United States Department of Labor
Employees' Compensation Appeals Board

K.J., Appellant	)	
and	)	**Docket No. 14-2067**
	)	**Issued: May 26, 2015**
U.S. POSTAL SERVICE, POST OFFICE, New Milford, CT, Employer	)	

Appearances:
Michael E. Woods, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 29, 2014 appellant, through her representative, filed a timely appeal from the August 25, 2014 merit 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 to review the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work; and (2) whether appellant has established that her refusal to accept the offered modified-duty position was justified.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 25, 2010 appellant, then a 31-year-old nursing assistant, sustained a traumatic injury in the performance of duty when she attempted to prevent a patient from falling to the floor. OWCP accepted her claim for lumbar sprain and displacement of lumbar intervertebral disc without myelopathy. Appellant received compensation for temporary total disability on the periodic rolls.

The attending physician, Dr. Byron E. Strain, a Board-certified physiatrist, completed a duty status report on March 7, 2013 setting forth appellant's restrictions.[2] He based these restrictions on his examination of appellant that day. At the bottom of the report, Dr. Strain added the comment: "No patient care."

OWCP asked Dr. Strain to clarify this comment. It indicated that it faxed a job offer to Dr. Strain's office for review. Dr. Strain responded by completing a duty status report on March 28, 2013. This report provided the same restrictions based on the same examination, but it omitted the comment on patient care. Dr. Strain confirmed that he had reviewed the job offer and that appellant could perform the duties outlined.

On April 2, 2013 the employing establishment offered appellant a limited-duty nursing assistant position based on Dr. Strain's March 28, 2013 restrictions. OWCP found the position suitable and in accordance with the restrictions provided by Dr. Strain. Appellant did not accept.

Dr. Strain examined appellant on June 3, 2013 and offered nearly identical restrictions.[3] He added the following comment: "No patient care for lifting, pushing, pulling over 10 pounds. These restrictions are permanent." Dr. Strain examined appellant on June 11, 2013 and provided the same restrictions. He again added the comment: "No patient care for lifting, pushing, pulling over 10 pounds."

In a decision dated June 12, 2013, OWCP terminated appellant's compensation on the grounds that she had refused an offer of suitable work.

On August 20, 2013 Dr. Strain asserted that the duties of the offered job were more extensive than the restrictions he gave appellant. "These duties that she cannot perform are shaving, feeding dependent patients, picking up trays, passing water, delivering small items, assisting with patient activities of daily living, changing linen, straightening the linen closet, stocking supplies, specimen collection, and dressing changes. These all require excessive bending, stooping, standing, and walking." Dr. Strain added that appellant was instructed not to participate in any patient care for lifting, pushing, or pulling over 10 pounds.

[2] Lifting/carrying 10 pounds continuously, 10 to 20 pounds intermittently, 4 to 6 hours a day; intermittent sitting 6 to 8 hours a day; intermittent standing, 10 to 30 minutes a day; intermittent walking 2 to 4 hours a day; intermittent twisting 30 minutes a day, intermittent pulling/pushing 10 to 20 pounds 4 hours a day; intermittent simple grasping 8 hours a day; intermittent fine manipulation 8 hours a day; and intermittent reaching above shoulder 1 to 4 hours a day.

[3] Dr. Strain changed the 10- to 20-pound restriction on lifting/carrying and pushing/pulling to 10 pounds.

On August 14, 2013 Dr. Adam D. Coffey, a licensed therapist/counselor, advised that appellant was unable to perform the duties required by the jobs the employing establishment had offered. He explained that many of these duties required her to be physically and emotionally stable, and her stability had not been consistent. Dr. Coffey believed appellant could be emotionally compromised by working with suicidal patients, who would not be served well by her.

Appellant requested reconsideration. She argued that OWCP had faxed to Dr. Strain's office a description of the minimal physical conditions of employment for nursing personnel, not a job offer of modified duty. Appellant argued that it misinterpreted Dr. Stain's March 28, 2013 restrictions. Further, there was no evidence he ever saw the April 2, 2013 job offer.

Appellant submitted a May 12, 2014 report from Dr. Strain, who stated: "Since March of 2013 I have repeatedly said [appellant] may return to work with restrictions which do not involve patient care…. These restrictions continue to this day and this is what I prescribed on March 28, 2013 when she could return to work."

To support the rationale for no patient care, appellant submitted Dr. Strain's February 15, 2013 report. Dr. Strain noted that she experienced severe pain that caused significant difficulty with sleeping and had dramatically reduced her ability to lift, stoop, bend, climb, kneel, stand, sit, twist, and walk. He advised that exceeding appellant's restrictions might require significant periods of recuperation. Dr. Strain further advised that she would not be able to perform her normal duties as a nursing assistant, including giving patients baths, lifting, sitting, and walking for long periods of time.

Appellant also argued that she was diagnosed with depression as a result of chronic pain syndrome and that OWCP had a duty to consider whether her depression prevented her from performing the duties of the April 2, 2013 job offer.

In a decision dated August 25, 2014, OWCP reviewed the merits of appellant's case and denied modification of its June 12, 2013 decision terminating her compensation. It found that she had not established that her reasons for refusing the offer and failing to report for duty were justified.

On appeal, appellant repeats arguments given to support her reconsideration request, including that OWCP misinterpreted Dr. Strain's March 28, 2013 restrictions and that OWCP did not inform Dr. Strain that appellant would be taking care of patients.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work, or who refuses or neglects to work after suitable work is offered to, procured by, or secured for her, is not entitled to compensation.[4] OWCP has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, it has the burden of

[4] 5 U.S.C. § 8106(c)(2).

demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[5] In other words, to justify termination of compensation under section 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[6]

ANALYSIS -- ISSUE 1

Appellant appeals OWCP's August 25, 2014 decision denying modification of its June 12, 2013 termination of compensation. When OWCP terminated her compensation on June 12, 2013, the medical evidence was unequivocal in establishing that she could return to work with restrictions. Dr. Strain, the attending physiatrist, completed a duty status report setting forth those restrictions.

The employing establishment offered appellant a limited-duty nursing assistant position based on Dr. Strain's March 28, 2013 restrictions. When OWCP faxed a job offer to Dr. Strain's office for his review, he confirmed that he had reviewed the modified job offer and that appellant could perform the required duties. Although OWCP informed her that the offered position was suitable and in accordance with the restrictions provided by Dr. Strain, and although it notified her of the penalty for refusing suitable work, appellant did not accept the job offer.

As the offered position was consistent with the restrictions imposed by the attending physician, the Board finds that OWCP met its burden of proof to terminate appellant's compensation based on her refusal of suitable work.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him or her is not entitled to compensation.[7] An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable and justified.[8]

ANALYSIS -- ISSUE 2

The termination of compensation having been established, the burden now shifts to appellant to establish that her refusal to accept the offered modified-duty position was justified. Appellant argued that OWCP misinterpreted the March 28, 2013 work restrictions outlined by Dr. Strain. After the termination, Dr. Strain submitted reports indicating that the position was

[5] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[6] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[7] 5 U.S.C. § 8106(c)(2).

[8] 20 C.F.R. § 10.517(a). *See also R.K.*, Docket No. 14-1345 (issued September 12, 2014).

not suitable. He advised on August 20, 2013 that the duties of the offered job were more extensive than the restrictions he had prescribed. Dr. Strain identified a number of duties from the April 2, 2013 job offer and asserted that they required excessive bending, stooping, standing, and walking.

The job offer did not indicate how much bending, stooping, standing, and walking each of these duties required, so it is unclear on what basis Dr. Strain could draw such a conclusion. To the contrary, the offer made clear that the assignment was based on the restrictions Dr. Strain outlined on March 28, 2013. The offer emphasized: "You are not to exceed your prescribed limitations." Accordingly, Dr. Strain appeared to have no basis for believing that some of the duties required appellant to exceed her prescribed restrictions.

On May 12, 2014 Dr. Strain asserted that he had repeatedly found appellant able to return to work with restrictions that did not involve patient care. He alleged that this was what he prescribed on March 28, 2013. Dr. Strain's assertion appears inconsistent with the evidence. When he noted on March 7, 2013 that appellant was to perform "no patient care," OWCP asked him to clarify. OWCP explained that, if the employing establishment offered a job that was entirely consistent with the prescribed restrictions, the nature of the job would be immaterial. Dr. Strain responded to the request for clarification by deleting the restriction "no patient care." Moreover, he affirmatively indicated that he had reviewed the job offer and that appellant could perform the duties outlined.

As the Board indicated earlier, the evidence at the time of termination supported OWCP's finding that the April 2, 2013 offer, involving patient care within the restrictions Dr. Strain outlined on March 28, 2013, was suitable. Dr. Strain examined appellant twice in June 2013 just prior to the termination, and on both occasions he advised that she was to perform no patient care "for lifting, pushing, pulling over 10 pounds." Far from prohibiting all patient care, this restriction allowed appellant to perform patient care so long as she did not lift, push, or pull over 10 pounds, which the April 2, 2013 job offer did not require.

Although Dr. Strain would later state that he consistently prohibited appellant from performing patient care, he did not explain why the nature of the job mattered if the physical demands of the position conformed to the restrictions he had outlined. The Board therefore finds that the medical opinion evidence is insufficient to establish that the offered position was, in fact, unsuitable.

It is immaterial whether Dr. Strain ever saw the April 2, 2013 job offer. The employing establishment based the offer on Dr. Strain's most recent duty status report, which he provided to clarify his position on patient care. The offer emphasized that appellant was not to exceed her prescribed limitations. It does not strengthen her argument if Dr. Strain reviewed and approved the minimal physical conditions of employment for nursing personnel in general, and not the April 2, 2013 job offer. Both made clear that appellant would be caring for patients in some capacity.

Appellant argued that, if medical reports documented a disabling condition arising after the compensable injury, then the job will be considered unsuitable.[9] FECA procedures provide: "If medical reports in the file document a condition which has arisen or worsened since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently acquired condition is not work related)."[10] Appellant, however, did not show that her depression was disabling. She argued that the burden fell upon OWCP to investigate, but once the suitable work offer was made, it became incumbent for her to provide medical evidence substantiating that she was unable to report to work during the period of time between the job offer and the date that OWCP terminated benefits.[11]

Following the termination, Dr. Coffey advised that appellant was unable to perform the duties required by the jobs offered by the employing establishment. He explained that many of the duties required her to be physically and emotionally stable, and her stability had not been consistent, but it is not clear that he is a qualified physician under 5 U.S.C. § 8101(2). "Physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. It does not appear that Dr. Coffey is a clinical psychologist. It appears that he is a Ph.D. and a licensed therapist or counselor. A licensed counselor is not a "physician" as defined under FECA. Dr. Coffey's reports, therefore, have no probative medical value.[12]

Although appellant has provided some evidence to support that she was restricted to "no patient care," the evidence appears inconsistent with the evidence that was before OWCP at the time of termination. Regardless, the evidence does not show that the April 2, 2013 job offer required her to exceed any of the physical restrictions outlined by Dr. Strain. Appellant has not offered competent medical evidence showing that she was disabled for the offered position by a subsequently acquired depression. Accordingly, the Board finds that she has not met her burden to establish that her refusal of the April 2, 2013 job offer was justified. The Board will affirm OWCP's August 25, 2014 decision denying modification of its June 12, 2013 decision to terminate appellant's compensation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation as she refused suitable work. The Board also finds that she has not established that her refusal of the modified job offer was justified.

[9] *Susan L. Dunnigan*, 49 ECAB 267 (1998).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4.c(7) (June 2013).

[11] *Dorothy N. Johnson*, Docket No. 05-916 (issued December 15, 2005).

[12] *S.A.*, Docket No. 14-1345 (issued December 15, 2014).

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 26, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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