

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

J.M., Appellant)	
)	
and)	Docket No. 23-0097
)	Issued: June 21, 2023
U.S. POSTAL SERVICE, METUCHEN POST)	
OFFICE, Metuchen, NJ, Employer)	
)	

Appearances:
Appellant, pro se
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 October 31, 2022 appellant filed a timely appeal from an August 18, 2022 merit decision and a September 30, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective June 15, 2020, because he refused an offer of suitable work,

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the September 30, 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.*

pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 18, 1976 appellant, then a 32-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back and both knees and calves on that date when he was attacked by a dog while in the performance of duty. He stopped work on March 18, 1976 and has not returned. OWCP accepted the claim for chronic lumbar strain and herniated nucleus pulposus (HNP) at L5-S1. It paid appellant wage-loss compensation on the periodic rolls.

On September 30, 2019 OWCP referred appellant, together with a statement of accepted facts (SOAF), the case record, and a series of questions, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature of his employment-related conditions, and extent of his disability and work restrictions.

In an October 22, 2019 medical report, Dr. Dinenberg reviewed the SOAF, the medical record, and the history of appellant's March 18, 1976 employment injury. He reported findings on physical examination. Dr. Dinenberg provided an impression of the accepted conditions of chronic lumbar sprain with persistent lumbar pain and HNP at L5-S1. He also provided an impression of multi-level lumbar degenerative disc/facet disease that was not related to the March 18, 1976 employment injury. Dr. Dinenberg opined that appellant did not have total disability as a result of the work injury, but that he could work full time, eight hours per day, with permanent restrictions of no lifting, pushing, or pulling more than 20 pounds for more than three hours a day, and bending, kneeling, climbing, crawling, and stooping only on a seldom basis. He advised that appellant could participate in active training and ultimate job placement. Dr. Dinenberg related that in the absence of employment for the past 43 years, there was a low likelihood of appellant's reemployment although he could participate in vocational rehabilitation services. In an accompanying work capacity evaluation (Form OWCP-5c) dated October 22, 2019, he reiterated his opinion on appellant's work capacity and permanent work restrictions.

In a letter dated November 21, 2019, OWCP requested that the employing establishment offer appellant a position, in writing, within the restrictions provided by Dr. Dinenberg, the second opinion physician.

On January 17, 2020 the employing establishment offered appellant a permanent full-time position as a modified city carrier, based on Dr. Dinenberg's October 22, 2019 permanent work restrictions. The position was in Metuchen, New Jersey. The employing establishment noted that it had investigated and verified that no work was available within 50 miles of appellant's residence in Sarasota, Florida. The duties of the position included: casing mail approximately one and one-half hours; delivering mail by driving out on a park and loop walking route approximately four hours; and assisting with Express Mail/parcels and answering telephones/handling customer complaints when needed. The physical requirements included sitting/standing/walking; regular grasping; pushing/pulling/lifting up to 20 pounds for three hours a day; reaching/reaching above shoulder; and driving a postal vehicle.

On January 22, 2020 appellant rejected the January 17, 2020 job offer, contending that it was unreasonable for him to relocate from Florida to Metuchen, New Jersey, he had not worked since 1976, and he was unable to withstand cold weather due to his bilateral knee condition.

In a January 28, 2020 letter, the employing establishment requested that OWCP make a suitability determination regarding its January 17, 2020 job offer. It advised that the offered position remained available.

OWCP subsequently received a January 28, 2020 progress note by Dr. Fabian A. Ramos, a Board-certified anesthesiologist. Dr. Ramos examined appellant and provided impressions of other spondylosis and spinal stenosis of the lumbosacral regions; other intervertebral disc displacement and other intervertebral disc degeneration of the lumbar and lumbosacral regions; and other long-term (current) drug therapy and use of opiate analgesic.

On February 26, 2020 the employing establishment confirmed that the January 17, 2020 job offer remained available to appellant.

By letter dated March 6, 2020, OWCP informed appellant that it had been notified that he had refused or failed to report to the modified city carrier position offered by the employing establishment. It advised him of its determination that the offered position was suitable and in accordance with the medical limitations provided by Dr. Dinenberg in his October 22, 2019 report. OWCP further advised appellant that the fact that he resided in a different geographic area from where the injury occurred, was not a valid reason for refusing a suitable offer of employment, since the employing establishment confirmed by notice dated January 17, 2020 that no suitable work was available in his current commuting area. Pursuant to 5 U.S.C. § 8106(c)(2), it afforded him 30 days to accept the position or to provide reasons for the refusal. OWCP advised appellant that his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the modified city carrier position or provide good cause for refusing the job offer.

In a March 5, 2020 letter received by OWCP on March 9, 2020, appellant contended that he was unable to accept the offered position because he sustained a permanent work-related back injury on March 18, 1976 and currently used a handicap placard.

Appellant submitted a May 17, 2014 report from Dr. Onefater Vladimir, a physiatrist, who provided assessments of lumbar sprain, lumbago with sciatica, bulging lumbar disc, lumbar radiculopathy, and myalgia myositis. In a June 6, 2014 report, Dr. Vladimir provided impressions of chronic low back pain, flare up of low back pain that was more pronounced on the left, and myofascial pain.

Thereafter, on several occasions, the employing establishment informed OWCP that appellant had not returned to work and continued to confirm that the offered position remained available.

In an April 29, 2020 letter, OWCP informed appellant that the offered position remained suitable and available to him, and that his reasons for refusing to accept the offered position were

not valid. It advised him that his wage-loss compensation and schedule award benefits would be terminated if he did not accept the position within 15 days of the date of the letter.

In a May 6, 2020 response, appellant contended that Dr. Dinenberg did not perform a complete, fair, and just evaluation as his Form OWCP-5c report did not include his limitations set forth in handicap placards signed by Dr. Judy C. Gordon, a family practitioner.

Appellant submitted Dr. Gordon's applications for disabled person parking permit placard dated January 19, 2016 and April 1, 2019. Dr. Gordon checked a box indicating that appellant was permanently disabled due to severe limitation in his ability to walk due to an arthritic, neurological, or orthopedic condition.

Subsequently, on several occasions, the employing establishment again informed OWCP that appellant had not returned to work and the offered position was still available.

By decision dated June 15, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, pursuant to 5 U.S.C. § 8106(c)(2), based on his refusal of suitable work. It found that the weight of the medical evidence rested with the October 22, 2019 report of Dr. Dinenberg, who provided a well-reasoned opinion as to appellant's current work limitations and the employing establishment offered him a job within those restrictions. OWCP further found that his failure to report to the offered position was not justified.

On July 24, 2020, June 9, August 9, and November 2, 2021, and February 9 and June 4, 2022 appellant requested reconsideration of OWCP's termination decision.

In support of his requests, appellant submitted letters dated July 24, 2020 and June 5, August 9, November 2, 2021, February 9, June 4 and 15, 2022, contending that he was unable to accept the offered position due to his disabling back conditions.

Appellant also submitted medical evidence. In progress notes dated June 16, July 9, 2020 and April 13, May 6, August 26, October 21, 2021, and reports dated September 3, October 22, December 17, 2020, and February 9, June 22, 2021, and July 28, 2022, Dr. Robert F. Benson, an attending anesthesiologist and pain medicine specialist, provided assessments of other spondylosis and spinal stenosis of the lumbosacral region; other intervertebral disc displacement and other intervertebral disc degeneration of the lumbar and lumbosacral regions; and other long term (current) drug therapy and use of opiate analgesic. In a March 4, 2021 order form, he requested a lumbar spine magnetic resonance imaging (MRI) scan to assess appellant's other intervertebral disc displacement of the lumbar region.

Laboratory reports dated February 11 and June 30, 2020, June 2, 2021, and May 16 and June 1, 2022 provided drug screening test results.

In a July 7, 2020 report, Dr. Frank C. Biondolillo, an emergency medicine specialist, diagnosed lumbosacral strain and muscle pain.

In a July 9, 2020 letter, Danny Delgado, a certified physician assistant, noted that appellant's low back symptoms correlated with lumbar spine MRI scan findings of advance

lumbar spondylosis, advance degenerative disc disease, and moderate lumbar foraminal stenosis. He listed appellant's physical restrictions.

In letters dated July 24, 2020 and March 31, 2021, Dr. Gordon noted that appellant had a history of low back problems with severe exacerbations. She opined that he was totally disabled from work. Dr. Gordon related that appellant was unable to walk, stand, or sit for more than 15 to 20 minutes before experiencing severe pain, and that he used a cane or walker during exacerbations.

Orders dated September 3 and 10, 2020 and signed by a provider with an illegible signature requested a brace to treat appellant's diagnosis of other spondylosis and other intervertebral disc degeneration of the lumbar region.

In a March 8, 2021 lumbar spine MRI scan report, Dr. Lidia Linetsky, a Board-certified diagnostic radiologist, provided impressions of interval development of right lateral posterior disc herniation at the L3-4 level; right paracentral posterior disc herniation at the L4-5 and L5-S1 level, stable; diffuse advanced lumbar spondylosis accompanied by moderate-to-advanced degenerative disc disease at the levels described above and mild s-shaped scoliosis, stable; mild central spinal canal stenosis at the L4-5 level, stable; some degree of multi-level neural foraminal stenosis, not significantly changed; and malalignment of the lumbar vertebrae, stable.

An October 22, 2014 Form OWCP-5c report by Dr. Fanourios Ferderigo, an orthopedic surgeon, advised that appellant was totally disabled from work and listed his permanent work restrictions.

Dr. Ramos, in progress notes dated June 22, 2021, March 17, and May 12, 2022, reiterated his prior assessments of other spondylosis and spinal stenosis of the lumbosacral regions; other intervertebral disc displacement and other intervertebral disc degeneration of the lumbar and lumbosacral regions; and other long-term (current) drug therapy and use of opiate analgesic.

A May 20, 2009 Form OWCP-5c report by Dr. William F. Bennett, a Board-certified orthopedic surgeon, indicated that appellant was unable to perform his usual job, but he could work four hours per day with indefinite restrictions.

By decisions dated November 18, 2020, July 26 and October 4, 2021, and January 31, May 10, and August 18, 2022, OWCP denied modification of its termination decision, finding that the evidence submitted was insufficient to outweigh the opinion of Dr. Dinenberg.

On September 3, 2022 appellant requested reconsideration of the August 18, 2022 decision. In support of the request, he submitted an August 31, 2022 Form OWCP-5c report from Dr. Sajeev Kumar, an anesthesiologist and pain medicine specialist. Dr. Kumar advised that appellant was totally disabled from work and listed his work restrictions.

OWCP, by decision dated September 30, 2022, denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.³ 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.⁴ 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.⁵ 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.⁶

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.⁷ 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.⁸

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

If possible, the employing establishment should offer suitable employment in the location where the employee currently resides. If this is not practical, it may offer suitable reemployment

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

⁴ 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).

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

⁶ *Y.J.*, Docket No. 20-1562 (issued December 14, 2021); *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁷ 20 C.F.R. § 10.517(a).

⁸ *Id.* at § 10.516.

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

¹⁰ 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).

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

at the employee's former duty station or other location.¹² Where the distance between the location of the offered job and the location where the employee currently resides is at least 50 miles, OWCP may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the employing establishment's rolls and would incur relocation expenses by accepting the offered employment.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective June 15, 2020, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On January 17, 2020 the employing establishment offered appellant a position as a modified city carrier and on March 6, 2020 OWCP determined that the position was suitable. The January 17, 2020 job offer was within the restrictions as prescribed by the second opinion physician, Dr. Dinenberg. Dr. Dinenberg reported that appellant could perform full-time work, eight hours per day, with permanent restrictions that included no lifting, pushing, or pulling more than 20 pounds, and bending, kneeling, climbing, crawling, and stooping only on a seldom basis. However, Dr. Dinenberg in assessing appellant's disability status opined that appellant did not have total disability as a result of the work injury. But he also provided an impression of multi-level lumbar degenerative disc/facet disease that was not related to the March 18, 1976 employment injury. Dr. Dinenberg did not address whether this additional subsequently developed nonwork-related condition caused additional disability. In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹⁴

As a penalty provision, the termination of compensation benefits is narrowly construed.¹⁵ As Dr. Dinenberg did not address whether appellant subsequently developed nonwork-related condition affected appellant's work capacity, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2).¹⁶

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective June 15, 2020, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

¹² 20 C.F.R. § 10.508; *S.H.*, Docket No. 15-0329 (issued June 5, 2015).

¹³ 20 C.F.R. § 2.814.6(d)(2); *see A.P.*, Docket No. 17-1135 (issued February 12, 2018); *W.B.*, Docket No. 13-0947 (issued August 16, 2013).

¹⁴ *Supra* note 11.

¹⁵ *R.M.*, Docket No. 19-1236 (issued January 24, 2020); *R.A.*, *supra* note 5; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

¹⁶ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 21, 2023
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