United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 22-0993**
	)	**Issued: November 28, 2022**
U.S. POSTAL SERVICE, WHITE BEAR STATION POST OFFICE, St. Paul, MN, Employer	)	

Appearances:
Allen R. Webb, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On June 16, 2022 appellant, through counsel, filed a timely appeal from a May 5, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[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.

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]

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and entitlement to a schedule award effective September 20, 2021 due to his refusal of suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 27, 2018 appellant, then a 40-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a back strain from twisting when delivering his mail route while in the performance of duty. He first became aware of his condition and that it was caused or aggravated by his employment on December 5, 2018. OWCP accepted the claim for bilateral sacroiliitis.

Appellant stopped work on December 22, 2018 and underwent conservative treatment, with minimal improvement. He returned to work in a part-time limited-duty capacity on May 12, 2019 and worked intermittently while continuing conservative medical treatment. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls commencing December 26, 2018.

In an April 28, 2021 report, Dr. Douglas A. Becker, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed appellant's history of injury, along with a statement of accepted facts (SOAF) and the medical record. He noted that, while appellant indicated that he had pain in the L5 region with SI joint discomfort and a tingling sensation in both legs posteriorly to his feet at times, appellant was not receiving any treatment or taking any medication for discomfort, but he was off work. On examination, Dr. Becker found a relatively normal examination with negative Patrick's and Stinchfield tests and with slight tenderness at L5, but no paraspinal spasm, asymmetry or atrophy. The neurological examination was grossly intact in the bilateral upper and lower extremities. X-rays of the lumbar spine showed mild diffuse degenerative joint disease and degenerative disc disease and the bilateral SI joints showed mild degenerative change. In response to OWCP questions, Dr. Becker diagnosed a permanent work-related aggravation of bilateral sacroiliitis, as seen by erosion on computerized tomography (CT) and magnetic resonance imaging (MRI) scans. He related that these conditions continued to be aggravated by prolonged standing and walking activities. Dr. Becker concluded that appellant could not resume his date-of-injury job. On a work capacity evaluation (Form OWCP-5c) he indicated that appellant could return to a medium full-duty position with permanent restrictions of

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the May 5, 2022 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*.

four hours of combined walking and standing, one hour of twisting, three hours of bending/stooping, four hours of lifting no more than 30 pounds, and one hour of climbing.

On June 9, 2021 the employing establishment offered appellant a modified city carrier position. The work hours were 7:30 through 16:00. The duties of the modified assigned were listed as casing mail (seated and standing) for up to two hours, delivering mail by driving up to "XX hours," and delivering mail on walking route up to "XX hours." The physical requirements of the position were noted as lifting up to four hours, standing/walking up to four hours, driving postal vehicle up to eight hours, and sitting up to eight hours. The employing establishment noted that appellant refused to sign the job offer pending review by his treating physician.

On June 23, 2021 the employing established confirmed that the offered position remained available to appellant and that he had not returned to work.

By letter dated June 23, 2021, OWCP advised appellant that it had determined that the June 9, 2021 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. Becker in his April 28, 2021 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 not receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

In a June 22, 2021 report, Dr. Dale J. Duthoy, a Board-certified family practitioner, noted that OWCP's referral physician Dr. Becker had issued new restrictions of maximum four hours standing and walking, and no lifting over 30 pounds for only one hour a day. He noted that appellant indicated that he had tried to work with these restrictions in the past, but had to stop after only two weeks. Dr. Duthoy indicated that appellant's lumbar spine examination revealed tender diffuse LS and SI bilaterally, flexion of 80 to 90 degrees, and extension 10 degrees with moderate discomfort. He provided an assessment of mechanical low back pain, hypermobility syndrome, and chronic bilateral sacroilitis. Dr. Duthoy noted that appellant's mechanical low back pain began after his work-related injury and that appellant had not recovered. He recommended that appellant apply for disability. In an attached June 22, 2021 note, Dr. Duthoy noted that appellant's previous visit was August 19, 2020. He indicated that appellant had reached maximum medical improvement on August 4, 2020 and was unable to work as of August 4, 2020. Dr. Duthoy concluded that he would support appellant's disability claim.

On July 28, 2021 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.

On August 13, 2021 appellant indicated that he was unable to be scheduled for a physician's appointment until August 24, 2021. OWCP, in a letter dated August 26, 2021, granted him a two-week extension to submit the medical information from his August 24, 2021 medical appointment. No additional evidence was received.

By decision dated September 20, 2021, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective that day as he had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that the April 28, 2021 report from Dr. Becker constituted the weight of the evidence and established that appellant could perform the offered position.

On September 29, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on February 18, 2022.

In a February 17, 2022 letter, Dr. Jeff Elbers, a family medicine physician, summarized appellant's medical treatment by Dr. Duthoy from 2018 for appellant's work-related back pain. He noted treating appellant on August 24, 2021 as Dr. Duthoy had retired. Dr. Elbers indicated that appellant had reported no improvement in his back symptoms and that he was unable to work at the employing establishment due to his severity of symptoms. He concurred with Dr. Duthoy's diagnoses of ankylosing spondylitis, bilateral sacroiliitis, and hypermobility syndrome of multiple joints, including the spine. Dr. Elbers noted that those conditions were chronic in nature and would likely continue to cause limitations, which could flareup at times and cause more severe limitations in activity or abilities.

By decision dated May 5, 2022, OWCP's hearing representative affirmed OWCP's September 20, 2021 decision.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[4] It has authority undersection 8106(c)(2) of FECA 5 U.S.C. § 8106(c)(2), to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his 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.[5] In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.[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

[4] *T.M.*, Docket No. 20-0401 (issued February 26, 2021); *E.W.*, Docket No. 19-1711 (issued July 29, 2020); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[5] 5 U.S.C. § 8106(c)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

[6] 20 C.F.R. § 10.500(b).

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]

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.[10] Its procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[11]

ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award effective September 20, 2021 due to his refusal of suitable work under 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant developed bilateral sacroiliitis in the performance of duty. Following appellant's work stoppage in February 2020, it referred him for a second opinion evaluation with Dr. Becker who examined appellant, reviewed the medical evidence of record and a SOAF. Dr. Becker diagnosed a permanent work-related aggravation of bilateral sacroiliitis, as seen by erosion on CT and MRI scans, which he found was aggravated by prolonged standing and walking activities. He opined that appellant could work with permanent restrictions of four hours of combined walking and standing, one hour of twisting, three hours of bending/stooping, four hours of lifting no more than 30 pounds, and one hour of climbing.

The employing establishment offered appellant a modified city carrier position which involved casing mail (seated and standing) for up to two hours, delivering mail by driving up to "XX hours" and on walking route up to "XX hours." The physical requirements of the position were listed as lifting up to four hours, standing/walking up to four hours, driving postal vehicle up to eight hours, and sitting up to eight hours.

As noted above, a job offer must be in writing and provide a description of the duties to be performed and the specific physical requirements of the position.[12]

[7] *T.M., supra* note 4; *E.W., supra* note 4; *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[8] 20 C.F.R. § 10.517(a).

[9] *Id.* at § 10.516.

[10] *Id.* at § 10.517(a).

[11] *Supra* note 5 at Chapter 2.814.5a(4) (2013); *see D.C.*, Docket No. 19-1297 (issued October 5, 2021); *J.K.*, Docket No. 19-0064 (issued July 16, 2020).

[12] *See supra* note 5 at Chapter 2.814.4(a) (June 2013).

The Board finds that the modified job offer provided an incomplete description of the duties to be performed. The position description indicated that appellant would be required to walk the route up to "XX" hours and perform mounted delivery (driving) up to "XX" hours. It is therefore unclear as to whether the duties could be performed within his physical restrictions. Appellant's physical restrictions provided by Dr. Becker limited appellant's standing/walking up to four hours, combined.

The position description also required mounted (driving) delivery up to "XX" hours. However, Dr. Becker had limited appellant to one hour of twisting per day. It is also unclear as to how appellant could perform mounted delivery duties for more than one hour a day without twisting. The Board finds that the position description is deficient and does not adequately set forth the duties of the modified assignment and does not establish that the physical requirements of the position are with appellant's work restrictions as found by Dr. Becker.[13]

As a penalty provision, section 8106(c)(2) must be narrowly construed.[14] The medical evidence does not clearly establish that the offered position was within appellant's capabilities. Consequently, OWCP did not discharge its burden of proof to support the termination of his wage-loss compensation and entitlement to a schedule award pursuant to section 8106(c)(2).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award effective September 20, 2021 due to his refusal of suitable work under 5 U.S.C. § 8106(c)(2).

[13] *E.B.*, Docket No. 13-319 (issued May 14, 2013); *N.W.*, Docket No. 11-661 (issued July 6, 2012) (finding that, when the description of the offered position is silent with respect to physical activities restricted by a physician, it cannot be found that the offered position is suitable).

[14] *See S.S.*, Docket No. 20-0123 (issued July 28, 2022); *T.M.*, *supra* note 4; *S.Y.*, Docket No. 17-1032 (issued November 21, 2017); *A.M.*, Docket No. 12-1301 (issued March 14, 2013).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 28, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board