

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

V.J., Appellant	)	
	)	
and	)	<b>Docket No. 22-0941</b>
	)	<b>Issued: September 8, 2023</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kearny, NJ,	)	
Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On June 1, 2022 appellant, through counsel, filed a timely appeal from a March 24, 2022 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 March 24, 2022 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 has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective September 30, 2021, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## **FACTUAL HISTORY**

On February 4, 2019 appellant, then a 49-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 4, 2019 she sustained injuries to her chin, left hand, and right knee when she tripped and fell on a bump walking in a parking lot while in the performance of duty. She stopped work on the date of the claimed injury. OWCP accepted appellant's claim for head laceration without foreign body, right wrist sprain, right knee contusion, and abrasions of the left index and middle fingers. It paid her wage-loss compensation on the supplemental rolls, effective March 22, 2019.<sup>4</sup> By decision dated December 30, 2019, OWCP expanded the acceptance of appellant's claim to include cervical and lumbar spine sprains.

On March 26, 2020 OWCP referred appellant, along with the case record and a statement of accepted facts (SOAF), and a series of questions for a second opinion examination and evaluation with Dr. James Schwartz, a Board-certified orthopedic surgeon. It requested that he evaluate her medical condition and her ability to work. The SOAF provided to Dr. Schwartz advised that OWCP accepted appellant's claim for head laceration without foreign body, right wrist sprain, right knee contusion, and abrasions of the left index and middle fingers.

In a May 23, 2020 report, Dr. Schwartz discussed appellant's factual and medical history, noting that she had multiple areas of preexisting injury, including injury to the cervical spine, lumbar spine, and thoracic spine, as well as the condition of bilateral thumb carpometacarpal arthrosis. He noted that she presently was working in a light-duty position. Dr. Schwartz reported the findings of his physical examination, noting that the knees were stable, that range of motion of the hands/fingers was full, and that the laceration of the head, abrasions of the left hand and fingers, and contusion of the right knee had healed. He noted that the cervical spine exhibited some cervical spondylosis and that appellant had nonspecific diffuse neck pain, but the cervical spine was found to have excellent range of motion. Dr. Schwartz advised that her condition was essentially fixed and stable, and he did not see any benefit for future physical therapy treatments. He advised that all the conditions sustained on February 4, 2019 had resolved, except for the right wrist sprain. Dr. Schwartz specifically indicated that the soft tissue sprain of the right wrist remained in the form of tenderness, but there was no instability of the wrist. He noted that both the objective and subjective findings from his examination showed that appellant's complaints seemed to be out of proportion to the findings. Dr. Schwartz recommended that a functional capacity evaluation (FCE) be performed. He noted that appellant's prognosis was guarded, but further indicated that it was "likely that with a good [FCE] [appellant] will be able to return to work, possibly even to her carrier position."

After the May 23, 2020 examination, Dr. Schwartz arranged for appellant to undergo an FCE on July 16, 2020. The FCE showed her ability to engage in light-duty work, but the therapist

---

<sup>4</sup> Appellant returned to work for four hours per day and received wage-loss compensation for periods of partial and total disability.

who performed the FCE indicated that there was low effort, which made the study a poor correlation of her full work capacity. In a work capacity evaluation (Form OWCP-5c) dated August 6, 2020, Dr. Schwartz found that appellant could work eight hours per day with restrictions. He indicated that she could engage in repetitive wrist motion for up to six hours per day, and could engage in lifting, pushing, pulling, and squatting for up to three hours. Appellant could not engage in kneeling.

OWCP requested clarification of Dr. Schwartz' May 23, 2020 report with respect to which of the conditions sustained on February 4, 2019 had resolved. In August 31 and September 11, 2020 reports, Dr. Schwartz indicated that all the conditions sustained on February 4, 2019 had resolved, except for the right wrist sprain. After his evaluation, appellant worked for four hours per day based on his restrictions as the employing establishment did not have full-time work within those restrictions. She continued to receive wage-loss compensation for partial disability.

By decision dated September 15, 2020, OWCP expanded the acceptance of appellant's claim to include a resolved left-hand abrasion.

In early-2021, appellant's vocational rehabilitation indicated that appellant could work for the employing establishment on a full-time basis as a city carrier with work restrictions commensurate with those recommended by Dr. Schwartz.

On May 27, 2021 the employing establishment offered appellant a full-time position as a modified city carrier. The position involved various duties performed on an intermittent basis, including clearing carrier accountable mail for one to three hours per day, responding to customers/answering telephones for three to four hours, and casing mail/delivering express mail for one to two hours. The physical duties of the modified position included intermittently lifting, pushing, and pulling up to 20 pounds for up to three hours per day, intermittently squatting for up to three hours, intermittently repetitively moving the wrists for up to six hours, and intermittently driving for four to six hours. The position did not require kneeling. Appellant did not accept the offered modified carrier position.

On August 6, 2021 OWCP confirmed with the employing establishment that the modified carrier position remained available to appellant.

In an August 6, 2021 letter, OWCP advised appellant that the modified city carrier position offered by the employing establishment was in accordance with the medical restrictions of Dr. Schwartz and it had determined that it was suitable. Pursuant to 5 U.S.C. § 8106(c)(2), it afforded her 30 days to either accept the position or to provide adequate reasons for refusal. OWCP informed appellant that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

In an undated statement received on August 19, 2021, appellant argued that her physical condition prevented her from accepting the offered modified position. She submitted a number of reports from attending physicians. In progress reports dated between February 7, 2019 and March 20, 2021, Dr. Scott Greenfield, a Board-certified family medicine specialist, detailed his treatment of appellant for lower neck and upper thoracic back pain. In some of the reports, he indicated that she could only work for four hours per day, and could only engage in lifting, carrying, pushing, or pulling less than two pounds. In a May 11, 2021 report, Dr. Mary Caldwell, an osteopath and Board-certified physiatrist, indicated that appellant exhibited neck pain on

examination, which “continues to be out of proportion to exam[ination]” without signs of radiculopathy or myotome weakness.

In a September 9, 2021 letter, OWCP advised appellant that her reasons for not accepting the modified city carrier position offered by the employing establishment were unjustified. It advised her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. Appellant did not accept the position.

By decision dated September 30, 2021, OWCP terminated appellant’s wage-loss compensation and entitlement to schedule award compensation, effective September 30, 2021, because she refused an offer of suitable work.

On October 6, 2021 appellant, through counsel, requested a telephonic hearing with a representative of OWCP’s Branch of Hearings and Review, which was held on January 7, 2022.

Appellant submitted a January 12, 2022 report from Dr. Carl B. Weiss, a Board-certified orthopedic surgeon, who noted that she had mild right wrist pain and no left wrist pain upon full range of motion. Dr. Weiss diagnosed left wrist sprain and aggravation of right wrist symptoms and indicated that her lifting restriction should be lowered to 10 pounds. He indicated that appellant could perform the duties of the modified city carrier position with the caveat that the weight limitation should be reduced to 10 pounds.

By decision dated March 24, 2022, OWCP’s hearing representative affirmed OWCP’s September 30, 2021 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>5</sup> 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.<sup>6</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>7</sup> 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.<sup>8</sup>

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

---

<sup>5</sup> See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>6</sup> 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).

<sup>7</sup> See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>8</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

showing that such refusal or failure to work was reasonable or justified.<sup>9</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>10</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>11</sup> 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.<sup>12</sup> In a suitable work determination, it must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective September 30, 2021.

The Board finds that, in determining that appellant was physically capable of performing the modified city carrier position offered by the employing in May 2021,<sup>14</sup> OWCP improperly relied on the opinion of Dr. Schwartz, an OWCP referral physician, who provided an evaluation of her medical condition in several reports dated between May 23 and September 11, 2020. In a work capacity evaluation dated August 6, 2020, Dr. Schwartz opined that she could work eight hours per day with restrictions. He indicated that appellant could engage in repetitive wrist motion for up to six hours per day, and could engage in lifting, pushing, pulling, and squatting for up to three hours. Dr. Schwartz advised that she could not engage in kneeling.

The Board finds that Dr. Schwartz' opinion does not establish that appellant was capable of performing the modified city carrier position offered by the employing establishment. Therefore, Dr. Schwartz' opinion does not show that the position was suitable.

The SOAF provided to Dr. Schwartz in early 2020 was deficient in that it did not include all the then-accepted conditions because it neglected to mention the accepted cervical and lumbar sprains. The Board has held that all conditions must be considered in assessing the suitability of an offered position.<sup>15</sup> The Federal (FECA) Procedure Manual provides that an OWCP-referral

---

<sup>9</sup> 20 C.F.R. § 10.517(a).

<sup>10</sup> *Id.* at § 10.516.

<sup>11</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>12</sup> *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).

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

<sup>14</sup> The physical duties of the modified position included intermittently lifting, pushing, and pulling up to 20 pounds for up to three hours per day, intermittently squatting for up to three hours, intermittently repetitively moving the wrists for up to six hours, and intermittently driving for four to six hours. The position did not require kneeling.

<sup>15</sup> *M.H.*, Docket No. 18-1727 (issued May 6, 2019).

physician's findings, be it a second opinion or impartial medical evaluation, must be based on the factual underpinnings of the claim, as set forth in the SOAF.<sup>16</sup>

For this reason, the Board finds that OWCP failed to establish that appellant refused an offer of suitable work, and it improperly terminated her wage-loss compensation and entitlement to schedule award compensation, effective September 30, 2021.

**CONCLUSION**

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective September 30, 2021.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 24, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 8, 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

---

<sup>16</sup> *Supra* note 12 at Chapter 2.810.11a (September 2019).