United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 23-1105**
	)	**Issued: February 9, 2024**
DEPARTMENT OF VETERANS AFFAIRS, BAY PINES VA MEDICAL CENTER, St. Petersburg, FL, Employer	)	

Appearances:
Lisa Varughese, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 18, 2023 appellant, through counsel, filed a timely appeal from an April 12, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 April 12, 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 met its burden of proof to terminate appellant's wage loss and compensation and entitlement to a schedule award effective January 5, 2022 because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On August 23, 2012 appellant, then a 45-year-old medical support assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left ankle, left elbow, and both knees when she stepped on a rock and fell when walking to work from the parking lot while in the performance of duty. OWCP accepted the claim for a contusion of the left knee, left ankle sprain, and a contusion of the left elbow. It subsequently expanded its acceptance to include a tear of the medial meniscus of the right knee, a periprosthetic fracture of the internal prosthetic joint, other mechanical complication of internal right knee prosthesis, a stress fracture of the right tibia, a periprosthetic fracture around the internal prosthetic right knee joint, an unspecified fracture of the upper end of the right tibia, a loose body in the left knee, temporary aggravation of tricompartmental degenerative changes of the left knee, and an aggravation of localized primary osteoarthritis of the bilateral lower legs. OWCP paid appellant wage-loss compensation on the supplemental rolls effective October 9, 2012 and on the periodic rolls effective August 25, 2013.[4]

OWCP previously accepted that appellant sustained a sprain of the left shoulder and upper arm, an aggravation of cervical intervertebral disc displacement at C3-4, C4-5, and C5-6, and cervicalgia due to a January 28, 2008 employment injury, assigned OWCP File No. xxxxxx605. It administratively combined OWCP File No. xxxxxx605 with the current claim, OWCP File No. xxxxxx159, with the latter serving as the master file.

Appellant subsequently relocated from Florida to Quantico, Virginia.

On April 3, 2013 appellant underwent a left partial medial and lateral meniscectomy. She underwent a left total knee replacement on October 7, 2013, a right total knee replacement on December 1, 2014, a revision of a right total knee replacement on September 29, 2016, and a revision of the left total knee replacement on September 28, 2017.

On May 17, 2021 OWCP referred appellant, the case record, and a statement of accepted facts (SOAF) to Dr. John C. Barry, a Board-certified orthopedic surgeon, for a second opinion examination.[5]

In a report dated June 15, 2021, Dr. Barry provided his review of appellant's history of injury, the medical evidence of record, and the accepted conditions set forth in the SOAF for both

[4] Following her employment injury, appellant stopped work on March 26, 2013 and returned to modified duty on November 16, 2015. She again stopped work on November 24, 2015 and resumed limited-duty work on January 7, 2019. Appellant stopped work on January 15, 2019 and did not return.

[5] OWCP had previously referred appellant to Dr. Chester DiLallo, a Board-certified orthopedic surgeon, for a second opinion examination on July 9, 2020. Dr. DiLallo provided reports dated August 10, September 4 and October 7, 2020. In his October 7, 2020 report, he found that appellant could perform sedentary work. Appellant's counsel argued that Dr. DiLallo's reports were contradictory, and as such OWCP referred her to Dr. Barry for a new second opinion examination.

injuries. He provided findings on examination of a valgus orientation of the right knee as opposed to the left with moderate joint effusion, mild, diffuse edema of the left ankle, and a normal examination of the cervical spine and right ankle. Dr. Barry opined that, based on the examination findings, appellant's left knee contusion, left elbow contusion, left ankle sprain, right medial meniscus tear, loose left knee body, sprain of the left shoulder and arm, aggravation of cervical intervertebral disc displacement, and cervicalgia had resolved. He noted that the accepted right knee conditions and the temporary aggravation of tricompartmental degenerative changes to the left knee and aggravation of primarily localized osteoarthritis of the lower leg had not resolved. Dr. Barry advised that appellant may require additional treatment of the right knee. He opined that appellant could not return to work in her usual employment but could perform a sedentary position. Dr. Barry reviewed the position of medical support assistant, and opined that she could perform the duties of the position. In a work capacity evaluation (Form OWCP-5c) of even date, he found that appellant could work eight hours per day with restrictions of walking for one hour per day, pushing, pulling, and lifting up to 10 pounds for one hour per day, and performing no squatting, kneeling, or climbing.

On July 30, 2021 the employing establishment offered appellant a position as a medical support assistant at her prior work location in Florida. The duties included scheduling appointments and verifying provider orders. The physical requirements consisted of eight hours of sedentary work including walking for one hour and pushing, pulling, and lifting up to 10 pounds.

In a memorandum of telephone call (Form CA-110) dated July 30, 2021, OWCP advised the employing establishment that it search for a position within appellant's current location and provide evidence that there was no work available prior to offering a position in Florida.

On August 4, 2021 OWCP received a July 30, 2021 email from D.P., an official with the employing establishment asking another official, K.B., whether a position was available at an unspecified location for an unspecified individual. In an August 2, 2021 email response, K.B. advised that there were no present vacancies, but openings may occur in the future.

By letter dated September 29, 2021, OWCP advised appellant that it had determined that the July 30, 2021 offered position in Florida was suitable, and afforded her 30 days to accept the position or provide reasons for her refusal. It found that the position was in accordance with the limitations provided by Dr. Barry in his June 15, 2021 report. OWCP informed appellant that an employee who refused an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation. It further notified her that she would receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

Thereafter, OWCP received an initial evaluation report dated September 2, 2021 from Dr. Ernest Africano, a Board-certified internist. Dr. Africano reviewed the history of the August 22, 2012 accepted employment injury, and noted that appellant had continued "severe symptoms affecting both knees and lower legs." He listed the diagnoses accepted as employment related and asserted, "Due to [appellant's] medical status after physical examination and history of recurrent falls, it is my conclusion that she is unstable, not fit to work, and should continually be off work." Dr. Africano recommended computerized tomography (CT) scans of the knees, lower legs, and left elbow.

In an addendum to his September 2, 2021 report, signed September 28, 2021, Dr. Africano advised that he disagreed with Dr. Barry's finding that the conditions of left knee contusion, left

ankle sprain, left elbow contusion, a tear of the right medial meniscus, a loose body of the left knee, bilateral sprain of the shoulders and upper arm, aggravation of cervical intervertebral disc displacement, and cervicalgia had resolved. He maintained that Dr. Barry was not provided information regarding appellant's January 28, 2008 employment injury. Dr. Africano opined that she could not walk, twist, turn, bend, or stand for more than five minutes due to her accepted work-related conditions.

On October 28, 2021 counsel contended that the offered position was not suitable as the employing establishment had failed to determine whether a position was available with appellant's work location. She further argued that the position did not meet the restrictions found by Dr. Africano.

On November 26, 2021 OWCP notified appellant that her reasons for refusing the offered position were not valid, and provided her 15 days to accept the position or have her entitlement to compensation benefits terminated. It advised her that the offered position remained available.

By decision dated January 5, 2022, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective that date as she had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It found that the employing establishment had confirmed on August 2, 2021 that there was no suitable work available within her commuting area.

Thereafter, OWCP received progress reports dated November 29, 2021 and March 4, 2022 from Dr. Africano, who provided findings on examination and noted that appellant was not working. In work status reports (OWCP-5c) dated April 11 and May 23, 2022, Dr. Africano found that appellant was totally disabled. In attending physician reports (Form CA-20) dated May 9 and June 20, 2022, he again indicated that she was totally disabled due to her work-related injuries.

In a progress report dated June 28, 2022, Dr. Africano provided diagnoses and findings on examination. He advised that appellant had not worked since 2019 due to her accepted employment injuries "which have caused chronic to permanent musculoskeletal weakness, decreased ranges of motion, painful ranges of motion, and functional limitations."

On January 4, 2021 appellant, through counsel, requested reconsideration. She submitted August 3 and 15, 2022 reports from Dr. David V. Cashen, a Board-certified orthopedic surgeon, recommending a revision of appellant's right knee arthroplasty. Counsel further submitted an August 2, 2022 report from Dr. Africano. Dr. Africano described appellant's bilateral knee pain, and indicated that it was aggravated by "prolonged standing, walking, twisting, turning, and bending." He noted that she had undergone extensive surgery on both knees. Dr. Africano advised that appellant fell in August 2021 and shattered her right tibia due to the weakening of her knees due to the accepted condition. He discussed the accepted conditions and why they were employment related. Dr. Africano related that a sedentary position would exacerbate appellant's work-related conditions, causing increased symptoms and loss of function. He indicated that while the position of medical support assistant had minor demands physically, it required a drive of over 2,000 miles each day which exceeded appellant's physical demands. Dr. Africano concluded that she was not fit for employment.

In a December 29, 2022 statement, counsel asserted that the evidence from Dr. Cashen and Dr. Africano established that appellant had continued residuals and disability due to her accepted employment injury. She further maintained that Dr. Barry's report was insufficient to support the

termination as he only examined appellant once, and found that she might need further right knee surgery.

By decision dated January 6, 2023, OWCP denied modification of its January 5, 2022 decision.

On January 13, 2023 appellant, through counsel, requested reconsideration. She submitted postoperative reports from Dr. Cashen.

By decision dated April 12, 2023, OWCP denied modification of its January 6, 2023 decision.

LEGAL PRECEDENT

Under FECA,[6] once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[7] 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.[8]

Section 10.517 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 proof to show that such refusal or failure to work was reasonable or justified.[9] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[10]

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.[11] 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.[12]

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[6] *Supra* note 2.

[7] *M.S.*, Docket No. 20-0676 (issued May 6, 2021); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[8] *Supra* note 2 at § 8106(c)(2); *see also M.S.*, *id.*; *M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster,* 54 ECAB 435 (2003).

[9] 20 C.F.R. § 10.517.

[10] *Id.* at § 10.516; *see M.S., supra* note 7; *Ronald M. Jones*, 52 ECAB 406 (2003).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013); *see also R.A.*, Docket No. 19-0065 (issued May 14, 2019).

[12] *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *see also Joan F. Burke*, 54 ECAB 406 (2003).

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.[13] 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.[14] In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[15]

OWCP procedures provide that, if the job offered to the claimant is outside his or her residential area, the employing establishment "must document that it first searched for suitable employment in the claimant's geographic area before it settled for a position outside of it."[16] If suitable reemployment in the location where the employee currently resides is not practical, the employing establishment may offer suitable reemployment at the employee's former duty station or other location.[17] The information must be provided to OWCP.[18]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage loss and compensation and entitlement to a schedule award effective January 5, 2022 because she refused suitable work pursuant to 5 U.S.C. § 8106(c)(2).

Following her employment injury, appellant relocated from Florida to Quantico, Virginia. The employing establishment offered her a modified position at her previous duty station in Florida.

OWCP procedures require that, if the job offer is for a site outside of the claimant's residential area, the employing establishment must document that it first searched for suitable employment in the claimant's current geographic area.[19] In the current case, OWCP relied upon a vague email from the employing establishment dated August 2, 2021, which stated that at that time, there were no vacancies that existed, but, may occur in the future. The August 2, 2021 email, however, did not identify ppellant nor the location where the employing establishment searched for a job. The Board held in *Sharon L. Dean*,[20] that it was reversible error for OWCP to terminate appellant's compensation benefits without positive evidence showing that an offer of suitable reemployment in the area that the employee currently resides was not possible or practical. In

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

[14] *See supra* note 11 at Chapter 2.814.5a (June 2013); *see D.P.*, Docket No. 21-0596 (issued August 31, 2021).

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

[16] *See supra* note 11 at Chapter 2.814.4a(2) (June 2013).

[17] 20 C.F.R. § 10.508; *see R.O.*, Docket No. 20-1670 (issued September 15, 2021); *S.W.,* Docket No. 18-0857 (issued November 26, 2018); *D.C.*, Docket No. 17-0582 (issued September 6, 2017); *Sharon L. Dean*, 56 ECAB 175 (2004).

[18] *Supra* note 16.

[19] *See R.O.*, *supra* note 17; *A.P.,* Docket No. 17-1135 (issued February 12, 2018); *W.D.,* Docket No. 15-1297 (issued August 23, 2016); *supra* note 16 at Chapter 2.814.4a.(2) (June 2013).

[20] 56 ECAB 175 (2004).

W.D.[21] The Board reaffirmed that, if the job offer is for a site outside of the employee's residential area, the employing establishment must document that it first searched for suitable employment in the employee's current geographic area.

The Board finds that OWCP did not substantiate that the employing establishment performed a current and proper search for suitable employment in appellant's geographic area. OWCP, therefore, did not properly determine that the offered position was suitable.[22]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage loss and compensation and entitlement to a schedule award effective January 5, 2022 because she refused suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 9, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[21] Docket No. 15-1297 (issued August 23, 2016).

[22] *R.O.*, *supra* note 17.