

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

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<b>J.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0342</b>
	)	<b>Issued: July 26, 2023</b>
<b>U.S. POSTAL SERVICE, RIVERDALE POST</b>	)	
<b>OFFICE, Bronx, NY, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 10, 2023 appellant filed a timely appeal from an October 11, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the October 11, 2022 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 schedule award benefits, effective October 11, 2022, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On December 24, 2020 appellant, then a 32-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that on December 15, 2020 she sustained a low back injury when she slipped on ice and fell to the ground while in the performance of duty. She stopped work on the same date. OWCP accepted appellant's claim for segmental and somatic dysfunction of the lumbar region (subluxation), and subsequently expanded the acceptance of her claim to include lumbar radiculopathy, sprain of lumbar spine ligaments, and injury of left leg sciatic nerve at hip and thigh level. It paid her wage-loss compensation on the supplemental rolls, effective February 27, 2021, and on the periodic rolls commencing June 20, 2021.

On January 26, 2022 OWCP referred appellant and case record, along with a statement of accepted facts (SOAF) and a series of questions, for a second opinion examination and evaluation with Dr. Sean Lager, a Board-certified orthopedic surgeon. It requested that Dr. Lager provide an evaluation of appellant's injury-related condition and her ability to work.

In a report dated March 7, 2022, Dr. Lager discussed appellant's factual and medical history and detailed the findings of his physical examination. On examination, he noted that she had limited range of motion of the lumbar spine, straight leg raising was positive on the left, and flexion/extension strength was 3/5 in each lower extremity. Appellant exhibited pain in the coccyx and lower sacrum, as well as radicular pain and paresthesia in the left leg. Dr. Lager found that none of her multiple accepted medical conditions had resolved. He advised that appellant's medical condition had not reached maximum medical improvement and that further medical treatment was needed. Dr. Lager advised that she could return to a sedentary position with a lifting restriction of 10 pounds. In a March 16, 2022 work capacity evaluation (Form OWCP-5c), he indicated that appellant could perform sedentary work for eight hours per day with a work restriction of lifting up to 10 pounds for up to three hours per day.

In several reports, including reports dated May 3 and 31, 2022, Dr. Nelson Hall, a chiropractor, indicated that appellant had multiple subluxations of the lumbar spine as demonstrated by x-rays to exist. In a June 6, 2022 report, Dr. Khalid Alladin, a Board-certified physiatrist, reported physical examination findings and diagnosed sacroiliitis, lumbosacral spondylosis, and left shoulder impingement. Dr. Hall and Dr. Alladin discussed appellant's treatment plans.

On May 16, 2022 the employing establishment offered appellant a job as a modified customer service supervisor. The full-time position involved computer work for 6 hours per day, counting mail for 30 minutes, and observing and giving instructions to employees for 90 minutes per day. The physical requirements of the position required walking/standing for 1 hour per day, sitting for 7 hours, intermittently reaching/bending/twisting for 1 hour, and intermittently lifting up to 10 pounds for 30 minutes per day. Appellant refused the offered position.

In a May 31, 2022 report, Dr. Michael Gerling, a Board-certified orthopedic surgeon, discussed appellant's low back and lower extremity symptoms and recommended that she undergo discectomy surgery at L4-5 and L5-S1 to alleviate such symptoms.

In a June 9, 2022 letter, OWCP advised appellant that the modified customer supervisor position offered by the employing establishment was in accordance with the medical restrictions of Dr. Lager, OWCP's referral physician, and it had determined that it was suitable. Pursuant to 5 U.S.C § 8106(c)(2), it afforded her 30 days to either accept the position or to provide adequate reasons for refusal. OWCP informed appellant that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

Appellant responded to the June 9, 2022 letter and argued that her work-related and nonwork-related conditions prevented her from working as a modified customer service supervisor. In an August 5, 2022 report, Dr. Lisa Corrente, a Board-certified radiologist, reported physical examination findings and opined that appellant was temporarily incapacitated from work.

In a September 2, 2022 letter, OWCP advised appellant that her reasons for not accepting the position offered by the employing establishment were unjustified. It advised her that her wage-loss compensation and entitlement to schedule award compensation would be terminated if she did not accept the position within 15 days of the date of the letter. No response was received.

By decision dated October 11, 2022, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective the same date under 5 U.S.C. § 8106(c)(2), because she refused an offer of suitable work. It found that the work restrictions of Dr. Lager, OWCP's referral physician, constituted the best assessment of appellant's ability to work around the time she was offered the modified customer service supervisor position.

### **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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> Section 8106(c)(2) will be narrowly construed

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<sup>3</sup> See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>4</sup> 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).

<sup>5</sup> See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 11, 2022.

The evidence of record does not show that appellant was capable of performing the modified customer service supervisor position offered by the employing establishment in May 2022 and determined to be suitable by OWCP in June 2022. The full-time position involved engaging in computer work for six hours per day, counting mail for 30 minutes, and observing and giving instructions to employees for 90 minutes per day. The physical requirements of the position required walking/standing for one hour per day, sitting for seven hours, intermittently reaching/bending/twisting for one hour, and intermittently lifting up to 10 pounds for 30 minutes per day.

In determining that appellant was physically capable of performing the modified customer service supervisor position offered by the employing establishment on May 16, 2022, OWCP improperly relied on the opinion of Dr. Lager. In his March 7, 2022 evaluation, Dr. Lager advised that appellant had a work restriction of lifting no more 10 pounds for no more three hours per day. While this work restriction was within the physical requirements of the modified customer service supervisor position, he did not provide medical rationale in support of his opinion on appellant's

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<sup>6</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>7</sup> 20 C.F.R. § 10.517(a).

<sup>8</sup> *Id.* at § 10.516.

<sup>9</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>10</sup> 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).

<sup>11</sup> See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

ability to work. Such medical rationale is especially necessary in appellant's case given her multifaceted medical problems as evidenced by the fact that her claim was accepted for segmental and somatic dysfunction of the lumbar region (subluxation), lumbar radiculopathy, sprain of lumbar spine ligaments, and injury of left leg sciatic nerve at hip and thigh level.<sup>12</sup> Dr. Lager highlighted numerous objective symptoms involving appellant's back, left hip, and left leg. He noted that she had limited range of motion of the lumbar spine on examination, straight leg raising was positive on the left, and flexion/extension strength was 3/5 in each lower extremity. In addition, appellant exhibited pain in the coccyx and lower sacrum, as well as radicular pain and paresthesia in the left leg. However, Dr. Lager did not adequately explain how, given the presence of these symptoms, appellant would be able to perform the types of duties required by the modified customer service supervisor position.

The Board further notes that the extent of appellant's ability to work was further called into question due to the fact that an attending physician recommended that she undergo lumbar surgery around the time that the employing establishment offered the modified customer service supervisor position to appellant in May 2022. In a May 31, 2022 report, Dr. Gerling discussed appellant's low back and lower extremity symptoms and recommended that she undergo discectomy surgery at L4-5 and L5-S1 to alleviate such symptoms. Prior to terminating appellant's compensation, OWCP failed to adequately address whether this ostensible need for surgery would have prevented appellant from working as a modified customer service supervisor.

For these reasons, OWCP did not adequately support its position that the modified customer service supervisor position offered by the employing establishment in May 2022 was suitable. Therefore, it did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 11, 2022.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 11, 2022.

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<sup>12</sup> See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017) (finding that medical opinions without adequate medical rationale are of limited probative value).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 11, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 26, 2023  
Washington, DC

Alec J. Koromilas, 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