

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

A.W., Appellant	)	
	)	
and	)	Docket No. 21-1287
	)	Issued: September 22, 2023
U.S. POSTAL SERVICE, JOHN F. KENNEDY	)	
AIRPORT POST OFFICE, Jamaica, NY,	)	
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  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On August 26, 2021 appellant filed a timely appeal from a May 27, 2021 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 OWCP received additional evidence following the May 27, 2021 decision. 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 wage-loss compensation, effective May 27, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

## FACTUAL HISTORY

On November 17, 2019 appellant, then a 57-year-old platform clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she slipped on a dock plate and injured her left knee while in the performance of duty. She stopped work on the date of injury. OWCP accepted appellant's claim for lumbar sprain, lumbar strain, left knee sprain, left leg strain, right wrist sprain, and right wrist strain. It subsequently expanded the acceptance of the claim to include left knee medial meniscus tear and left knee derangement.<sup>3</sup> OWCP paid appellant wage-loss compensation on the supplemental rolls effective January 3, 2020 and on the periodic rolls effective April 26, 2020.

In a report dated December 16, 2019, Dr. Thomas Scilaris, Board-certified in orthopedic surgery, opined that appellant remained disabled from work. He diagnosed sprain/strain of right wrist and left knee, right wrist interstitial scapholunate ligament tear/oblique triangular fibrocartilage tear, and left knee medial meniscus tear. Regarding causation, Dr. Scilaris opined that the work injury was the competent cause of the diagnosed conditions and disability.

In a January 31, 2020 report, Dr. Orsuville Cabatu, a neuromusculoskeletal medicine specialist, also opined that appellant remained totally disabled from work.

OWCP continued to receive reports, wherein Drs. Scilaris and Cabatu reiterated appellant's disability status.

On January 13, 2021 OWCP referred appellant, along with a statement of accepted facts, a copy of the case record, and a series of questions, to Dr. Andrew Farber, an osteopath and Board-certified orthopedic surgeon, for a second opinion evaluation regarding her residuals and ability to perform her date-of-injury job or a modified position.

In a February 4, 2021 report, Dr. Farber noted appellant's history of injury and medical treatment. He examined her and provided physical examination findings. Dr. Farber diagnosed lumbar sprain/strain, left knee strain and medial meniscus tear, and right wrist sprain/strain. He found tenderness and decreased range of motion (ROM) in the lumbar spine and left knee. Dr. Farber opined that the work-related condition had resolved for the right wrist, but had not resolved for the lumbar spine and left knee. He indicated that appellant could return to work in a full-time, limited-duty, sedentary position, and he provided work restrictions of walking up to four

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<sup>3</sup> Appellant has prior claims, including a January 8, 2002 traumatic injury claim accepted for a left forearm contusion, right shoulder sprain, and thoracic contusion under OWCP File No. xxxxxx908; a December 5, 2007 traumatic injury claim accepted for cervical sprain, lumbar sprain, left shoulder and upper arm sprain, and left elbow and forearm sprain under OWCP File No. xxxxxx852; and a June 1, 2014 traumatic injury claim accepted for left shoulder adhesive capsulitis, left shoulder rotator cuff tear or rupture, exacerbation of cervical sprain, lumbar sprain, and left shoulder and upper arm sprain, under OWCP File No. xxxxxx043.

hours, standing up to four hours, lifting up to 10 pounds for three hours, and no climbing. Dr. Farber also recommended further treatment to include a series of three epidural injections and surgical treatment for the left knee, with four weeks of physical therapy, three times per week.

On March 12, 2021 based on Dr. Farber's work restrictions, the employing establishment offered appellant a full-time, modified mail processing clerk position, which required her to use a hand scanner to scan mail and trucks, scan placards and trucks with a plastic seal, scan truck arrivals and departures into scanner, and assign and close placards to the truck. The physical requirements included standing and walking intermittently for up to four hours; lifting up to 10 pounds intermittently for up to three hours; and simple grasping and use of a scanner for up to eight hours. The effective date of the offer was March 19, 2021 and the annual salary was listed as \$64,216.00. On the second page, the offer of modified assignment noted that "this assignment will remain within the physical restrictions furnished by your treating physician. You are advised not to exceed these restrictions. This assignment is currently available and is subject to revision based on the changes in your physical restrictions and/or the availability of adequate work. If a revision is necessary, you will be given a revised written modified assignment." The offer also advised that "This job offer is available indefinitely during the period of recovery while [appellant's] work restrictions are temporary in nature."

In a letter dated March 23, 2021, the employing establishment informed OWCP that appellant had not responded to the job offer.

On March 29, 2021 OWCP received a February 12, 2021 report from Dr. Cabatu who reiterated his prior opinion that appellant remained totally disabled from work. Dr. Cabatu also completed an attending physician's report (Form CA-20), checked the box marked "Yes" in response to whether her condition was caused or aggravated by an employment activity, and advised that she was awaiting left knee surgery.

Appellant refused the March 12, 2021 job offer.

In a March 29, 2021 report, Dr. Scilaris noted that appellant's objective findings included left knee ROM from 0 to 110 degrees, continued tenderness in the medial and lateral compartment, pain with patellofemoral compression, and positive McMurray's sign. He referred to diagnostic reports from December 2019, and noted that she was tentatively scheduled for left knee arthroscopy on April 6, 2021.

In an April 19, 2021 e-mail, the employing establishment confirmed that the offered position remained available and appellant had not returned to work.

In a notice of proposed termination dated April 22, 2021, OWCP proposed to terminate appellant's wage-loss compensation, in accordance with 20 C.F.R. § 10.500(a), based on her refusal of the modified mail processing clerk, temporary light-duty position. It advised her that it had reviewed the work restrictions provided by Dr. Farber, the second opinion physician, and found that his opinion represented the weight of the medical evidence. OWCP further determined that the position offered to appellant was within those work restrictions. It informed her of the provisions of 20 C.F.R. § 10.500(a), and that any claimant who declined a temporary, light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss.

OWCP noted that the offered pay rate of \$1,234.92 for 40 hours per week would have met or exceeded the wages of the job appellant held when injured, and she would not be entitled to ongoing wage-loss compensation. It afforded her 30 days to accept the modified assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

On May 24, 2021 the employing establishment confirmed that the pay rate when injured was the same salary offered in the limited-duty position.

OWCP subsequently received a May 7, 2021 prescription note, wherein Dr. Cabatu diagnosed right wrist sprain/strain, lumbar strain/sprain, left knee strain/sprain, and left knee tear of medial meniscus, and opined that appellant was totally disabled from work.

By decision dated May 27, 2021, OWCP terminated appellant's wage-loss compensation, effective as of the date, because she failed to accept the temporary light-duty assignment. It explained that, had she accepted the temporary light-duty assignment, she would have worked 40 hours per week, with wages of \$1,234.92 per week, and her actual earnings would have met or exceeded the current wages of the job held when injured, and she would have sustained no wage loss. OWCP found that the assignment was appropriate and within the established work restrictions provided by Dr. Farber and appellant was not entitled to compensation.

### **LEGAL PRECEDENT**

Section 10.500(a) of OWCP's regulations provides in relevant part:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents [him or her] from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee's work restrictions. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph).”<sup>4</sup>

When it is determined that an appellant is no longer totally disabled from work and is on the periodic rolls, OWCP's procedures provide that the claims examiner should evaluate whether the evidence establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being

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<sup>4</sup> 20 C.F.R. § 10.500(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1) (June 2013).

removed from the periodic rolls.<sup>5</sup> When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.<sup>6</sup> OWCP's procedures further advise, "If there still would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based on the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light[-]duty assignment)."<sup>7</sup>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective May 27, 2021, pursuant to 20 C.F.R. § 10.500(a).

OWCP terminated appellant's wage-loss compensation on May 27, 2021 pursuant to 20 C.F.R. § 10.500(a). The Board, however, is unable to determine from the current record whether its termination of her benefits is proper under 20 C.F.R. § 10.500(a) since it cannot be established whether she had been offered a temporary or a permanent employment position. OWCP's procedures require that, when an employing establishment provides an alternate employment position to a partially disabled employee who cannot perform his or her date-of-injury position, it must be determined whether the offered position is permanent or temporary in nature. If the employment offered to an employee on the periodic rolls is temporary and the employee does not accept the position, section 20 C.F.R. § 10.500(a) applies.<sup>8</sup> However, if the offered employment is permanent in nature and the employee does not accept the position the penalty provisions under 5 U.S.C. § 8106(c) apply.<sup>9</sup>

The evidence of record contains a written job dated March 12, 2021 for a position of "modified mail processing clerk" beginning March 19, 2021. The job offer noted the duties and physical requirements of the modified assignment. The assignment was for full-time work and had an annual salary of \$64,216.00. The offer also indicated that the position was available indefinitely during the period of recovery while the claimant's work restrictions were temporary in nature. OWCP subsequently issued a notice of proposed termination of wage-loss compensation on April 22, 2021. It noted that appellant had been provided with a "temporary light[-]duty assignment as a modified mail processing clerk" on March 12, 2021. The Board finds, however, that the documentation of record supporting that the offered assignment was temporary in nature is unclear.<sup>10</sup> The March 12, 2021 job offer did not indicate in the description found on the first page of the modified offer whether the position was temporary or permanent. The employing

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<sup>5</sup> *Id.* at Chapter 2.814.9c(1)(b) (June 2013).

<sup>6</sup> *Id.* at Chapter 2.814.9c(1)(d) (June 2013).

<sup>7</sup> *Id.* at Chapter 2.814.9c(8).

<sup>8</sup> *R.S.*, Docket No. 20-1004 (issued March 15, 2021).

<sup>9</sup> *Supra* note 4.

<sup>10</sup> *See C.C.*, Docket No. 19-0241 (issued August 12, 2019) (the Board reversed the termination of a claimant's wage-loss compensation benefits under 20 C.F.R. § 10.500(a) because it was unclear from the record whether the assignment offered to the claimant on the periodic rolls was temporary in nature).

establishment also did not provide a cover letter advising appellant or OWCP of whether the modified mail processing clerk position was temporary or permanent.

Appellant began receiving wage-loss compensation on the periodic rolls, effective April 26, 2020, and was still on the periodic rolls at the time of the March 12, 2021 offer of employment. Therefore, to terminate her wage-loss compensation benefits pursuant to 20 C.F.R. § 10.500(a), OWCP had the burden of proof to establish that the offered employment position was temporary in nature. This determination is critical as a permanent job offer would require OWCP to terminate benefits in compliance with the strict provisions of section 8106(c). As it cannot be established that appellant's job offer was a temporary position, OWCP has not met its burden of proof to terminate wage-loss compensation pursuant to 20 C.F.R. § 10.500(a).<sup>11</sup>

### **CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective May 27, 2021, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 27, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 22, 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

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<sup>11</sup> See *C.W.*, Docket No. 18-1779 (issued May 6, 2019).