position or to provide adequate reasons for refusal. It informed her that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

In a February 4, 2021 statement, counsel asserted that appellant could not accept the position of modified sales and services distribution associate because it was located in California and appellant currently resided in Tennessee. Appellant submitted a March 1, 2021 report from Dr. Kaelin who reported physical examination findings including normal sensory testing at L3 through S1 and tenderness to palpation over the lumbar paraspinal muscles. Dr. Kaelin indicated that appellant was being sent for a functional capacity evaluation (FCE) and noted, "We will have her continue to remain out of work at this time."

On March 25, 2021 the employing establishment confirmed that the position of modified sales and services distribution associate remained available to appellant.

In a March 29, 2021 letter, OWCP advised appellant that her reasons for not accepting the position of modified sales and services distribution associate offered by the employing establishment were unjustified. It informed her that the fact she that resided in a different geographic area from where the injury occurred, *i.e.*, Tennessee rather than the injury site of California, was not a valid reason for refusing a suitable offer of employment since the employing establishment confirmed on January 22, 2021 that no suitable work was available in appellant's current commuting area. OWCP advised appellant that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. Appellant did not accept the position within the afforded period.

By decision dated April 21, 2021, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective April 25, 2021, because she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It found that the opinion of Dr. Stanton provided the best assessment in the case record of appellant's ability to work and indicated that the fact that appellant resided in a different geographic area from where the injury occurred was not a valid reason for refusing a suitable offer of employment.

On May 3, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the August 16, 2021 hearing, counsel discussed difficulties in obtaining an assessment of appellant's medical condition and

argued that updated medical evidence would demonstrate that appellant was not physically capable of working as a modified sales and services distribution associate.

By decision dated November 1, 2021, OWCP's hearing representative affirmed the April 21, 2021 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.⁴ 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.⁵ To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.⁶ 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.⁷

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured, has the burden of showing 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 a showing before a determination is made with respect to termination of entitlement to compensation.⁹

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.¹⁰ OWCP 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.¹¹ In a suitable work determination,

⁴ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁵ 5 U.S.C. § 8106(c)(2); see also *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *Geraldine Foster*, 54 ECAB 435 (2003).

⁶ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.517(a).

⁹ *Id.* at § 10.516.

¹⁰ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹²

ANALYSIS

The Board finds that OWCP properly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective April 25, 2021, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record establishes that appellant was capable of performing the position of modified sales and services distribution associate offered by the employing establishment and determined to be suitable by OWCP in January 2021.¹³ The position was sedentary in nature and involved the performance of clerical duties, including use of a computer, to handle and process undeliverable mail. The physical requirements of the position included lifting and carrying up to two pounds, engaging in fine manipulation, and simple grasping for up to eight hours per day, as well as occasionally standing for 10 to 60 minutes at a time. The record does not reveal that the position of modified sales and services distribution associate was temporary in nature.¹⁴ Appellant participated in vocational rehabilitation efforts, and vocational testing revealed that she had transferrable skills related to clerical work. There is no indication in the case record that she was incapable of working as a modified sales and services distribution associate from the vocational standpoint.¹⁵

In determining that appellant was physically capable of performing the position of modified sales and services distribution associate, OWCP properly relied on the opinion of Dr. Stanton, the OWCP referral physician. In his January 13, 2021 report, Dr. Stanton discussed appellant's factual and medical history and reported the findings of his physical examination. He determined that appellant's disability with regard to her shoulder and back appeared to have resolved or had become stable after a period of one year. Dr. Stanton found that appellant was able to return to sedentary and light-duty work on a full-time basis and was capable of lifting up to 15 pounds on a regular basis. He found that she was not capable of bending, stooping, or engaging in overhead activities. Dr. Stanton explained that this was in part due to her morbid obesity and deconditioned state, but also due to her shoulder impingement and rotator cuff tendinitis. He concluded that appellant's back condition had resolved. The Board notes that the

¹² See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹³ In the present case, appellant moved from California to Tennessee after sustaining the April 17, 2019 employment injury. The Board has held that, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee currently resides. See *E.G.*, Docket No. 06-1787 (issued February 27, 2007); *Martin Joseph Ryan*, Docket No. 00-1262 (issued June 14, 2002). The case record reflects that the employing establishment confirmed that no suitable work was available in appellant's current commuting area in Tennessee.

¹⁴ If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(5), 9 (June 2013).

¹⁵ See *id.* at Chapter 2.814.4 (June 2013).

physical requirements of the position of modified sales and services distribution associate are within the restrictions provided by Dr. Stanton.

The Board finds that OWCP properly accorded the weight of the medical opinion evidence with Dr. Stanton who reported that appellant could work full time with restrictions. Dr. Stanton based his opinion on a proper factual and medical history and physical examination findings and provided medical rationale for his opinion on appellant's ability to work. Accordingly, OWCP properly relied on Dr. Stanton's opinion relative to work tolerances and limitations in terminating appellant's wage-loss compensation and entitlement to a schedule award, effective April 25, 2021, because she refused an offer of suitable work.¹⁶

Appellant submitted a March 1, 2021 report from Dr. Kaelin who reported physical examination findings and indicated, "We will have her continue to remain out of work at this time." However, Dr. Kaelin did not provide a rationalized explanation regarding why appellant could not work. The Board has held that a report is of limited probative value if it does not contain medical rationale explaining a claimant's level of disability.¹⁷ The Board finds that this report is insufficient to outweigh the well-rationalized report of Dr. Stanton who addressed both the accepted and concurrent conditions.

The Board finds that, therefore, OWCP has established that the position of modified sales and services distribution associate offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified. The Board has reviewed the evidence and argument submitted by appellant in support of her refusal of the position of modified sales and services distribution associate and notes that it is insufficient to justify her refusal of the position.¹⁸

For these reasons, the Board finds that OWCP properly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective April 25, 2021, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective April 25, 2021, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

¹⁶ See *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

¹⁷ See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁸ The Board finds that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant 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. See generally *DM*, Docket No. 19-0686 (issued November 13, 2019); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2022
Washington, DC

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

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

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