

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

_____)	
L.L., Appellant)	
)	
and)	Docket No. 20-0468
)	Issued: June 15, 2022
U.S. POSTAL SERVICE, PERTH AMBOY)	
POST OFFICE, Perth Amboy, NJ, Employer)	
_____)	

Appearances:
Michael D. Overman, Esq., for the appellant¹
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 December 30, 2019 appellant, through counsel, filed a timely appeal from an August 26, 2019 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.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 a pellant submitted additional evidence to OWCP following the August 26, 2019 decision. 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 and entitlement to a schedule award, effective July 26, 2018, as she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 7, 2009 appellant, then a 43-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained low back pain, neck pain, and right shoulder pain due to factors of her federal employment including repetitively casing mail and carrying a mail satchel. Appellant indicated that she initially became aware of her conditions on approximately September 15, 2007 and related them to factors of her federal employment on November 24, 2009. She stopped work on November 18, 2009. On December 15, 2009 OWCP accepted the claim for cervical radiculitis and lumbosacral radiculitis. It subsequently expanded its acceptance of the claim to include displacement of cervical intervertebral disc without myelopathy and left carpal tunnel syndrome. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing December 2, 2009 and placed her on the periodic rolls effective February 14, 2010.⁴

Dr. Mark A.P. Filippone, a Board-certified physiatrist, provided periodic reports from November 24, 2009 onward finding appellant totally disabled from work due to multi-level cervical and lumbar disc herniations with right C5-6 and C7 cervical radiculopathy, bilateral L5-S1 radiculopathy, and internal derangement of the right shoulder.⁵

In a January 26, 2010 report, Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, noted a history of injury and treatment. He diagnosed disc herniations with persistent discogenic pain and radiculopathy at C4-5, C5-6, and C6-7, and a herniated lumbar disc with persistent radiculopathy, principally at L4-5.

On December 14, 2011 Dr. Thomas R. Peterson, a Board-certified neurosurgeon, performed OWCP-authorized bilateral L4-5 and bilateral L5-S1 laminotomy and medial facetectomy with left L4-5 discectomy.

Appellant retired from the employing establishment on May 15, 2014.

In a May 15, 2014 report, Dr. Cohen diagnosed recurrent disc herniation with lateral recess stenosis and lumbar degenerative disc disease at L3-4 and L4-5, and failed lumbar surgery. He

⁴ From January through March 2013, appellant participated in vocational rehabilitation and attained a certificate in computer skills.

⁵ OWCP received periodic reports from Dr. Filippone dated from January 7, 2013 through March 1, 2016 finding appellant totally disabled for work. On January 7, 2013 Dr. Filippone obtained an upper extremity electromyogram (EMG) and nerve conduction velocity (NCV) study, which demonstrated partial denervation in muscles innervated by the right C5, C6, and C7 and left C5 and C6 cervical nerve roots, consistent with left carpal tunnel syndrome, right C5, C6, and C7 radiculopathy, and left C5-6 cervical radiculopathy. A March 29, 2013 cervical and lumbar magnetic resonance imaging (MRI) scan demonstrated bilateral facet degenerative changes at L5-S1, and a left-sided hemilaminotomy defect at L4-5 with enhancing epidural fibrosis and mild annular bulging.

recommended open lumbar revision with microdisc surgery and endoscopic assist. Dr. Cohen opined that appellant's symptoms remained related to the accepted employment injury.

On November 20, 2014 the employing establishment offered appellant a full-time rehabilitation job assignment as a customer care agent -- Tier 2. The duties involved sitting in an office chair, using a computer mouse and keyboard, and answering calls using a telephone headset.

In reports dated March 3 and 25, 2015, Dr. Cohen recommended a C4-5, C5-6, and C6-7 fusion as the September 15, 2017 employment injury had worsened and her cervical spine had destabilized.⁶

On March 10, 2016 appellant accepted the November 20, 2014 job offer. She returned to work on May 2, 2016.

In reports dated from May 11 through October 18, 2016, Dr. Filippone noted that appellant experienced neck and back pain while working. In December 7, 2016 reports, he opined that appellant's sitting posture had exacerbated her cervical and lumbar spine conditions. Dr. Filippone found appellant totally disabled for work.

On December 16, 2016 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability commencing December 7, 2016 due to turning her head and arching her back to relieve cervical and lumbar spine pain while in the performance of duty. She stopped work on December 7, 2016.

In a January 10, 2017 report, Dr. Cohen noted that, while at work, appellant sat with her head bent forward and rotated to accommodate her cervical spine issue, worsening the accepted injury.⁷ He diagnosed cervical instability and retrolisthesis at C5-6, cervical disc from C4 through C7, and cervical radiculopathy with neurological deficits. Dr. Cohen recommended a multi-level cervical fusion surgery.

By decision dated February 14, 2017, OWCP accepted the claimed recurrence of disability. It paid appellant compensation on the supplemental rolls commencing December 8, 2016 and on the periodic rolls effective May 28, 2017.

In a February 27, 2017 report, Dr. Cohen recommended an open anterior cervical discectomy and fusion stabilization at C4-5, C5-6, and likely C6-7. He opined that appellant's condition was a progressive worsening of the September 15, 2007 employment injury as documented by imaging scans and electrodiagnostic studies. In a March 7, 2017 note, Dr. Cohen

⁶ A March 24, 2015 MRI scan of the right shoulder demonstrated tendinopathy/tendinitis of the supraspinatus and infraspinatus tendons, distal supraspinatus tendon tear, subacromial/subdeltoid bursitis and subscapularis/subcoracoid bursitis, a acromioclavicular spurring and impingement, and degeneration and tear of the anterior cartilaginous labrum.

⁷ A December 16, 2016 MRI scan of the cervical spine demonstrated disc herniations at C2-3, C4-5, and C6-7, a C3-4 disc bulge, C5-6 minimal grade 1 retrolisthesis with mild facet arthropathy, a annular tear, disc herniation with mild cord compression, and severe left lateral recess and neural foraminal narrowing compressing the existing left C6 nerve root. A February 10, 2017 lumbar MRI scan demonstrated facet arthritic degenerative changes at L5-S1, soft tissue in the left lateral recess at L4-5 suspicious for disc herniation, right lateral recess disc herniation at L3-4 with right lateral recess stenosis, and proximal right foraminal narrowing at L2-3 with mild annular disc bulging.

noted that an MRI scan demonstrated a left-sided disc herniation at L4-5 with evidence of neurological compression.⁸

OWCP received reports from Dr. Filippone dated from March 6 through September 8, 2017 advising that appellant was totally disabled for work.

On March 9, 2017 OWCP referred the case to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), and requested that he evaluate whether Dr. Cohen's request for authorization to perform cervical fusion surgery should be authorized as medically necessary and causally related to appellant's accepted conditions. In March 9 and 20, 2017 reports, Dr. Fellars opined that the proposed C5-6 fusion was medically indicated, but not at the C4-5 level.

On April 14, 2017 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF) to Dr. Timothy Henderson, a Board-certified orthopedic surgeon for a second opinion regarding appellant's work capacity and the necessity for additional surgery. Dr. Henderson submitted a May 4, 2017 report noting his review of the medical record and SOAF. On examination, he found no lumbar paraspinal tenderness on palpation, and a positive left Phalen's test. Dr. Henderson opined that the accepted employment injury had exacerbated cervical and lumbar degenerative disc disease, and that the left carpal tunnel syndrome had resolved. He found that appellant did not require additional surgery or other treatment. Dr. Henderson opined that appellant was able to return to full-time work at the moderate physical demand level, with lifting permanently restricted to 25 pounds.

On June 20, 2017 OWCP determined that there was a conflict in the medical opinion evidence. In a referral form dated September 14, 2017, it specified that the conflict of medical opinion was between Dr. Cohen, the attending physician, and Dr. Henderson, OWCP's referral physician, on the issues of appellant's work capacity and whether additional surgery was necessary. In order to resolve the conflict, OWCP referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion. The June 20, 2017 SOAF provided to Dr. Dennis noted that appellant had returned to light-duty work as a customer care agent on May 2, 2016 and had continued "in that capacity to date."

In a letter dated September 14, 2017, OWCP advised appellant that a conflict in medical opinion had arisen between Dr. Henderson and a DMA on the issues of her diagnosis, ongoing condition, surgical necessity, and work capacity. It referred appellant to Dr. Dennis.

In an October 2, 2017 report, Dr. Dennis reviewed the SOAF and the medical record, and acknowledged that the conflict of medical evidence was between Dr. Henderson and Dr. Fellars regarding the type and necessity of surgical treatment. On examination, he noted full range of motion of both shoulders, no visible impairment of the cervical spine, a well-healed surgical scar over the lumbar spine, negative straight leg raising bilaterally, and no weakness or restricted

⁸ In March 2017 appellant underwent a series of lumbar epidural steroid injections from L3 through S1, performed by Dr. Boqing Chen, a physician Board-certified in psychiatry, pain management, and sports medicine.

motion in either wrist. Dr. Dennis opined that appellant required no further surgery or other treatment and could perform full-time sedentary work.

On October 26, 2017 the employing establishment offered appellant a full-time modified position as a customer care agent -- Tier 1. The position was described as sedentary, answering customer calls and using a computer keyboard and mouse while sitting or standing as needed. On November 6, 2017 appellant refused the offered position pending a discussion with her physician.⁹

On November 16, 2017 appellant sustained a myocardial infarction.

On November 21, 2017 OWCP requested that Dr. Dennis review the October 26, 2017 job offer and indicate if appellant could perform the duties as described.

In a November 28, 2017 report, Dr. Cohen opined that appellant remained totally disabled for work due to spinal cord compression.

In a January 9, 2018 addendum report, Dr. Dennis found the October 26, 2017 job offer of customer care agent--Tier 1 to be suitable work. He opined that appellant's symptoms were caused by somatoform disorder.

On January 16, 2018 OWCP obtained a second opinion report from Dr. Dorothy Kunstadt, a Board-certified internist and cardiologist, regarding whether the nonoccupational myocardial infarction would disable appellant from performing the offered customer care agent position. Dr. Kunstadt noted that there was "no medical documentation" related to appellant's myocardial infarction or a subsequent cardiac catheterization and stent insertion appellant described. She obtained an electrocardiogram (EKG) that was within normal limits, but did not exclude the possibility of a prior nontransmural myocardial heart attack. Dr. Kunstadt opined that from a cardiac perspective, appellant could perform the duties of the offered position.

On January 24, 2018 OWCP confirmed that the offered customer care agent position remained open and available.

By letter dated February 14, 2018, OWCP advised appellant that the offered position was suitable, based on Dr. Dennis' opinion as the weight of the medical evidence. 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 a March 14, 2018 letter, the employing establishment noted that appellant had not returned to work, and that the offered position remained available.

⁹ Dr. Filippone submitted reports dated from November 9, 2017 through March 8, 2018 finding appellant totally disabled for work due to cervical and lumbar radiculopathy and left carpal tunnel syndrome.

By letter dated March 20, 2018, OWCP advised appellant that she had not provided valid reasons for refusing the offered position of customer care agent--Tier 1. It afforded her an additional 15 days to accept.¹⁰

In April 5 and May 17, 2018 reports, Dr. Filippone found appellant totally disabled for work due to bilateral carpal tunnel syndrome, multilevel cervical disc herniations, and cervical triple crush syndrome. He opined that performing the customer care agent duties had worsened these conditions.

On July 16, 2018 OWCP again confirmed that the offered position of customer care agent remained available.

By decision dated July 25, 2018, OWCP terminated appellant's wage-loss compensation and schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2), effective July 26, 2018. It noted that the offered customer care agent position was within the restrictions provided by Dr. Dennis in his October 2, 2017 and January 9, 2018 reports and confirmed by Dr. Kunstadt in her January 16, 2018 report.

On July 31, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, subsequently modified to a request for a telephonic hearing, which was held on June 11, 2019.

OWCP received additional reports from Dr. Filippone dated from August 7, 2018 through May 10, 2019 finding that appellant remained totally disabled for work due to previously diagnosed conditions.

Counsel also submitted records from Dr. Mahmood Alam, a Board-certified cardiologist. In a December 12, 2018 report, Dr. Alam diagnosed precordial pain, mixed hyperlipidemia, and atherosclerotic heart disease with angina pectoris with spasm. In a June 12, 2019 report, he newly diagnosed lumbar spinal stenosis with neurogenic claudication.

By decision dated August 26, 2019, an OWCP hearing representative affirmed the July 25, 2018 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹¹ 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.¹² To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to

¹⁰ On March 31, 2018 appellant elected Federal Employees Retirement System (FERS) benefits in lieu of FECA compensation.

¹¹ *T.M.*, Docket No. 18-1368 (issued February 21, 2019); *Linda D. Guerrero*, 54 ECAB 556 (2003).

¹² 5 U.S.C. § 8106(c)(2); *see J.K.*, Docket No. 19-0064 (issued July 16, 2020); *Geraldine Foster*, 54 ECAB 435 (2003).

accept such employment.¹³ 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.¹⁴

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.¹⁵ Section 10.516 provides that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter its finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.¹⁶

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.¹⁷ All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁸

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹⁹ OWCP's procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.²⁰

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, OWCP shall appoint a third physician (known as a referee physician or impartial medical examiner (IME)) who shall make an examination.²¹ 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.²² When there exist opposing medical reports of virtually equal weight and rationale and the

¹³ *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Y.A.*, 59 ECAB 701 (2008).

¹⁴ *P.C.*, Docket No. 20-0395 (issued February 19, 2021); *J.K.*, *supra* note 12; *Joan F. Burke*, 54 ECAB 403 (2003).

¹⁵ 20 C.F.R. § 10.517(a); *J.S.*, Docket No. 19-1399 (issued May 1, 2020); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁶ *Id.* at § 10.516; *see S.M.*, Docket No. 19-1227 (issued August 28, 2020); *see Melvin James*, 55 ECAB 406 (2004).

¹⁷ *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁸ *Id.*

¹⁹ 20 C.F.R. § 10.517(a).

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a(4) (June 2013); *P.C.*, *supra* note 14; *see J.K.*, *supra* note 12.

²¹ 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

²² 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

case is referred to an IME 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.²³

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 July 26, 2018, as it improperly determined that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

In terminating appellant's compensation benefits, OWCP relied on the opinion of Dr. Dennis, an IME in finding that the offered customer care agent position -- Tier 1 constituted suitable work. Based on his opinion that appellant could perform full-time sedentary work, on October 26, 2017, the employing establishment offered appellant a sedentary position as a customer care agent.

The Board finds, however, that Dr. Dennis' opinion is insufficient to resolve the conflict between Dr. Henderson and Dr. Cohen as it was based on an inaccurate SOAF. Specifically, OWCP accepted that appellant sustained a recurrence of disability commencing December 7, 2016 while performing a customer care agent position. However, the SOAF provided to Dr. Dennis incorrectly noted that appellant had returned to light-duty work as a customer care agent on May 2, 2016 and had continued in that position. As Dr. Dennis was selected to determine whether the offered customer care agent position was suitable work, appellant's demonstrated ability to perform essentially the same position was of crucial importance. The SOAF incorrectly indicated that appellant continued to work as a customer care agent, although she had stopped work on December 7, 2016 and had not returned.

Additionally, Dr. Dennis based his opinion on the inaccurate September 14, 2017 referral letter, which misidentified the physicians involved in the conflict of medical opinion. He noted in his October 2, 2017 report that the conflict regarding the necessity and type of additional surgery was between Dr. Henderson and Dr. Fellars. OWCP's procedures provide that the notification sent to a claimant must note the existence of a conflict of medical opinion and identify its specific nature.²⁴ While the letter properly identified that a conflict existed and the medical issues in dispute, it noted that the disagreement was between Dr. Henderson and an OWCP DMA, rather than Dr. Henderson and Dr. Cohen. However, under section 8123(a) of FECA, a conflict of medical opinion arises only between an attending physician and an OWCP referral physician.²⁵

The Board finds that Dr. Dennis' opinion is based on an inaccurate SOAF, and a misidentification of the conflict by OWCP in the referral letter, his opinion is not entitled to the

²³ *P.C.*, *supra* note 14; *J.K.*, *supra* note 12; *see Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

²⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations, Referee Examinations*, Chapter 3.500.4.d(1) (July 2011). *See also Henry J. Smith*, 43 ECAB 524 (1992).

²⁵ *Supra* note 22.

special weight typically accorded an IME and is insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.²⁶

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 July 26, 2018, as it improperly determined that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 15, 2022
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

²⁶ *P.C.*, *supra* note 14; *G.C.*, Docket No. 18-0842 (issued December 20, 2018); *Anna M. Delaney*, 53 ECAB 384 (2002).