United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 25-0095**
	)	**Issued: January 10, 2025**
U.S. POSTAL SERVICE, BYERS POST OFFICE, Byers, CO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 5, 2024 appellant filed a timely appeal from a July 24, 2024 merit decision and September 9, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective July 24, 2024, pursuant to 20 C.F.R. § 10.500(a), based on her refusal of an offer of a temporary limited-duty assignment; and (2) whether OWCP properly denied

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the September 9, 2024 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*.

appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On October 12, 2022 appellant, then a 39-year-old clerk typist, filed a traumatic injury claim (Form CA-1) alleging that on October 6, 2022 she sustained a lumbar injury when she lifted a heavy parcel and felt a "click" in her lower back while in the performance of duty. She stopped work on October 8, 2022, and did not return. OWCP accepted the claim for lumbar strain. It subsequently expanded the acceptance of appellant's claim to include lumbar radiculopathy.

On December 6, 2023 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Qing-Min Chen, a Board-certified orthopedic surgeon, for a second opinion examination to address the nature and extent of the accepted conditions, and appellant's work capacity.

In a January 3, 2024 report, Dr. Chen reviewed the medical record and SOAF. With regard to the lumbar spine, he noted that a November 22, 2022 magnetic resonance imaging (MRI) scan had demonstrated bulging discs, a series of three intra-articular injections had not relieved appellant's symptoms, and that she was scheduled to consult an orthopedic surgeon in two weeks. On examination, Dr. Chen observed tenderness to palpation over the left paraspinal musculature, restricted lumbar motion in all planes, left knee extension strength at 4+/5 secondary to pain, decreased sensation across the lower region of the left lower extremity in the L5 dermatome, bilateral Achilles and patellar reflexes at 1/4, and positive straight leg and Faber's tests on the left. He diagnosed preexisting L4-S1 degenerative disc disease, and an acute-on-chronic, work-related, ongoing left-sided L5-S1 disc herniation. Dr. Chen opined that the accepted October 6, 2022 employment injury accelerated the need for L5-S1 disc surgery, as evinced by loss of sensation across the left L5-S1 nerve root distributions and persistent pain. He opined that appellant was unable to return to her date-of-injury position. Dr. Chen related that appellant could perform work that was either purely sedentary or allowed sitting for the majority of the time. He completed a work capacity evaluation (Form OWCP-5c), wherein he indicated that appellant could perform sedentary work.

In a January 10, 2024 Form OWCP-5c, Dr. Paul L. Cooper, a Board-certified family practitioner, diagnosed lumbar radiculopathy, and strain of muscle, fascia, and tendon of the lower back. He indicated that appellant could not perform her date-of-injury position, but could operate a motor vehicle to and from work.[3]

On May 23, 2024 the employing establishment provided appellant with an offer of a modified assignment (limited duty) as a sales and service associate, with eight hours of combined window operations, distribution of mail to "hot case," counting and verifying change for business reply mail, and updating/maintaining post office box information electronically. All duties were

[3] April 16, 2024 lumbar x-rays revealed spondylosis, most prominent at L5-S1, multiple level zygapophysial joint arthritis, and curvature of the spine toward the left. An April 16, 2024 lumbar MRI scan demonstrated spondylosis, protrusion, and/or osteophytes at L4-5 and L5-S1, multilevel zygapophyseal joint arthritis at L4-5 most pronounced on the left side, mild canal and left lateral recess narrowing at L5-S1, and bilateral sacroiliac joint arthritis.

to be performed "seated" or "mostly seated." The physical demands of the position included eight hours of lifting, pushing, and pulling up to 10 pounds, and occasional standing and walking.

In a May 31, 2024 letter, the employing establishment instructed appellant to appear for a June 5, 2024 job offer meeting.

In a June 5, 2024 correspondence, the employing establishment notified OWCP that appellant did not attend the job offer meeting.

In a notice dated June 6, 2024, OWCP proposed to terminate appellant's wage-loss compensation. It advised her that it had reviewed the work restrictions provided by Dr. Chen and determined that the "temporary" position the employing establishment offered her on May 23, 2024 was within her restrictions. OWCP informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised her that her entitlement to wage-loss compensation would be "terminated indefinitely" if she did not accept the offered "temporary" job or provide a written explanation with justification for her refusal within 30 days.

Thereafter, OWCP received April 2 and 24, 2024 reports, wherein Dr. Michael Rauzzino, a Board-certified neurosurgeon, recounted a history of injury and treatment. Dr. Rauzzino diagnosed an apparent herniated lumbar disc with primarily left-sided radicular symptoms. He prescribed a left-sided L5-S1 intra-articular injection.

In a June 19, 2024 report, Dr. Donald Stader, Board-certified in emergency and addiction medicine, referred appellant for pain management.

In a June 24, 2024 Form OWCP-5c, Dr. Cooper found appellant totally disabled from work.

In a June 30, 2024 statement, appellant declined the offered position. She recounted that on June 19, 2024, she sought treatment at a hospital emergency department because she could not walk. Appellant indicated that her new treating physician agreed with the second opinion physician that she required surgery.

In a July 1, 2024 statement, appellant asserted that she remained disabled from work due to the accepted October 6, 2022 employment injury and required lumbar surgery.

In a July 22, 2024 report. Dr. Kenneth Finn, a Board-certified physiatrist, diagnosed other spondylosis with radiculopathy, lumbar region. He prescribed a lumbar intra-articular injection.

By decision dated July 24, 2024, OWCP terminated appellant's wage-loss compensation, effective that date, in accordance with 20 C.F.R. § 10.500(a). It noted that she had not accepted the May 23, 2024 "temporary" modified position which was within the work restrictions provided by Dr. Chen.

On August 29, 2024 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

Thereafter, OWCP received an August 12, 2024 report, and August 21, 2024 Form OWCP-5c, wherein Dr. Cooper opined that appellant was disabled from work. He related that appellant was unable to sit for eight hours, stand or walk for eight hours, or lift more than 10 pounds.

By decision dated September 9, 2024, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP, along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[4]

Section 10.500(a) of the Code of Federal Regulations provides:

> "(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.)"[5]

OWCP's procedures also provide that if the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions is available, and the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the duration of light-duty availability, since such benefits are payable 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.[6] The claims examiner

[4] *See N.H.*, Docket No. 24-0659 (issued September 19, 2024); *M.B.*, Docket No. 24-0478 (issued June 5, 2024); *S.V.*, Docket No. 17-1268 (issued March 23, 2018); *I.J.*, 59 ECAB 408 (2008).

[5] 20 C.F.R. § 10.500(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1)(a) (June 2013).

must provide a pretermination notice if the claimant is being removed from the periodic rolls.[7] When a temporary light-duty assignment either ends or is no longer available, the claimant is entitled to compensation and should be returned to the periodic rolls immediately as long as medical evidence supports any disabling residuals of the work-related condition.[8]

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective July 24, 2024.

The evidence of record contains a written job offer, dated May 23, 2024, for a modified sales and service associate. The duties were identified as window operations, distribution of mail to a "hot case," counting and verifying change, and updating/maintaining post office box information electronically. The physical requirements were identified as occasional standing and walking, and lifting, pushing, and pulling up to 10 pounds for up to eight hours a day. However, the May 23, 2024 job offer did not indicate that the modified position was temporary. OWCP, however, subsequently issued a notice of proposed termination of wage-loss compensation on June 6, 2024, noting that appellant had been offered a "temporary" light-duty assignment as a modified sales service distribution associate on May 23, 2024.

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.[9] As OWCP has not established that offered modified job was a temporary position, the Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation.[10]

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective July 24, 2024.[11]

[7] *Id.* at Chapter 2.814.9c(1)(b).

[8] *Id.* at Chapter 2.814.9c(1)(d).

[9] *See N.H., supra* note 4; *M.B., supra* note 4; *A.W.*, Docket No. 21-1287 (issued September 22, 2023); *C.W.*, Docket No. 18-1779 (issued May 6, 2019).

[10] *Id.*

[11] In light of the Board's disposition of Issue 1, the Board finds that Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2024 decision of the Office of Workers' Compensation Programs is reversed. The September 9, 2024 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: January 10, 2025
Washington, DC

Alec J. Koromilas, 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