

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

F.S., Appellant)	
)	
and)	Docket No. 23-0576
)	Issued: October 2, 2023
U.S. POSTAL SERVICE, MEDFORD POST)	
OFFICE, Medford, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 7, 2023 appellant, through counsel, filed a timely appeal from a February 1, 2023 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 February 1, 2023 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 compensation, effective February 1, 2023, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On June 25, 1992 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 23, 1992 he sustained an injury when he stepped in a rut and twisted his right knee while in the performance of duty. He did not stop work. OWCP accepted appellant's claim for internal derangement of the right knee. On November 2, 1992 appellant underwent OWCP-authorized right knee arthroscopic surgery, which included arthrotomy, synovectomy, total medial meniscectomy, and debridement of arthritis with chondroplasty. He subsequently stopped work and OWCP paid him wage-loss compensation on the periodic rolls, effective June 16, 2002.

Appellant received treatment for his right knee condition from Dr. Brett R. Silverman, an osteopath and Board-certified physiatrist. In a June 14, 2022 report, he discussed appellant's June 23, 1992 employment injury and reported findings of his physical examination, noting that appellant's right knee exhibited decreased range of motion, mild swelling, abnormal patellar mobility, crepitus, and medial/lateral joint line tenderness. He noted that appellant's left knee showed decreased range of motion, abnormal patellar mobility, crepitus, and unspecified tenderness. Dr. Silverman found that appellant had chronic knee and leg dysfunction with significant muscle atrophy and weakness requiring use of bracing and a cane for ambulation. He diagnosed derangement of left knee, status post medial meniscectomy of the right knee, chronic right knee pain, and gait disorder, and opined that appellant was "100 percent disabled at this time." Dr. Silverman indicated that appellant was being treated for a work-related injury.

On July 22, 2022 OWCP referred appellant and the case record, along with a series of questions and a statement of accepted facts (SOAF), for an examination and evaluation with Dr. Jonathan Paul, a Board-certified orthopedic surgeon. It requested that Dr. Paul provide an opinion on appellant's injury-related residuals and ability to work.

In an August 9, 2022 report, Dr. Silverman reported findings of his physical examination, noting that appellant's right knee exhibited decreased range of motion, mild swelling, abnormal patellar mobility, crepitus, medial/lateral joint line tenderness, and medial collateral ligament laxity. Appellant's left knee showed decreased range of motion and unspecified tenderness. Dr. Silverman advised that appellant had chronic knee and leg dysfunction with significant muscle atrophy and weakness requiring use of bracing and a cane for ambulation. He diagnosed derangement of left knee, status post medial meniscectomy of the right knee, and chronic right knee pain, and opined that appellant was "100 percent disabled at this time." Dr. Silverman indicated that appellant was being treated for a work-related injury.

In an August 17, 2022 report, Dr. Paul discussed appellant's factual and medical history, including his present complaints of pain and swelling in his right knee. He reported the findings of his physical examination, noting that appellant ambulated with an antalgic gait on the right and

wore a right knee brace. Dr. Paul advised that appellant's right knee was tender along the right medial and lateral joint line and that there was good ligament stability. He diagnosed right knee post-traumatic osteoarthritis, 30 years post total medial meniscectomy. Dr. Paul indicated that appellant continued to have pain and decreased range of motion in his right knee, and noted that his subjective complaints corresponded with the objective findings. He advised that a total right knee replacement was the only warranted surgery. Dr. Paul opined that appellant could no longer work as a letter carrier, but could return to work in a sedentary job, which allowed him to get up and walk around to alleviate his knee swelling. He opined that this disability was work related. In an August 17, 2022 work capacity evaluation (Form OWCP-5c), Dr. Paul indicated that appellant could perform sedentary work for eight hours per day with restrictions, including pushing, pulling, or lifting up to 10 pounds for 2.5 hours per day for each activity, sitting for six hours, walking for one hour, and standing for one hour. Appellant could not bend, stoop, squat, kneel, or climb, and needed to take a five-minute break every hour to walk.

On September 1, 2022 OWCP requested that Dr. Paul provide clarification of his August 17, 2022 evaluation, including providing an indication of whether appellant had reached maximum medical improvement (MMI) and whether the recommended work restrictions would be considered indefinite. In a September 26, 2022 supplemental report, Dr. Paul indicated that appellant had reached MMI and that the recommended work restrictions would be considered indefinite. He advised that, if appellant underwent a total right knee replacement, he "could be advanced to more than a sedentary job" but it was highly unlikely that he could perform his date-of-injury job as a letter carrier. Dr. Paul completed a Form OWCP-5c on September 26, 2022, which contained the same work restrictions as those that he provided on the August 17, 2022 Form OWCP-5c.

On November 3, 2022 the employing establishment offered appellant a full-time position as a modified city carrier. The physical requirements of the offered position included sitting for up to six hours a day, walking for up to one hour, standing for up to one hour, and pushing/pulling/lifting up to 10 pounds for 2.5 hours for each activity. The position did not require bending, stooping, squatting, kneeling, or climbing, and allowed for a five-minute break every hour to walk. Appellant rejected the offer of the position on November 6, 2022, noting that he was "medically unable to accept" due to ongoing work-related disability.

In a November 22, 2022 letter, OWCP advised appellant that the modified city carrier position offered by the employing establishment was in accordance with the medical restrictions of Dr. Paul and it had determined that it was suitable. It found that the weight of medical opinion evidence regarding appellant's ability to work rested with the opinion of Dr. Paul, and that the opinion of Dr. Silverman was of limited probative value. Pursuant to 5 U.S.C § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position or to provide adequate reasons for refusal. It informed him that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

Appellant submitted a November 14, 2022 report wherein Dr. Silverman indicated that, on physical examination, he had restricted range of right knee motion, significant quadriceps atrophy, and significant quad weakness necessitating the use of his knee brace. He had repeatedly demonstrated significant tenderness about the right knee with ongoing edema and swelling about the knee joint. Dr. Silverman discussed Dr. Paul's opinion and maintained that appellant could

not return to work because, even when he sits at home, he needs to sit in a recliner chair to elevate his leg/knee due to swelling in the knee and leg, and must use his transcutaneous electrical nerve stimulation (TENS) unit, capsaicin cream, and cold packs. He maintained that appellant would not be able to perform eight-hour shifts, and would not even be able to tolerate a “traditional sedentary job” at this time. In a November 10, 2023 report, Dr. Silverman reported physical examination findings similar to those contained in his August 9, 2022 report and again noted that appellant was “100 percent disabled at this time.”

In a January 11, 2023 letter, OWCP advised appellant that his reasons for not accepting the modified city carrier position offered by the employing establishment were unjustified. It advised appellant that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter. On January 30, 2023 the employing establishment confirmed that the modified city carrier position was still available.

By decision dated February 1, 2023, OWCP terminated appellant’s wage-loss compensation and entitlement to schedule award compensation, effective that date, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

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.⁴ 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.⁵ 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.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 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

⁴ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁵ 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).

⁶ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.517(a).

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

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.¹⁰ 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.¹¹ In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹²

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹³ For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.¹⁴ In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective February 1, 2023, pursuant to 5 U.S.C. § 8106(c)(2).

The Board finds that, due to a conflict in the medical opinion evidence, OWCP has not shown that appellant is capable of performing the modified city carrier position offered by the employing establishment and determined to be suitable by OWCP in November 2022. The physical requirements of the offered position included sitting for up to six hours a day, walking for up to one hour, standing for up to one hour a day, and pushing/pulling/lifting up to 10 pounds for 2.5 hours.

⁹ *Id.* at § 10.516.

¹⁰ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹¹ 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).

¹² See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹³ 5 U.S.C. § 8123(a); see *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹⁴ *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

¹⁵ See *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

In an August 17, 2022 report, Dr. Paul, OWCP's referral physician, reported the findings of his physical examination, noting that appellant ambulated with an antalgic gait on the right and wore a right knee brace. He diagnosed right knee post-traumatic osteoarthritis, 30 years post total medial meniscectomy. Dr. Paul indicated that appellant continued to have pain and decreased range of motion in his right knee, and noted that his subjective complaints corresponded with the objective findings. He advised that a total right knee replacement was the only warranted surgery. Dr. Paul opined that appellant could not work as a letter carrier, but could return to work in a sedentary job, which allowed him to get up and walk around to alleviate knee swelling. He advised that this disability was work related. In an August 17, 2022 Form OWCP-5c, Dr. Paul indicated that appellant could perform sedentary work for eight hours per day with restrictions, including pushing, pulling, or lifting up to 10 pounds for 2.5 hours per day for each activity, sitting for six hours, walking for one hour, and standing for one hour. Appellant could not bend, stop, squat, kneel, or climb, and needed to take a five-minute break every hour to walk. In a September 26, 2022 supplemental report, Dr. Paul indicated that appellant had reached MMI and that the recommended work restrictions would be considered indefinite. He completed a Form OWCP-5c report on September 26, 2022, which contained the same work restrictions as those that he provided on the August 17, 2022 Form OWCP-5c.

In contrast, Dr. Silverman, an attending physician, reported findings of his physical examination in an August 9, 2022 report, noting that appellant's right knee exhibited decreased range of motion, mild swelling, abnormal patellar mobility, crepitus, medial/lateral joint line tenderness, and medial collateral ligament laxity. Appellant's left knee showed decreased range of motion and unspecified tenderness. Dr. Silverman found that appellant had chronic knee and leg dysfunction with significant muscle atrophy and weakness requiring use of bracing and a cane for ambulation. He diagnosed derangement of left knee, status post medial meniscectomy of the right knee, and chronic right knee pain, and opined that appellant was "100 percent disabled at this time." Dr. Silverman indicated that appellant was being treated for a work-related injury.

In addition, Dr. Silverman indicated in a November 14, 2022 report that, on physical examination, appellant had restricted range of right knee motion, significant quadriceps atrophy, and significant quad weakness necessitating the use of his knee brace. Appellant had repeatedly demonstrated significant tenderness about the right knee with ongoing edema and swelling about the knee joint. Dr. Silverman discussed Dr. Paul's opinion and maintained that appellant could not return to work because, even when he sits at home, he needs to sit in a recliner chair to elevate his leg/knee due to swelling in the knee and leg, and must use his TENS unit, capsaicin cream, and cold packs. Dr. Silverman maintained that appellant would not be able to perform eight-hour shifts, and would not even be able to tolerate a "traditional sedentary job" at this time. In a November 10, 2023 report, he reported physical examination findings similar to those contained in his August 9, 2022 report and again noted that appellant was "100 percent disabled at this time."

Due to this continuing conflict in the medical opinion evidence, OWCP improperly relied on the opinion of Dr. Paul in determining that appellant was physically capable of performing the modified city carrier position.¹⁶ Therefore, it failed to establish that the modified city carrier was

¹⁶ See *supra* notes 13 through 15.

suitable, and appellant's rejection of the position would not subject him to the penalty provisions of section 8106(c)(2) of FECA.¹⁷

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective February 1, 2023, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 2, 2023
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ See *supra* notes 5 and 6.