

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

P.L., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Kerhonkson, NY, Employer)
_____)

Docket No. 20-0700
Issued: November 17, 2022

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 10, 2020 appellant, through counsel, filed a timely appeal from a January 16, 2020 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 following the January 16, 2020 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 met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 17, 2019, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On October 11, 2013 appellant, then a 48-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she sustained injury to her left side from her hip to neck when she reached into a mailbox and the left rear of her postal vehicle was hit by another vehicle while in the performance of duty.⁴ She stopped work on October 11, 2013. OWCP accepted the claim for neck sprain, lumbar sprain, and left hip bursitis. It paid appellant wage-loss compensation for disability from work commencing October 11, 2013 on the supplemental rolls and commencing October 19, 2014 on the periodic rolls.

Appellant received periodic medical treatment from attending physicians, including Dr. Richard Dentico, a Board-certified physiatrist. In an attending physician report (Form CA-20) dated November 18, 2013, he listed the date of injury as October 11, 2013 and diagnosed lumbar strain, left hip bursitis, and neck pain. Dr. Dentico checked a box marked "Yes" indicating that the diagnosed conditions were caused or aggravated by the reported employment incident and found total disability for the period October 11 through December 20, 2013.

OWCP engaged in development of the medical evidence, including referral of appellant for a second opinion examination and evaluation to Dr. Ronald L. Mann, a Board-certified orthopedic surgeon, who opined in March 7 and July 18, 2014 reports that appellant had partial disability due to residuals of her employment injuries.

On April 25, 2016 OWCP again referred appellant for a second opinion examination and evaluation regarding employment-related residuals and disability. As part of this referral, it provided a statement of accepted facts and a series of questions to Dr. Louis Nunez, a Board-certified orthopedic surgeon. In a May 9, 2016 report, Dr. Nunez reported the findings of his physical examination and indicated that appellant's symptom embellishment and multiple positive Waddell signs upon examination brought into question her subjective complaints regarding her neck, lumbar spine, and left hip. He opined that appellant's accepted conditions of neck sprain, lumbar sprain, and left hip bursitis had resolved. Dr. Nunez found that, when considering appellant's total medical condition including any nonwork-related conditions, she could return to her regular work duties as a mail carrier on a full-time basis. In a May 9, 2016 work capacity evaluation (Form OWCP-5c), he indicated that appellant did not have any work restrictions.

In a June 20, 2016 report, Dr. Luis Mendoza, Jr., a Board-certified emergency medicine specialist, indicated that, upon physical examination, appellant exhibited trigger point tenderness

⁴ In a prior OWCP claim, assigned OWCP File No. xxxxxx336, OWCP accepted the occupational disease of disorder of bursae and tendons in the right shoulder region, which appellant first realized was related to her federal employment on May 24, 2007. It also accepted her claim for a September 2, 2010 traumatic injury, assigned OWCP File No. xxxxxx354, for right knee abrasion and right knee, right ankle, and left wrist contusions. OWCP later accepted appellant's claim for an occupational disease sustained on March 20, 2011, assigned File No. xxxxxx902, for left hip bursitis.

of the posterior cervical spine and restricted range of motion of the lumbar spine. He found that she was permanently partially disabled and “unable to work in any capacity at this time.”⁵

In a January 10, 2017 Form OWCP-5c, Dr. Dentico advised that appellant could perform limited-duty work for eight hours per day with restrictions of lifting no more than 20 pounds and being able to take breaks every 20 minutes. Appellant could not engage in bending or stooping.

In February 2017 appellant began participating in an OWCP-sponsored vocational rehabilitation program designed to return her to work.⁶

In an October 9, 2017 report, Dr. Dentico noted that appellant had 5/5 strength in all extremities, and diagnosed cervical radiculopathy, lumbar radiculopathy, and overweight status. He found that appellant could return to work with restrictions of lifting no more than 20 pounds, no sitting/standing for prolonged periods, and no engaging in bending, twisting, stooping, or climbing. In an October 17, 2017 Form OWCP-5c, Dr. Dentico indicated that appellant could perform limited-duty work for eight hours per day with restrictions of lifting no more than 20 pounds and being able to take breaks every 20 minutes.

In a May 7, 2018 report, Dr. Dentico reported physical examination findings similar to those he recorded on October 9, 2017. He diagnosed myofascial pain syndrome, muscle spasm, cervical/lumbar facet syndrome, and lumbar spondylolisthesis. Dr. Dentico found that appellant could return to work with no lifting more than 20 pounds, no sitting/standing for prolonged periods, and no engaging in bending, twisting, stooping, or climbing. In a May 11, 2018 Form OWCP-5c, he repeated the work restrictions from his May 7, 2018 report. In a May 11, 2018 Form CA-20, Dr. Dentico indicated that appellant could perform modified-duty work for eight hours per day with restrictions of lifting no more than 20 pounds and no bending twisting, stooping, climbing or sitting or standing for prolonged periods.

In June 19, September 18, and December 18, 2018 reports, Dr. Dentico indicated that appellant continued to have “75% disability.” In an October 18, 2018 Form OWCP-5c, he provided the same work restrictions as he provided in the May 11, 2018 Form OWCP-5c report.

On March 1, 2019 the employing establishment offered appellant a full-time modified position as a general clerk. The position involved responding to customer inquiries in person and through use of a telephone and computer, shredding/bagging stale documents, verifying addresses in a route book, and labelling mail cases/equipment. The physical requirements of the position provided that appellant would not be required to lift/carry/push more than 20 pounds and that she would be able to change her position every 20 minutes. Appellant would intermittently engage

⁵ In an October 3, 2016 report, Dr. Mendoza provided an opinion regarding appellant’s disability, reiterating the opinion he provided on June 20, 2016.

⁶ On August 15, 2017 the employing establishment offered appellant a modified position as a sales and service distribution associate. However, it withdrew the job offer as it was for a part-time position and appellant was working on a full-time basis at the time of her October 11, 2013 employment injury.

in standing, walking, sitting, and reaching above shoulder level.⁷ She rejected the offered position on March 4, 2019.

In a March 10, 2019 Form OWCP-5c, Dr. Dentico found that appellant could return to work with no lifting/pushing/pulling more than 20 pounds, no sitting/standing for prolonged periods, and no engaging in bending, twisting, or stooping. In a March 20, 2019 report, he diagnosed cervical/lumbar radiculopathy and determined that appellant could not lift/push/pull more than 20 pounds, engage in stooping or bending, or stay in a given body position for a prolonged period.

On April 4 and 10, 2019 the employing establishment confirmed that the general clerk position remained available to appellant.

By letter dated April 16, 2019, OWCP advised appellant of its determination that the general clerk position offered by the employing establishment was suitable in accordance with the medical limitations provided by Dr. Dentico in his October 18, 2018 report. OWCP informed appellant that her compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2), if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.⁸

On April 24, 2019 appellant accepted the position offered by the employing establishment, but she did not begin working in the position.

In a June 5, 2019 record of a telephone call, appellant advised OWCP that she was not accepting the general clerk position offered by the employing establishment. In a June 6, 2019 letter, an employing establishment official indicated that appellant had expressed a desire to retire and elect Office of Personnel Management (OPM) benefits, rather than “move forward with the reemployment process” with the employing establishment. The case record contains a June 15, 2019 document in which appellant elected to receive OPM benefits, effective July 21, 2019.

By letter dated June 20, 2019, OWCP notified appellant that her reasons for refusing the position offered by the employing establishment were unjustified. It provided her 15 days to accept the position or have her entitlement to wage-loss compensation benefits terminated.

Appellant submitted a June 21, 2019 document in which she again elected to receive OPM benefits, effective July 21, 2019.

On July 9, 2019 OWCP advised that the employing establishment had confirmed that the general clerk position remained available to appellant. On July 16, 2019 it advised that the employing establishment reported that appellant had not appeared for work or otherwise been “cooperating with the rehiring process.”

By decision dated July 17, 2019, OWCP terminated appellant’s compensation, effective the same date, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

⁷ Appellant’s vocational rehabilitation counselor later advised that the offered position was suitable to appellant’s work skills and medical condition. She closed appellant’s vocational rehabilitation in mid-July 2019.

⁸ On April 22, 2019 counsel advised OWCP that appellant’s disability retirement had been accepted.

On July 22, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on November 4, 2019 counsel asserted that the employing establishment did not offer a starting date for the general clerk position and, therefore, she decided she could not trust the employing establishment and chose retirement over a return to work.

Appellant subsequently submitted a June 20, 2019 letter in which she advised the employing establishment that she did not "wish to move forward with the job offer." She also submitted May 13, September 5, and October 21, 2019 reports in which Dr. Dentico indicated that her work status remained unchanged, as well as diagnostic testing from mid-October 2019.

In a December 24, 2019 letter, appellant asserted that she did not recall receiving a starting date for the general clerk position offered by the employing establishment.

By decision dated January 16, 2020, OWCP's hearing representative affirmed the July 17, 2019 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.⁹ 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.¹⁰ 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.¹¹ 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.¹²

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.¹³ 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.¹⁴

⁹ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

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

¹¹ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

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

¹³ 20 C.F.R. § 10.517(a).

¹⁴ *Id.* at § 10.516.

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.¹⁵ 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.¹⁶ In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹⁷

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 17, 2019, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record establishes that appellant is capable of performing the general clerk position offered by the employing establishment on April 1, 2019 and determined to be suitable by OWCP on April 16, 2019. The position involves performing various clerical duties and provided that appellant would not be required to lift/carry/push more than 20 pounds and that she would be able to change her position every 20 minutes. Appellant would intermittently engage in standing, walking, sitting, and reaching above shoulder level.

The general clerk position was approved by appellant's vocational rehabilitation counselor and OWCP properly relied on the opinion of the counselor in determining that appellant is vocationally and educationally capable of performing the position.¹⁸

In determining that appellant is physically capable of performing the general clerk position, OWCP properly relied on the opinion of attending physician Dr. Denticio. In numerous reports dated between 2017 and 2019, Dr. Denticio provided an opinion that appellant could return to full-time work with no lifting/handling more than 20 pounds, no sitting/standing for prolonged periods, and no engaging in bending, twisting, or stooping. The reports of Dr. Denticio most contemporaneous with the offer of the general clerk position were a March 10, 2019 Form OWCP-5c report in which he found that appellant could return to work with no lifting/pushing/pulling more than 20 pounds, no sitting/standing for prolonged periods, and no engaging in bending, twisting, or stooping, as well as a March 20, 2019 narrative report in which he determined that appellant could not lift/push/pull more than 20 pounds, or engage in stooping, bending, or stay in a given body position for a prolonged period.¹⁹ The Board finds that these work restrictions would allow appellant to work in the general clerk position offered by the employing establishment.

¹⁵ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁶ 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).

¹⁷ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

¹⁹ In 2018, Dr. Denticio advised that appellant should take breaks every 20 minutes, but by 2019 he no longer indicated that appellant's medical condition required such breaks. He only noted that appellant needed to periodically change her body position.

The Board finds that OWCP properly accorded the weight of the medical opinion evidence with Dr. Dentico in that he based his opinion on a proper factual and medical history and provided medical rationale for his opinion regarding appellant's work capabilities.²⁰ Therefore, OWCP has established that the general clerk position 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 her has the burden of showing that such refusal to work was justified.²¹ The Board has reviewed the evidence and argument submitted by appellant in support of her refusal of the general clerk position and finds that it is insufficient to justify her refusal of the position. The case record reflects that the position remained available to appellant. Appellant submitted additional reports from Dr. Dentico, dated between May and October 2019, as well as diagnostic test results from mid-October 2019. The Board notes that these documents fail to establish that appellant could not work as a general clerk or physically perform the position.

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.²² For these reasons, OWCP properly terminated appellant's entitlement to wage-loss compensation and a schedule award, effective July 17, 2019, because she refused an offer of suitable work.²³

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 17, 2019, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

²⁰ See *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

²¹ See *supra* notes 11 and 12.

²² See generally *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

²³ See *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 17, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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