United States Department of Labor
Employees' Compensation Appeals Board

G.A., Appellant	)	
and	)	**Docket No. 22-0192**
	)	**Issued: July 26, 2022**
DEPARTMENT OF VETERANS AFFAIRS, JAMES H. QUILLEN VA MEDICAL CENTER, Mountain Home, TN, Employer	)	

Appearances:
Wayne Johnson, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 19, 2021 appellant, through counsel, filed a timely appeal from a May 25, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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*.

[3] The Board notes that, following the May 25, 2021 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*.

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 March 14, 2018 because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 8, 2014 appellant, then a 41-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 7, 2014 he injured his low back moving a patient while in the performance of duty. OWCP accepted the claim for lumbar sprain. On October 22, 2014 appellant underwent an OWCP-authorized posterior fusion from L4 to S1. OWCP paid him wage-loss compensation on the supplemental rolls effective October 22, 2014, and on the periodic rolls effective November 16, 2014.

An electromyogram (EMG) and nerve conduction velocity study performed on January 5, 2016 showed a chronic lesion of the L5 and S1 nerve roots on the left.

Appellant returned to work on March 30, 2015 without restrictions.

OWCP subsequently accepted that appellant sustained a recurrence of disability effective November 9, 2015. It also expanded the acceptance of the claim to include thoracic or lumbosacral neuritis or radiculitis as employment related. OWCP paid appellant wage-loss compensation on the periodic rolls beginning November 9, 2015.

In a report dated September 16, 2016, Dr. Nicholas A. Grimaldi, an osteopath and OWCP referral physician, reviewed the history of appellant's April 7, 2014 employment injury treated with a fusion. On examination, he found a negative straight leg raise bilaterally and full strength with dorsi and plantar flexion. Dr. Grimaldi diagnosed chronic low back pain with periodic chronic lumbosacral radiculitis. He noted that appellant had a prior history of an anterior fusion in 2012. Dr. Grimaldi opined that his lumbar sprain had resolved and that he had no objective findings of lumbosacral neuritis or radiculitis other than electrodiagnostic testing. He found that appellant could not resume his usual employment, but could return to light-duty work as found by an October 26, 2016 functional capacity evaluation (FCE).[4]

On September 26, 2016 OWCP further expanded the acceptance of appellant's claim to include pseudarthrosis after fusion or arthrodesis.

In a November 4, 2016 work capacity evaluation (Form OWCP-5c), Dr. Grimaldi found that appellant could work 8 hours per day occasionally sitting up to 2 hours, bending, twisting, and stooping up to 2 hours and 40 minutes, performing occasional repetitive wrist movements up to 2 hours and 40 minutes a day with the wrists and eight hours with the elbows, occasionally pushing, pulling, and lifting up to 20 pounds, and frequent squatting with up to 10 pounds.

In an investigative report dated December 14, 2016, an investigative service working for the employing establishment advised that surveillance of appellant revealed that he had attended

[4] While Dr. Grimaldi performed his evaluation on September 16, 2016, he reviewed subsequent medical evidence before rendering his report, including the October 26, 2016 FCE.

his son's high school basketball game and was observed sitting, going out to the bathroom, walking out of the gymnasium, and pushing a man in a wheelchair. It obtained video evidence that it asserted "may show that [appellant] is less than totally disabled."

On March 3, 2017 OWCP notified appellant that it was providing surveillance video to Dr. Grimaldi for review.

A computerized tomography (CT) myelogram of the lumbar spine performed on March 13, 2017 revealed new moderate central canal stenosis at L3-4 "secondary to a broad-based disc protrusion, thickening to the ligamentum flavum and fat posteriorly within the central canal."

In a supplemental report dated March 15, 2017, Dr. Grimaldi advised that he had reviewed the video surveillance and indicated that, on the video, appellant had not performed bending or twisting or any activity requiring effort or speed. He related that he did "not find this surveillance video significantly useful in changing his restrictions." Dr. Grimaldi opined that appellant could work full-time light duty with a "20-pound weight restrictions, alternating sitting to standing as needed." In a Form OWCP-5c dated March 16, 2017, he found that appellant could work alternating sitting, walking, and standing; bend, stoop, and twist up to three hours per day; push, pull and lift up to 20 pounds; and squat with up to 10 pounds.

Appellant submitted reports dated April through June 2017 from a nurse practitioner.

On August 22, 2017 appellant returned to modified-duty employment in a temporary position as a patient advocate with the employing establishment.

A magnetic resonance imaging (MRI) scan of the cervical spine, obtained on September 14, 2017, revealed degenerative disc disease at C5-6 and C6-7.

On October 23, 2017 the employing establishment offered appellant a position as a medical support assistant. The duties included bending, stooping, and twisting up to three hours per day; alternating sitting, standing, and walking; and pushing and pulling up to 20 pounds.

In a report dated November 20, 2017, Dr. David A. Wiles, a Board-certified neurosurgeon, discussed appellant's complaints of increased lower back and bilateral leg symptoms. He related that he had reviewed the position of medical support assistant and noted that it required walking and standing for up to eight hours, two hours of kneeling, and two hours of bending. Dr. Wiles opined that appellant was not able "to perform the tasks which are required for this specific job." He recommended another FCE after placement of a spinal cord stimulator.

Appellant stopped work on November 7, 2017.

In a December 13, 2017 memorandum of telephone call (Form CA-110), OWCP advised the employing establishment that the offered position was unacceptable because of the physical requirements. The employing establishment advised that it would remove the requirement for walking and standing up to eight hours per day.

On December 13, 2017 the employing establishment offered appellant a position as a medical support assistant. The position required "alternating sitting, standing and walking,

pushing, pulling, and lifting limited to 20 pounds, squatting limited to 10 pounds, [and] twisting, bending and stooping limited to 3 hours per shift."

Appellant declined the offered position on December 27, 2017. He asserted that his symptoms had worsened while he worked in his temporary position and that testing since his FCE had shown increased central stenosis at L3-4 and chronic nerve damage.

By letter dated January 16, 2018, OWCP advised appellant that it had determined that the December 13, 2017 offered position was suitable and afforded him 30 days to accept the position or provide reasons for his refusal. It found that the position was in accordance with the limitations provided by Dr. Grimaldi in his March 16, 2017 report. OWCP informed appellant that an employee who refused an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation, pursuant to 5 U.S.C. § 8106(c)(2). It further notified him that he would receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

Thereafter, OWCP received a January 24, 2018 report from Dr. Thomas Morgan, Board-certified in family practice. Dr. Morgan reviewed appellant's complaints of low back and bilateral lower extremity pain that increased with extensive standing or sitting and "walking even short distances." He indicated that a CT myelogram obtained on March 13, 2017 showed moderate central canal stenosis at L3-4 and noted that appellant was status post L4 through S1 fusion. Dr. Morgan asserted that a January 5, 2016 EMG study had shown chronic radiculopathy bilaterally. He noted that the CT myelogram was performed after the most recent FCE and the September 2016 second opinion examination. Dr. Morgan advised that he wanted to wait until after the spinal implant before another FCE and opined that he preferred that appellant "not go back to work until he can have further evaluation and treatment."

On February 8, 2018 Dr. Morgan again noted that a CT myelogram had "confirmed the diagnosis of moderate degree of acquired central canal stenosis at L3-4. The difficulty [appellant] has with walking is directly related to his diagnosis of lumbar radiculopathy and central canal stenosis at L3-4." Dr. Morgan reiterated that the CT myelogram changes occurred subsequent to the most recent FCE and second opinion examination. He requested an updated FCE after the spinal cord stimulator trial. Dr. Morgan advised that appellant was unable to work pending a new FCE.

On February 22, 2018 OWCP notified appellant that his reasons for refusing the offered position were not valid and provided him 15 days to accept the position or have his entitlement to compensation benefits terminated. It advised him that the offered position remained available.

By decision dated March 13, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective March 14, 2018 as he had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that the March 16, 2017 report from Dr. Grimaldi constituted the weight of the evidence and established that he could perform the offered position.

On August 28, 2018 Dr. Wiles implanted a spinal cord stimulator.

On March 13, 2019 appellant, through counsel, requested reconsideration of OWCP's March 13, 2018 termination decision. He asserted that Dr. Grimaldi did not have the CT myelogram available for review in reaching his conclusions.

By decision dated May 30, 2019, OWCP denied modification of its March 13, 2018 decision terminating appellant's wage-loss compensation and entitlement to a schedule award for refusing suitable work under 5 U.S.C. § 8106(c)(2).

On December 11, 2019 appellant, through counsel, requested reconsideration of the May 30, 2019 decision. He submitted a report dated August 19, 2019 from Dr. Selma Kominek, a neurosurgeon. Dr. Kominek discussed appellant's history of a 2012 lumbar fusion from L4 to S1, an injury at work on April 7, 2014, and a subsequent redo of the posterolateral fusion from L4 to S1. She noted that the surgery was not successful, and he diagnosed with postlaminectomy syndrome and pseudoarthrosis. Dr. Kominek indicated that the employing establishment had offered appellant a medical support specialist. She advised that the position required bending, twisting, and stooping up to three hours per day and asserted that Dr. Grimaldi's restrictions in this regard were not clear. Dr. Kominek opined that appellant was not able to perform the offered position based on the results of the FCE and as it would present a "significant risk of re-injury."

By decision dated February 24, 2020, OWCP denied modification of its May 30, 2019 decision.

On February 24, 2021 appellant, through counsel, requested reconsideration of the February 24, 2020 decision. He submitted a decision from the Social Security Administration finding that he was totally disabled.

By decision dated May 25, 2021, OWCP denied modification of its February 24, 2021 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] 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.[6] 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.[7] Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision, which may bar

[5] *See K.S.*, Docket No. 19-1650 (issued April 28, 2020); *T.M.*, Docket No. 18-1368 (issued February 21, 2019); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[6] 5 U.S.C. § 8106(c)(2); *see also M.J.*, Docket No. 18-0799 (issued December 3, 2018).

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

an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[8]

Section 10.517(a) 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 showing that such refusal or failure to work was reasonable or justified.[9] 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.[10]

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.[11] 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.[12] In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[13]

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.[14] 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.[15]

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award, effective March 14, 2018.

OWCP failed to establish that appellant could perform the offered position of medical support assistant. The issue of whether a claimant can perform the duties of an offered position is a medical question that must be resolved by probative medical evidence.[16] In finding the position suitable, OWCP relied upon the opinion of Dr. Grimaldi, an OWCP referral physician. In a September 16, 2016 report, Dr. Grimaldi diagnosed chronic low back pain with periodic chronic

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

[9] 20 C.F.R. § 10.517(a).

[10] *Id*. at § 10.516.

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

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *see D.P.*, Docket No. 21-0596 (issued August 31, 2021).

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

[14] 5 U.S.C. § 8123(a); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *M.S.*, 58 ECAB 328 (2007).

[15] 20 C.F.R. § 10.321; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

[16] *See R.M.*, Docket No. 19-1236 (issued January 24, 2020).

lumbosacral radiculitis. He determined that appellant was disabled from his usual employment but could perform modified duties. On March 15, 2017 Dr. Grimaldi advised that reviewing surveillance video had not altered his opinion on appellant's restrictions and advised that he could work light duty alternating sitting and standing and lifting up to 20 pounds. In a March 16, 2019 Form OWCP-5c, he additionally found that appellant could bend, twist, and stoop up to three hours per day and squat with up to 20 pounds.

The employing establishment, on December 13, 2017, offered appellant a position as a medical support assistant. The physical requirements consisted of alternating sitting, standing, and walking, pulling, pushing, and lifting no more than 20 pounds, squatting with no more than 10 pounds, and twisting, bending, and stooping no more than three hours per day.

In a January 24, 2018 report, Dr. Morgan advised that subsequent to the most recent FCE and the evaluation by the second opinion physician, appellant had undergone a CT myelogram that had shown moderate central canal stenosis at L3-4. He discussed appellant's low back and bilateral lower extremity pain walking for brief periods and with extended standing or sitting. Dr. Morgan found that appellant could not work pending further evaluation. On February 8, 2018 he attributed appellant's difficulty walking to his lumbar radiculopathy and L3-4 central canal stenosis. Dr. Morgan requested an updated FCE after a spinal cord stimulator trial and opined that appellant was unable to work pending a new FCE.

Appellant's treating physician and OWCP's second opinion physician disagreed regarding whether he had the physical capacity to perform the duties of the offered position. The Board finds that a conflict of medical opinion exists relative to this issue, pursuant to 5 U.S.C. § 8123(a). OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.[17] As it failed to resolve the conflict in medical opinion evidence, it has not met its burden of proof to justify the termination of appellant's compensation benefits and entitlement to a schedule award for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).[18]

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award.

[17] *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

[18] *E.L.*, *id*.

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 26, 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