United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 22-0594**
	)	**Issued: October 16, 2023**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Appellant, *pro se*
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 March 3, 2022 appellant filed timely appeals from September 21 and 29, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 reduce appellant's compensation to zero, effective September 21, 2021, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for failure to cooperate with the early stages of vocational rehabilitation without good

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the September 29, 2021 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*.

cause; and (2) whether OWCP has met its burden of proof to terminate appellant's entitlement to wage-loss compensation and a schedule award, effective September 29, 2021, as he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On September 7, 2007 appellant, then a 40-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 29, 2007 he sustained a left knee injury when he stood up after delivering mail through a slot while in the performance of duty. He stopped work on August 30, 2007. OWCP accepted the claim for derangement of the posterior horn of the medial meniscus. It authorized left knee arthroscopic surgery, which was performed by Dr. Eric Freeman, a Board-certified orthopedic surgeon, on June 27, 2008. OWCP paid appellant wage-loss compensation on the supplemental rolls from October 13 through November 24, 2007 and on the periodic rolls from November 25, 2007 through October 25, 2008. It subsequently paid him wage-loss compensation on the supplemental rolls for intermittent disability from work.

In a work capacity evaluation (Form OWCP-5c) dated October 7, 2008, Dr. Freeman released appellant to return to work modified duty, five hours per day, effective October 22, 2008, with no lifting, pushing, or pulling greater than 15 pounds and no bending or stooping.

On October 20, 2008 appellant accepted a part-time, modified-duty carrier position, working five hours per day. The duties of the assignment required casing and tying out his route, answering telephones, updating carrier books, creating labels, and lifting, pushing, and pulling up to 15 pounds.

In a Form OWCP-5c dated October 7, 2009, Dr. Freeman released appellant to return to work five hours per day with limitations of lifting, pushing, and pulling no more than 20 pounds. He thereafter released appellant to return to work six hours per day with a 10-pound limitation, effective November 6, 2012, and for six hours per day with a 20-pound limitation, effective October 15, 2014.

Commencing October 24, 2009, OWCP paid appellant compensation on the periodic rolls for 2.5 hours per day based on an informal loss of wage-earning capacity (LWEC) determination.

On November 20, 2019 OWCP referred appellant, along with a statement of accepted facts and a series of questions, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation.

On December 3, 2019 appellant explained that he had suffered a heart attack in July 2019 and was disabled.

Appellant resigned from the employing establishment effective January 7, 2020.

In a January 8, 2020 report, Dr. Sultan noted appellant's history of left knee injury resulting in surgery performed by Dr. Freeman on June 27, 2008, including abrasion arthroplasty of the patella, extensive tricompartmental synovectomy with partial medial and lateral meniscectomy and removal of loose body. He further noted that appellant had returned work light duty casing mail for six hours per day in 2010 and that he had a myocardial infarction on July 21, 2019 for

which he had undergone two stent insertions and wore a device for an irregular heartbeat. Dr. Sultan diagnosed medial and lateral meniscal tears with post-traumatic synovitis and grade 2 changes involving the medial facet of the patella consistent with post-traumatic chondromalacia. He opined that these conditions were caused by the August 29, 2007 work injury. Dr. Sultan advised that appellant was unable to return to full duty, but could continue light duty casing mail for six hours per day. He noted that part of the work restrictions were "secondary to [appellant's] underlying heart condition."

On February 10, 2021 OWCP requested that Dr. Sultan provide a supplemental opinion for clarification.

In a report dated March 3, 2021, Dr. Sultan noted that he had previously seen appellant regarding his August 29, 2007 employment injury. He summarized appellant's history of injury and medical treatment. Dr. Sultan related that appellant's physical examination findings included atrophy of the left distal thigh, patellofemoral crepitus, left knee pain with squatting, and favoring of the left lower extremity when ambulating. He again diagnosed medial and lateral meniscal tears with post-traumatic synovitis and grade 2 changes involving the medial facet of the patella consistent with post-traumatic chondromalacia due to the August 29, 2007 work injury. Dr. Sultan determined that appellant had reached maximum medical improvement and that his prognosis was "guarded to poor." He opined that "from an orthopedic standpoint" appellant could return to light-work activity casing mail for six hours per day, five days per week, and that his nonaccepted heart conditions had "no pertinence on [appellant's] work status and restrictions" and that his "work restrictions are solely due to the injuries sustained on August 29, 2007 and not due to any nonwork-related conditions." Dr. Sultan further opined that "a part of [appellant's] work restrictions are secondary to the underlying heart condition" and that appellant's current level of disability was "related in part" to his preexisting heart condition.

In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Sultan noted that appellant was capable of working six hours per day with no pushing, pulling, or lifting over 20 pounds.

On March 10, 2021 OWCP referred appellant for vocational rehabilitation services based on Dr. Sultan's March 3, 2021 report.

In a letter dated April 8, 2021, the employing establishment requested that appellant attend an interview on April 21, 2021 to discuss the possibility of returning to work in a permanent modified-duty assignment. Attached to the letter was a job description for a modified city carrier including casing mail, delivering mail and packages up to 20 pounds, and scanning parcels up to 20 pounds, for six hours per day.

In a July 28, 2021 development letter, OWCP informed appellant that the offered modified city carrier position was suitable work and comported with the physical restrictions of Dr. Sultan, which it had accorded the weight of the evidence. It noted that it had not received medical notes from any of his treating providers since the April 25, 2017 note of Dr. Freeman. OWCP further noted that the position was still available and afforded appellant 30 days to accept the position and report to duty. It advised that, if he failed to accept the position, he had 30 days to provide a written explanation. OWCP further advised appellant that, at the end of the 30-day period, if his reasons

for refusing the suitable work position were not considered justified, his right to wage-loss compensation and schedule award benefits would be terminated.

By letter dated August 4, 2021, OWCP informed appellant that it had been advised that he had been unresponsive to attempts by a vocational rehabilitation counselor to contact him by telephone and written correspondence on several occasions between July 12 and 30, 2021. It notified him that, pursuant to section 8113(b) of FECA, if an employee without good cause failed to undergo vocational rehabilitation when so directed, OWCP may reduce compensation prospectively based on what would have been the employee's LWEC had he or she not failed to undergo vocational rehabilitation. OWCP also informed appellant that, if he refused to cooperate with the essential preparatory efforts, it would assume absence evidence to the contrary that the vocational rehabilitation effort would have resulted in a return to work with no loss of LWEC in accordance with 20 C.F.R. § 10.519. It advised him that his case would be held open for 30 days to afford him an opportunity to make a good faith effort to participate in the rehabilitation effort. OWCP further notified him that, if during the allotted 30-day period he did not comply with the instruction to undergo the rehabilitation effort, or did not show good cause for not participating, the rehabilitation effort would be terminated, and action would be initiated to reduce his compensation to zero. No evidence was received.

By decision dated September 21, 2021, OWCP reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective that date, due to his failure to cooperate with vocational rehabilitation without good cause. It found that his failure to undergo the essential preparatory effort of vocational testing did not permit OWCP to determine what would have been his LWEC had he undergone the testing and rehabilitation effort.

By decision dated September 29, 2021, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, pursuant to 5 U.S.C. § 8106(c)(2), effective that date. It found that the offered modified city carrier position was within the restrictions provided by Dr. Sultan in his March 3, 2021 report.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.[3] Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[4]

Section 8113(b) of FECA[5] provides that, if an individual without good cause fails to apply for an undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the LWEC of the individual would probably have substantially increased, may reduce

[3] *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556 (1986).

[4] 5 U.S.C. § 8104(a).

[5] *Supra* note 1.

prospectively the monetary compensation of the individual in accordance with what would probably have been his LWEC in the absence of the failure, until the individual in good faith complies with the direction of the OWCP.[6]

OWCP's regulations, at 20 C.F.R. § 10.519, provide in pertinent part:

> "If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows --
>
> > "(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her [LWEC] had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.
> >
> > "(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early, but necessary stages of a vocational rehabilitation effort (that is, meetings with OWCP nurse, interviews, testing, counseling, functional capacity evaluations [(FCE)], and work evaluations) OWCP cannot determine what would have been the employee's [LWEC].
> >
> > "(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no [LWEC], and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."[7]

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's compensation, effective September 21, 2021, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

On February 10, 2021 OWCP properly referred appellant to Dr. Sultan for a second opinion evaluation to determine whether appellant had any remaining residuals and/or disability

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[6] 5 U.S.C. § 8113(b).

[7] 20 C.F.R. § 10.519(a) – (c); *see D.W.*, Docket No. 20-0840 (issued August 19, 2021); *R.H.*, Docket 58 ECAB 654 (2007).

due to his accepted August 29, 2007 employment injury and also whether his nonaccepted heart conditions contributed to any ongoing disability. In his March 3, 2021 report, Dr. Sultan determined that, "from an orthopedic point of view," appellant was capable of light-work activity casing mail six hours per day, five days per week, with no lifting, pushing, or pulling greater than 20 pounds. He further opined that appellant's heart condition had "no pertinence on his work status and restrictions" and that his work restrictions were "solely due" to the August 29, 2007 employment injury and "not due to any nonwork-related conditions." However, in the same report, Dr. Sultan also opined that "a part of [appellant's] work restrictions" were "secondary to the underlying heart condition" and appellant's "current level of disability" was "related in part" to a preexisting heart condition. OWCP did not seek clarification from Dr. Sultan regarding these contradictory statements in his March 3, 2021 report.

OWCP's procedures provide in pertinent part that there should not be any outstanding medical issues, work related or nonwork related, precluding participation in the rehabilitation effort. If there are nonwork-related conditions apparent in the file, any restrictions resulting from those conditions should be clarified prior to referral.[8]

The evidence of record established that appellant suffered a myocardial infarction on July 21, 2019 for which he had undergone two stent insertions and was wearing a device for an irregular heartbeat. In his March 3, 2021 report, Dr. Sultan's opinions were contradictory as to the nature and extent of any disability attributable to his nonaccepted heart conditions. As such, the claims examiner should have sought clarification from Dr. Sultan.[9] Thus, the Board finds that OWCP failed to meet its burden of proof.

LEGAL PRECENT -- ISSUE 2

As noted above, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[10] 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.[11] To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[12] 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.[13]

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Vocational Rehabilitation Services*, Chapter 2.813.5(c)(4) (February 2011).

[9] *Id.*; *see S.B.*, Docket No. 19-0781 (issued February 2, 2022).

[10] *Supra* note 3.

[11] 5 U.S.C. § 8106(c)(2); *see J.K.*, Docket No. 19-0064 (issued July 16, 2020); *Geraldine Foster*, 54 ECAB 435 (2003).

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

[13] *P.C.*, Docket No. 20-0395 (issued February 19, 2021); *J.K.*, *supra* note 11; *Joan F. Burke*, 54 ECAB 403 (2003).

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.[14] 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.[15]

The determination of whether an employee is capable of performing modified-duty work is a medical question that must be resolved by probative medical opinion evidence.[16] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[17]

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.[18] OWCP's procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's entitlement to wage-loss compensation and a schedule award, effective September 29, 2021, as it improperly determined that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

As noted above, a determination of whether an employee can perform modified-duty work is a medical question that must be resolved by probative medical opinion evidence.[20] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[21]

In terminating appellant's compensation benefits, OWCP relied on the March 3, 2021 second opinion evaluation of Dr. Sultan in finding that the offered modified city carrier position constituted suitable work. However, as explained above, the March 3, 2021 report was internally

[14] 20 C.F.R. § 10.517(a); *J.S.*, Docket No. 19-1399 (issued May 1, 2020); *Richard P. Cortes*, 56 ECAB 200 (2004).

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

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

[17] *Id.*

[18] 20 C.F.R. § 10.517(a).

[19] *Supra* note 8 at Chapter 2.814.5a(4) (June 2013); *P.C.*, *supra* note 13; *see J.K.*, *supra* note 11.

[20] *Supra* note 16.

[21] *Id.*

inconsistent as to the nature and extent of any disability attributable to his nonaccepted heart conditions.

The Board has held that medical reports are of limited probative value if they are internally inconsistent.[22] Therefore, OWCP erred in according the weight of the evidence to Dr. Sultan's March 3, 2021 second opinion evaluation as it was insufficient to meet OWCP's burden of proof.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective September 21, 2021, for failing to cooperate with the early stages of vocational rehabilitation. The Board further finds that OWCP failed to meet its burden of proof to terminate appellant's entitlement to wage-loss compensation and a schedule award, effective September 29, 2021, as it improperly determined that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the September 29 and 21, 2021 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: October 16, 2023
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

[22] *L.L.*, Docket No. 18-0861 (issued April 5, 2019); *S.K.*, Docket No. 18-0836 (issued February 1, 2019); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).