

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

E.F., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS, S.S.
STRATTON VETERANS MEDICAL CENTER,
Albany, NY, Employer**

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**Docket No. 15-103
Issued: May 12, 2015**

Appearances:
Appellant, pro se
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 20, 2014 appellant filed a timely appeal from a September 18, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective September 21, 2014 as she refused suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On January 11, 1979 appellant, then a 41-year-old telephone operator, filed a traumatic injury claim alleging that she sustained injury to her right knee, left upper chest and left wrist

¹ 5 U.S.C. §§ 8101-8193.

when she tripped over telephone wires and fell. OWCP initially accepted the claim for contusion to her right knee, left upper chest, and left wrist and thereafter paid benefits.

In May 1979, appellant reported back symptoms. On June 21, 1979 she was hospitalized for a herniated disc left L5-S1. On July 3, 1979 appellant underwent an accepted left L5-S1 laminectomy and discectomy. She returned to work as tolerated on October 29, 1979. OWCP expanded the claim to include displacement of lumbar intervertebral disc without myelopathy L5-S1. After a period of work, appellant complained of back pain in March 1980. On August 11, 1980 she underwent an accepted laminectomy bilaterally with a discectomy at L5-S1. Appellant eventually returned to work with subjective complaints of pain in her back, left leg and several bilateral toes. After several periods of work stoppage in limited-duty capacity, she stopped work on August 27, 1983 and has not returned. OWCP placed appellant on the periodic compensation rolls in October 1983.

In a September 16, 1983 report, Dr. Arthur Schlip, a Board-certified neurologist, reported appellant was seen for persistent low back pain and bilateral lower extremity pain. Examination revealed that appellant was in moderate discomfort and walked cautiously around the examining room. She had no difficulty heel or toe walking, good strength in lower extremities, excellent motion on squatting and walking, and no atrophy in the calves and thighs. Examination findings were reported as well as a recent weight gain. Dr. Schlip stated that rhizotomy and cordotomy procedures were probably not going to work for appellant. He stated that a myelogram might show considerable adhesive arachnoiditis. However, Dr. Schlip explained that treatment was extremely difficult for that condition and often did not yield much improvement. He indicated that appellant could lose 20 to 25 pounds and get re-fitted for a firm corset.

The medical evidence of record from 1983 onward noted appellant's subjective complaints of pain, restricted movement in the lumbar spine, and numbness with tingling in the buttock regions, both lower extremities and feet.

In a November 6, 2007 report, Dr. Alan Bloomberg, Board-certified in emergency medicine, noted the history of injury and medical course, which included some physical therapy. He noted appellant's complaint that, for the most part, she lived with low back pain. Regarding her physical examination, Dr. Bloomberg noted that appellant was now unable to heel and toe walk. Muscle spasm and tenderness in lumbar paraspinals were noted along with tenderness to palpation at L3, L4, and L5 and S1 joints and hyposthesia of the L4, L5, and S1 dermatomes. Diagnoses of lumbar radiculopathy, lumbar pain, and lumbar sprain/strain were provided. Dr. Bloomberg opined that appellant's back condition was the result of the June 10, 1979 work-related injury. He recommended physical therapy.

Appellant underwent a nerve conduction study and electromyogram (EMG) study on November 27, 2007, which indicated a left peroneal neuropathy (axonal loss) to be correlated clinically. OWCP approved a lumbar support cushion on August 1, 2008 and a portable home transcutaneous electrical nerve stimulation unit on October 3, 2008. Appellant continued to undergo physical therapy.

On March 14, 2013 the employing establishment requested that OWCP refer appellant for a second opinion evaluation to determine her disability status. It thereafter referred appellant to Dr. Edwin E. Mohler, a Board-certified orthopedic surgeon.

In an August 8, 2013 report, Dr. Mohler reviewed the statement of accepted facts and appellant's medical record. He noted the history of injury, appellant's current symptoms, that she had been under Dr. Bloomberg's care since 2007, and that she had been attending physical therapy and decompressive therapy. Examination findings were presented and the following diagnoses were provided: status post laminotomy and discectomy, left side, L5-S1 July 3, 1979; status post L5-S1 laminectomy, bilaterally, with fasciectomy August 11, 1980; left-sided L5 radiculopathy by EMG/NCV studies with peroneal neuropathy November 27, 2007; and failed back syndrome.

Dr. Mohler noted that objective findings on examination consisted of less calf muscle development on the left side, reduced lumbar lordosis, and reduced flexibility of the lumbar spine, surgical scar in the midline of the lower lumbar and upper sacrum, and absence of Achilles tendon reflexes. He opined that these were disabling residuals of the accepted condition of the displacement of lumbar intervertebral disc without myelopathy at L5-S1. However, Dr. Mohler found that the conditions of the right knee, upper chest, and left wrist had resolved. He opined that appellant reached maximum medical improvement as of September 16, 1983, based on the consultation report of the same date, that she was not interested in additional pain management or medications, and was not considered a candidate for additional surgeries or rhizotomies. At that time, appellant was advised to lose weight and recondition with no recommendation or need for additional treatment by a healthcare provider. Dr. Mohler noted that Dr. Bloomberg had recommended continued treatment with medications renewed every four weeks at the return office visit.

Dr. Mohler noted that, over the years, there had been no evidence of improved function, and appellant's functional capacity evaluation performed in 2000 revealed multiple self-limiting behaviors for which she precluded herself from ability to do eight-hour workdays.

Regarding appellant's disability status, Dr. Mohler concluded that, in addition to having no evidence of neurological impairment of her right lower extremity, her normal gait, functional range of motion of her lumbosacral spine, nonphysiological response to sensory examination of her lower extremities; as well as her ability to do her own dressing, undressing, toileting, hygiene, drive, cook, perform household chores, visit family, and utilize a computer without any documented improvement over the last 30 years, negated her total disability status and the need for additional treatment by healthcare providers. He stated that given appellant's age, the fact that she had been out of work for 30 years, with no indication of motivation to return to work when evaluated in 2000 for the functional capacity evaluation, he did not anticipate her return to her date-of-injury job as a telephone operator; although, from a medical and subjective point of view, he opined that she could perform that position for eight hours a day, if she were motivated to do so.

Dr. Mohler opined that appellant met the criteria for light physical demand work, which included: occasional lifting up to 20 pounds, frequent lifting up to 10 pounds with alternating her position among sitting, standing, and walking. He opined that appellant was capable of

doing her date-of-injury job as it fell within his physical demand level. Dr. Mohler noted that any improvement of the accepted conditions was solely based upon appellant's own motivation and efforts of reconditioning and not based on the need for further medical treatment. He noted that a work capacity evaluation and work-hardening program were not needed as she was capable of being gainfully employed with a guarded prognosis for improvement. The attached OWCP-5 noted that appellant was at maximum medical improvement with permanent physical limitations of sitting no more than six hours per day; walking no more than two hours per day; standing no more than two hours per day; twisting no more than two hours per day; bending/stooping no more than one hour per day; operating a motor vehicle no more than four hours per day; pushing two hours no greater than 40 pounds; pulling two hours no greater than 30 pounds; and lifting two hours no greater than 20 pounds.

Dr. Bloomberg continued to submit reports noting no change in appellant's condition and recommending physical therapy with short-term goals of improving performance of activities of daily living, improving range of motion, stretching affected musculature, resolving restriction, reducing trigger points and improving range of motion.

On November 8, 2013 the employing establishment offered appellant a full-time position as an information receptionist effective November 25, 2013. It noted that the physical demands of the position were consistent with Dr. Mohler's permanent physical limitations. The work was noted as being sedentary, with employee sitting comfortably to work, with some walking, standing, bending, carrying of light items such as papers, books, small parts, and driving an automobile. No special physical demands were required. The duties of the offered job were also described. Major duties were to direct callers and visitors; provide information about the organization and provide explanation of office functions, and provide basic instructions. Inquiries received required evaluation to determine the most useful and appropriate information, resolve inconsistencies in available information, or provide alternatives. Performance of other related duties as assigned.

On November 18, 2013 appellant declined the permanent, full-time job offer as an information receptionist. She stated had not recovered from a displaced disc. Appellant stated that her injury since 1979 resulted in surgeries and the doctors there determined that her attempt to continue working caused inflammation and an escalation of her pain and that she should leave work, which she did. Since 1982, she had provided OWCP with a physician's report certifying her continued disability. Appellant alleged that Dr. Mohler did not do an examination to determine her physical limitations and was not impressed with her EMG studies. She stated that she could not work for more than an hour, could not walk or stand for more than a few minutes, and could not sit for more than 15 or 20 minutes. Appellant added that bending or twisting was totally out of the question.

On January 29, 2014 OWCP found the November 8, 2013 job offer for full-time information receptionist not suitable as it failed to list specific physical requirements of the job relative to appellant's medical restrictions.

In a February 6, 2014 letter, the employing establishment advised the November 8, 2013 job offer mirrored the permanent physical limitations as found on Dr. Mohler's August 8, 2013 OWCP-5c work capacity evaluation and stated the November 8, 2013 job offer was still

available to appellant. It noted that appellant had declined this job offer on November 18, 2013, and requested reconsideration of the suitability determination.

On February 12, 2014 the employing establishment reoffered the full-time information receptionist position to appellant. It stated that the position was primarily sedentary and noted the physical demands of the position were the same as that listed by Dr. Mohler in his August 8, 2013 OWCP-5c work capacity evaluation. On February 20, 2014 appellant declined the position for the same reasons noted in her original declination of November 24, 2013.

In an April 22, 2014 letter, OWCP advised appellant that the job offer was suitable and in accordance with the medical limitations provided by Dr. Mohler in the report dated August 8, 2013 because he had physically examined her and based his opinion on her ability to return to work with limitations on examination and objective findings. It found that the weight of the medical evidence rested with Dr. Mohler because he thoroughly examined her and provided a full detail of justification supported by objective findings why she was capable of returning to modified work. OWCP also noted that the employing establishment confirmed that the position remained open and available to her. It allowed appellant 30 days to accept the position or provide her reasons for refusal. Appellant was advised that an employee who refused an offer of suitable work without reasonable cause was not entitled to compensation.

In a May 15, 2014 statement, appellant disputed Dr. Mohler's medical report. She alleged that Dr. Mohler lied when interpreting the second opinion report of September 16, 1983 when he stated that she refused any new treatment or medications. Appellant argued that he used that lie to determine that she invalidated any claim she had for her January 10, 1979 work injury and opined that she should be returned to work with only the limitations she had before she was injured. She argued that Dr. Mohler provided no evidence medical or physical, to support his contentions that she could work within the physical restrictions he provided. Appellant additionally noted that Dr. Mohler relied on testing done over 10 years ago, which should not be a determining factor in her ability to work at the present time.

Appellant submitted copies of physical therapy reports and records from December 17, 2013 through March 2014; a range of motion inclinometry dated April 29, 2014; an August 11, 1980 operative report; a May 21, 2014 letter from the employing establishment.

Reports from Dr. Bloomberg continued to note no change in appellant's condition and recommended physical therapy, with his previously stated short-term goals. In an April 8, 2014 work capacity evaluation report, Dr. Bloomberg opined that appellant had not reached maximum medical improvement and had limitations on sitting, walking, standing, twisting, bending/stooping, pushing, pulling, lifting, squatting, kneeling, and climbing due to left leg and back pain. He stated that flare-ups of such pain precluded appellant from returning to work.

In a May 30, 2014 letter, OWCP advised appellant that her refusal of the offered job was not deemed justified and she was afforded an additional 15 days to accept the job.

On June 30 and September 16, 2014 the employing establishment notified OWCP that appellant had not reported for duty.

By decision dated September 18, 2014, OWCP terminated appellant's entitlement for compensation to wage-loss and schedule award benefits effective September 21, 2014 on the basis she refused suitable work.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA provides in pertinent part, "a partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."² However, to justify such termination, OWCP must show that the work offered was suitable.³ An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.⁴

When OWCP informs a claimant that it has determined that a given offered position is suitable and invites him to write and give reasons for not accepting, OWCP acknowledges that its determination is not yet final and that a reasonable explanation would justify the claimant's refusal of the position and result in the continuation of his compensation for disability. Certain explanations will, of course, justify a claimant's refusal to accept an offer of employment. OWCP's procedure manual itself lists a number of reasons that are considered acceptable. 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.⁵ If a claimant refuses the employment offered and provides such a reason, OWCP will consider his refusal justified and will continue his compensation for disability.⁶

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, OWCP must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can OWCP afford the claimant an opportunity to accept or refuse an offer of suitable work. Only after it has finalized its decision on suitability can OWCP notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.⁷

OWCP's regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty.

² 5 U.S.C. § 8106(c)(2).

³ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁴ 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁵ 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. 13-319 (issued May 14, 2013).

⁶ *Id.*

⁷ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.⁸

ANALYSIS

Following OWCP's acceptance of appellant's January 10, 1979 claim for contusions of the right knee, left upper chest, and left wrist, as well as displacement of lumbar intervertebral disc without myelopathy, she received appropriate compensation benefits for disability from work and medical expenses. After a period of intermittent work and disability, appellant was placed on OWCP's periodic rolls, where she received total disability compensation. In a September 18, 2014 decision, OWCP terminated her wage-loss compensation effective September 21, 2014 as she refused an offer of suitable work.

The evidence of record establishes that appellant was capable of performing the information receptionist position offered by the employing establishment and determined to be suitable by OWCP on April 22, 2014. The position was a full-time sedentary position which involved directing callers and visitors; providing information about the organization, providing the most useful and appropriate information, resolving inconsistencies in available information or providing alternatives, and performing related duties as assigned. The physical requirements included sitting six hours per day; walking, standing and twisting two hours per day; bending/stooping one hour per day; operating motor vehicle four hours per day; pushing two hours no greater than 40 pounds; pulling two hours no greater than 30 pounds; and lifting two hours no greater than 20 pounds per day. The record does not reveal that the information receptionist position was temporary in nature.⁹ Moreover, there is no indication in the record that appellant, a former telephone operator, could not vocationally perform the offered position.

In determining that appellant was physically capable of performing the information receptionist position, OWCP relied on the August 8, 2013 opinion of Dr. Mohler, a Board-certified orthopedic surgeon serving as an OWCP referral physician. He provided a comprehensive medical report in which he reviewed appellant's history of injury and medical treatment, presented examination findings, and found that she could return to full-time limited-duty work subject to physical limitations he specified. The employing establishment prepared a limited-duty job offer conforming with Dr. Mohler's physical restrictions which OWCP reviewed and found suitable to appellant's physical limitations.

Appellant argued that she could not perform the offered position, that Dr. Mohler did not perform an examination to determine her physical limitations, and that he misinterpreted the medical evidence of file. The issue of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.¹⁰ In assessing medical evidence, the number of physicians

⁸ 20 C.F.R. § 10.516.

⁹ If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(5), (9) (June 2013).

¹⁰ *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

supporting one position over another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹¹

In his August 8, 2013 report, Dr. Mohler was provided with the appropriate medical records contained in the case and a statement of accepted facts in order to have a sufficient history to render a well-reasoned opinion regarding the extent of disability following his examination. Despite appellant's claim to the contrary, he provided a comprehensive medical examination and listed his findings in the report. Dr. Mohler found that while appellant had residuals of the accepted condition of the displacement of lumbar intervertebral disc without myelopathy at L5-S1, her physical examination and objective evidence indicated she was able to work with restrictions. He reviewed the medical record and found there were no other nonwork factors, incidences or disabilities that prevented her from returning to full-duty work. Dr. Mohler also stated the fact that she demonstrated normal gait, functional range of motion of the lumbosacral spine, nonphysiological response to sensory examination of the lower extremities. He noted however that for the last 30 years, the medical record revealed that she was incompletely engaged in range of motion, strengthening, and aerobic activity. Dr. Mohler thereafter explained that these findings, along with appellant's ability to engage in a variety of daily living activities, without any evidence of documented improvement, negated a total disability status.

Dr. Mohler stated that any improvement of the accepted conditions was solely based on appellant's own motivation and efforts of reconditioning and not on the need for further medical treatment. He opined that she reached maximum medical improvement, detailed his specific findings and provided medical rationale to support his conclusion that appellant could return to work with limitations.

While Dr. Bloomberg opined appellant was totally disabled and needed continued physical therapy treatment, he failed to provide any medical rationale to support his opinion. He continued to recommend physical therapy with short-term goal of improving performance of activities of daily living, improving range of motion, stretching affected musculature, resolving restriction, reducing trigger points and improving range of motion. In an April 8, 2014 work capacity evaluation report, Dr. Bloomberg opined that appellant had not reached maximum medical improvement and had limitations on sitting, walking, standing, twisting, bending/stooping, pushing, pulling, lifting, squatting, kneeling, and climbing due to left leg and back pain. He stated that flare-ups of such pain precluded appellant from returning to work. However, Dr. Bloomberg provided no medical rationale as to why continued medical treatment was needed or how or why flare-ups of her back pain would prevent appellant from performing the duties of the offered position as of the February 12, 2014 job offer.

¹¹ *Connie Johns*, 44 ECAB 560, 570 (1993).

Thus, the Board concludes that the weight of the medical opinion evidence rests with Dr. Mohler's opinion.

The Board finds that OWCP has established that the information receptionist position offered by the employing establishment is suitable. As noted above, once it has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of her refusal of the modified sales and service associate position and notes that it is not sufficient to justify her refusal of the position.

The physical therapy reports from December 17, 2013 through March 2014 and the April 29, 2014 range of motion inclinometry do not offer any medical rationale that appellant could not perform the duties of the offered position.

For these reasons, OWCP properly terminated appellant's compensation effective September 21, 2014 on the grounds that she refused an offer of suitable work.¹²

On appeal, appellant reiterates her position that Dr. Mohler misinterpreted the medical evidence of record, which effectively invalidated her claim. As discussed, however, Dr. Mohler provided a comprehensive medical report based on current examination findings, the medical record and a statement of accepted facts and found appellant was able to work could return to full-time limited-duty work subject to physical limitations he specified. OWCP found and the Board agrees that the information receptionist position was within appellant's physical limitations as set forth by Dr. Mohler.

Appellant may submit new evidence or further, more rationalized argument from Dr. Bloomberg which expands upon his disability opinion, 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 compensation effective September 21, 2014 on the grounds that she refused an offer of suitable work.

¹² The Board notes that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing her with an opportunity to accept the position offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid; *see generally* *Maggie L. Moore, supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2015
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board