

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

<hr/>	)	
C.G., Appellant	)	
	)	
and	)	<b>Docket No. 23-0842</b>
	)	<b>Issued: October 31, 2023</b>
U.S. POSTAL SERVICE, NEW JERSEY	)	
NETWORK DISTRIBUTION CENTER,	)	
Jersey City, NJ, Employer	)	
<hr/>	)	

*Appearances:* *Case Submitted on the Record*  
Michael D. Overman, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 2, 2023 appellant, through counsel, filed a timely appeal from a January 3, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the January 3, 2023 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.*

## **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award benefits, effective June 23, 2022, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## **FACTUAL HISTORY**

On September 16, 2019 appellant, then a 57-year-old bulk mail dock clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 15, 2019 she sustained a left ankle injury when she was struck by a pallet jack while in the performance of duty. She stopped work on September 15, 2019 and has not returned. OWCP accepted the claim for left foot displaced lateral cuneiform fracture, left foot displaced medial cuneiform fracture, left foot fracture, left foot navicular (scaphoid) displaced fracture, and complex regional pain syndrome of the left lower limb. OWCP paid appellant on the supplemental rolls commencing October 31, 2019 and on the periodic rolls commencing March 1, 2020.

In a letter dated December 3, 2020, OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record, and list of questions, for a second opinion evaluation with Dr. Paul Teja, an osteopathic Board-certified orthopedic surgeon, to determine the status of her accepted conditions and work capacity.

In a report dated December 29, 2020, Dr. Teja noted appellant's history of injury and medical course. He indicated that appellant's physical examination revealed ambulation with a cane, significant left side antalgic gait, mild left foot swelling, a six centimeter (cm) incision along the mid left foot dorsum, a seven cm incision along the left foot medial border, left foot hypersensitivity, no left foot deformities were noted, significant tenderness noted diffusely from midfoot through first and second metatarsals through metatarsophalangeal joints up to the ankle joint both laterally and medially and slightly along the Achilles tendon insertion. Dr. Teja diagnosed left foot lateral cuneiform displaced fracture, left foot medial cuneiform displaced fracture, left foot fracture, and left foot navicular displaced fracture. He found that appellant continued to suffer from left foot disabling residuals including decreased range of motion (ROM) and significant left foot hypersensitivity and decreased sensation. Dr. Teja opined that appellant was disabled from her date-of-injury job, but was capable of working eight hours per day in a sedentary position. In an attached work capacity evaluation form (Form OWCP-5c), he provided work restrictions for a sedentary position, noting the length of the work restrictions was unknown and that she had not reached maximum medical improvement (MMI). The restrictions included: two hours of walking and standing; no bending/stooping, operating a motor vehicle at work, squatting, kneeling, and climbing; and eight hours of lifting, pulling, and pushing 10 pounds.

On January 25, 2021 the employing establishment offered appellant a modified assignment as a customer care agent at the customer care center in Edison, NJ. The duties of the job required eight hours of handling inbound customer calls, eight hours of using the computer/telephone to interact by voice/e-mail, eight hours of researching information to answer and respond to customers, and eight hours of "see attached job description for additional duties." It noted that the job was available indefinitely during appellant's period of recovery while her work restrictions were temporary in nature.

On February 1, 2021 appellant rejected the job offer.

A January 25, 2021 x-ray demonstrated stable postoperative changes in the medial of the left midfoot, some sclerosis of the cuneiform consistent with healing, and small plantar spur.

In progress notes dated January 28, 2021, Dr. Frank Liporace, a Board-certified orthopedic surgeon, noted that appellant was doing well following removal of left foot hardware. On physical examination of the left foot, he reported no peri-incisional drainage or erythema, minimal tenderness along the mid foot and forefoot, and intact sensation to light touch over the lateral foot. Dr. Liporace noted that from an orthopedic perspective that nothing further could be done and referred her to physical medicine and rehabilitation (PM&R) for evaluation and management for her chronic pain due to the crush injury.

In a report dated February 17, 2021, Dr. Basil Kurdali, a physician Board-certified in anesthesiology and interventional pain medicine, noted injury and medical histories, reviewed diagnostic tests, and provided physical examination findings. He reported lateral and medial malleolus tenderness, limited range of motion with pain on active plantar flexion and dorsiflexion, and well-healed incision along the dorsum and medial aspect without erythema. Diagnoses included: left foot complex regional pain syndrome (CRPS) and left ankle crush injury status post ORIF and removal of hardware. In an attached undated attending physician's report (Form OWCP-20), Dr. Liporace diagnosed left foot crush status post ORIF and removal of hardware, and left foot CRPS. He advised that appellant was totally disabled beginning February 17, 2021, the date of his examination, and that she could not return to work at that time.

On March 3, 2021 OWCP requested Dr. Teja review a January 25, 2021 diagnostic test and Dr. Liporace's January 28, 2021 report and provide an opinion on whether appellant was able to return to work as per his December 29, 2020 report. It noted that appellant claimed she was unable to work due to nerve damage in her foot.

In a report dated March 17, 2021, Dr. Kurdali noted medical records reviewed and appellant's complaints of constant left foot pain with associated swelling, which is aggravated by standing and walking. On physical examination of the left foot and ankle, he reported an antalgic gait with a cane, tenderness along medial and lateral malleolus, limited ROM, hypersensitivity to light touch along the dorsum of the foot, and swelling along the lateral and medial malleolus. Diagnoses included left foot CRPS and left ankle crush injury status post ORIF and removal of hardware. Dr. Kurdali recommended that appellant continue with physical therapy.

In a March 19, 2021 Form OWCP-20, Dr. Kurdali again related appellant's diagnoses and related that appellant was totally disabled from work.

Dr. Teja, in an April 5, 2021 addendum, noted review of additional medical records. He opined that appellant was capable of performing light-duty sedentary work and that she was capable of performing the offered position. Dr. Teja advised that appellant's restrictions were permanent.

In an April 21, 2021 report, Dr. Kurdali reiterated the findings noted in his prior reports.

In an e-mail dated May 5, 2021, the employing establishment confirmed that the offered job remained available for appellant and that she has not returned to work.

On May 11, 2021 OWCP advised appellant that it found the January 25, 2021 job offer was suitable work within the work limitations provided by Dr. Teja. It afforded her 30 days to accept the offered position or to provide valid reasons for refusal.

In a letter dated May 25, 2021, counsel asserted that the job offer was not suitable and submitted appellant's statement, a February 11, 2021 Form CA-20, and a copy of the January 28, 2021 report from Dr. Liporace.

In a February 11, 2021 Form OWCP-20, Dr. Liporace noted an injury date of September 15, 2019 and found appellant totally disabled. He explained that appellant had long-term nerve pain/symptoms, no further orthopedic treatment was needed, and she had been referred to a pain management specialist for work status and care.

In a May 20, 2021 electromyograph (EMG) test, Dr. Fergie Montero-Cruz, an osteopath and Board-certified physiatrist, diagnosed left L5 radiculopathy with active denervation and no evidence of peripheral neuropathy.

On May 28, 2021 Dr. Kurdali diagnosed left CRPS. A left lumbar L3 sympathetic block was performed for treatment of left foot CRPS.

Dr. Kurdali, in a report dated June 8, 2021, noted appellant's medical history, reviewed diagnostic tests, and related that her physical examination findings remained unchanged. He reviewed an electromyogram study (EMG) dated May 20, 2021 and related an impression of left L5-S1 radiculopathy. Dr. Kurdali diagnosed left lower limb CRPS and lumbar radiculopathy.

In a Form OWCP-20 dated June 11, 2021, Dr. Kurdali found appellant totally disabled from work.

In a letter dated June 15, 2021, the employing establishment advised that the permanent rehabilitation assignment remained available to appellant until there was a change in her medical restrictions.

In progress notes dated July 7, 16, August 4, and September 8, 2021, Dr. Kurdali diagnosed lumbar radiculopathy, CRPS throughout appellant's body, as well as CRPS of the left foot.

In a letter dated March 4, 2022, OWCP referred appellant, together with a SOAF, medical record, and list of questions, for a second opinion evaluation with Dr. Sean Lager, a Board-certified orthopedic surgeon, to determine the status of her accepted conditions and work capacity.

In a report dated March 31, 2022, Dr. Lager noted medical course, reviewed medical records, the SOAF, list of questions, and the modified job offer. He noted that OWCP had accepted lumbar and groin region sprains due to a February 18, 2007 injury under OWCP File No. xxxxxx248, accepted lumbosacral sprain due to a February 6, 2019 under OWCP File No. xxxxxx079, accepted left breast contusion due to a July 18, 2018 under OWCP File No. xxxxxx144. Dr. Lager also noted that appellant had filed a claim for a right shoulder injury due to an August 3, 2016 injury under OWCP File No. xxxxxx079, which had not been formally adjudicated. On physical examination he provided findings regarding appellant's left lower extremity, detailed a shuffling, labored gait, hyperpigmentation of the foot, no left foot medial sensation, and diminished left foot and ankle dorsolateral and plantar aspect sensation. Dr. Lager

reported decreased left foot and ankle ROM including 50 degrees left foot dorsiflexion, 10 degrees left plantar flexion, 6 degrees left inversion and no left eversion. Diagnoses include left foot displaced fracture of the lateral and medial cuneiforms and navicular bones and CRPS. Dr. Lager opined that appellant was not able to return to her date-of-injury job, but was capable of performing a sedentary job with a 10-pound lifting restriction.

On April 26, 2022 OWCP notified appellant that the job remained available to her and that she had 15 days to accept the offered modified position and report for work. It further notified her that if she either did not provide a valid reason for accepting the job offer, or failed to report for work, it would terminate her compensation benefits and entitlement to a schedule award, pursuant to 5 U.S.C. § 8106(c)(2).

OWCP received a May 16, 2022 progress report and Form OWCP-20 from Dr. Kurdali, wherein he reiterated his prior findings.

Physical therapist reports from Elise Burnell, dated May 23 and June 7, 2022 found appellant was capable of working part-time work for up to 5 hours and 17 minutes with restrictions. The restrictions include no stair climbing; occasional bending reaching, walking, squatting, sitting and standing, and occasional lifting, pushing, and pulling up to 10 pounds.

In a letter to the employing establishment dated June 17, 2022, OWCP advised the weight of the medical evidence rested with Dr. Lager's March 31, 2022 report and requested it offer appellant a job with the restrictions noted by Dr. Lager.

By decision dated June 23, 2022, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, under 5 U.S.C. § 8106(c)(2), as she refused an offer of suitable work. It found that the job offer was suitable based upon her current work restrictions as provided by Dr. Teja in his December 29, 2020 report and April 5, 2021 addendum and Dr. Lager's March 31, 2022 report.

On June 30, 2022 appellant, through counsel requested a hearing before an OWCP hearing representative. A telephonic hearing was held on October 9, 2022.

OWCP received additional progress reports from Dr. Kurdali dated August 10 and October 19, 2022.

By decision dated January 3, 2023, OWCP's hearing representative affirmed OWCP's June 23, 2022 decision.

### **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>4</sup> Section 8106(c)(2) of

---

<sup>4</sup> See *S.W.*, Docket No. 20-0240 (issued January 26, 2021); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECB 197 (2005).

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>5</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>6</sup> Section 8106(c)(2) of FECA (5 U.S.C. § 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.<sup>7</sup>

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.<sup>8</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>9</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>10</sup> OWCP's 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>11</sup> In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective June 23, 2022.

OWCP accepted the claim for left foot displaced lateral cuneiform fracture, left foot displaced medial cuneiform fracture, left foot fracture, left foot navicular (scaphoid) displaced fracture, and left lower limb CRPS. OWCP determined that the January 25, 2021 job offer was

---

<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

<sup>7</sup> *S.W.*, *supra* note 4; *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>8</sup> 20 C.F.R. § 10.517(a).

<sup>9</sup> *Id.* at 10.516.

<sup>10</sup> *M.W.*, Docket No. 21-0649 (issued December 8, 2022); *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>11</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *see M.W., id.*; *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

<sup>12</sup> *See M.W., id.*; *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

suitable and in accordance with the limitations provided by Dr. Teja in his December 29, 2020 report, April 5, 2021 addendum, and confirmed by Dr. Lager in his March 31, 2022 report, after their review of appellant's accepted conditions. However, Dr. Lager noted that appellant had prior injuries and had preexisting conditions of lumbar and groin region sprains, left breast contusion, and a right shoulder injury. Neither Dr. Teja nor Dr. Lager addressed whether appellant's preexisting conditions caused additional disability. The Board also notes that Dr. Kurdali, in a report dated June 8, 2021, reviewed an electromyogram study (EMG) dated May 20, 2021 and related an impression of left L5-S1 radiculopathy. In subsequent progress reports dated from July 7, 2021. Dr. Kurdali diagnosed lumbar radiculopathy, CRPS throughout appellant's body, as well as CRPS of the left foot.

In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.<sup>13</sup> As a penalty provision, the termination of compensation benefits is narrowly construed.<sup>14</sup>

The Board finds that as OWCP did not obtain a medical opinion which addressed whether all of appellant's preexisting and subsequently-acquired conditions affected her work capacity, OWCP failed to meet its burden of proof to terminate appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2).<sup>15</sup>

### **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 23, 2022.

---

<sup>13</sup> See *J.M.*, Docket No. 23-0097 (issued June 21, 2023); *L.H.*, Docket No. 21-0244 (issued October 27, 2022); *B.H.*, Docket No. 20-0729 (issued March 19, 2021).

<sup>14</sup> *R.M.*, Docket No. 19-1236 (issued January 24, 2020); *R.A.*, *supra* note 6.

<sup>15</sup> *B.G.*, Docket No. 21-1404 (issued August 3, 2022); *C.M.*, Docket No. 19-1160 (issued January 10, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 31, 2023  
Washington, DC

Patricia H. Fitzgerald, Deputy 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