United States Department of Labor
Employees' Compensation Appeals Board

Y.J., Appellant	)	
and	)	**Docket No. 20-1562**
	)	**Issued: December 14, 2021**
U.S. POSTAL SERVICE, MAIL RECOVERY CENTER, Atlanta, GA, Employer	)	

Appearances:
Alan J. Shapiro, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 28, 2020 appellant, through counsel, filed a timely appeal from an April 7, 2020 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 7, 2020 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 a schedule award, effective August 11, 2017, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 14, 2014 appellant, then a 51-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 11, 2014 she sustained injury to her right arm/shoulder when lifting boxes while in the performance of duty. She stopped work on April 14, 2014. OWCP initially accepted appellant's claim for lateral and medial epicondylitis of the right elbow and other joint derangement of the right upper arm. It later expanded the acceptance of the claim to include partial rotator cuff tear of the right shoulder. OWCP paid appellant wage-loss compensation on the supplemental rolls for disability from work commencing June 18, 2014 and commencing May 31, 2015 on the periodic rolls. On February 1, 2016 appellant underwent OWCP-authorized right shoulder surgery, including shoulder arthroscopy with subacromial decompression, rotator cuff repair, and biceps tenodesis.

In a December 13, 2016 report, Dr. Jay B. Bender, a Board-certified orthopedic surgeon, indicated that appellant had significant deficits and objective examination findings that warranted total temporary incapacitated status.

In January 13 and 27, 2017 reports, Dr. Daniel A. Nicholson, a Board-certified orthopedic surgeon, reported physical examination findings and diagnosed right elbow pain.

On March 3, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and series of questions, for a second opinion examination and evaluation with Dr. Raju Vanapalli, a Board-certified orthopedic surgeon. It requested that Dr. Vanapalli evaluate whether appellant continued to have residuals of the April 11, 2014 employment injury and to assess her ability to work.

In a March 28, 2017 report, Dr. Bender indicated that appellant had significant deficits and objective examination findings that warranted total temporary incapacitated status.

In a March 30, 2017 report, Dr. Vanapalli discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that, upon examination, appellant complained of pain throughout the right shoulder and jumped with anxiety when palpated. Dr. Vanapalli indicated that, during testing for range of motion of the right shoulder, appellant engaged in voluntary inhibition and limitation. Appellant exhibited normal sensation and 5/5 strength in her upper extremities. Dr. Vanapalli indicated that appellant was capable of performing full-time work at the medium level of work with restrictions. In a March 30, 2017 work capacity evaluation (Form OWCP-5c), he noted that appellant could work on a full-time basis with

restrictions of no reaching above shoulder level for more than one hour a day, and no pushing, pulling, or lifting more than 20 pounds.

In April 2017 appellant began participating in the initial stages of vocational rehabilitation efforts, but her vocational rehabilitation counselor reported that she refused to meet with a field nurse.

On May 24, 2017 the employing establishment offered appellant a full-time modified-duty position as a customer retention agent with a reporting date of May 30, 2017. The position involved performing clerical duties to address customers' concerns by speaking on a telephone and engaging in light data input on a computer. From a physical perspective, the position was sedentary and required speaking on the telephone for eight hours, simple grasping/handling of a computer mouse, fine manipulation of a keyboard, and lifting up to 10 pounds. Appellant's vocational rehabilitation counselor advised that the customer retention agent position was vocationally and physically suitable. Appellant did not respond to the job offer.

By notice dated June 13, 2017, OWCP advised appellant that it had determined that she refused or failed to report to the offered position as a modified customer retention agent. It informed her that it had reviewed the offered position and found it was suitable and in accordance with the medical restrictions provided by Dr. Vanapalli's March 30, 2017 report. Pursuant to 5 U.S.C § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position or to provide adequate reasons for refusal. It informed her that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

Appellant submitted June 13 and July 11, 2017 reports from Dr. Bender who indicated that she had significant deficits and objective examination findings that warranted total temporary incapacitated status. She also submitted a June 15, 2017 form report from Dr. Susan S. Jordan, a Board-certified orthopedic surgeon, who indicated "Restrictions per the FCE [functional capacity evaluation]."

In a July 25, 2017 letter, OWCP advised appellant that her reasons for not accepting the 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 August 10, 2017, OWCP terminated appellant's compensation and entitlement to a schedule award effective August 11, 2017, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

On October 5, 2017 appellant requested reconsideration of the August 10, 2017 decision. She submitted several reports of Dr. Bender, including an August 22, 2017 form report in which he indicated that she was unable to perform any work, as well as disability forms dated June 13 through September 22, 2017.

By decision dated January 19, 2018, OWCP denied modification of the August 10, 2017 decision.

On May 15, 2018 appellant requested reconsideration. She submitted additional medical evidence including a January 24, 2018 work status note from Dr. Bender and a May 3, 2018 report

from Dr. Kevin G. McGowan, a Board-certified orthopedic surgeon, who recommended work restrictions including lifting no more than 70 pounds.

By decision dated July 25, 2018, OWCP denied modification of the January 19, 2018 decision.

On November 5, 2018 appellant requested reconsideration and submitted an October 15, 2018 report from Dr. Victor Osisanya, a Board-certified physiatrist, who indicated that her employment status was retired. By decision dated December 17, 2018, OWCP denied modification of the July 25, 2018 decision.

On June 4, 2019 appellant requested reconsideration and submitted an August 5, 2019 report from Dr. Osisanya who indicated that she had employment-related neck, right shoulder, and right elbow conditions.

By decision dated August 6, 2019, OWCP denied modification of the December 17, 2018 decision.

Appellant again requested reconsideration and submitted reports dated May 2 through July 18, 2017 in which Dr. Bender opined that she was totally disabled and reports dated December 10, 2018 through January 23, 2020 from Dr. Osisanya. In reports dated January 22 and 23, 2020, Dr. Osisanya opined that appellant's cervical condition, including cervical disc degeneration, would have prevented her from working in mid-2017.

By decision dated April 7, 2020, OWCP denied modification of the August 6, 2019 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.[4] 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.[5] 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.[6] Section 8106(c) 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.[7]

[4] *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[5] 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).

[6] *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

[7] *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

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 showing that such refusal or failure to work was reasonable or justified.[8] 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.[9]

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.[10] 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.[11] In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[12]

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective August 11, 2017, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record shows that appellant is capable of performing the customer retention agent position offered by the employing establishment and determined to be suitable by OWCP in June 2017. The position involved performing clerical duties to address customers' concerns. The position required speaking on the telephone, simple grasping/handling of a computer mouse, fine manipulation of a keyboard, and lifting up to 10 pounds. There is no indication that it required reaching above shoulder level. The record does not reveal that the customer retention agent position was temporary in nature.[13]

The customer retention agent position was approved by appellant's vocational rehabilitation counselor and OWCP properly relied on the opinion of appellant's counselor in determining that appellant is vocationally and educationally capable of performing the position.[14]

In determining that appellant was physically capable of performing the customer retention agent position, OWCP properly relied on the opinion of Dr. Vanapalli, the second opinion

[8] 20 C.F.R. § 10.517(a).

[9] *Id.* at § 10.516.

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

[11] *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).

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

[13] 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).

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

physician. In a March 30, 2017 report, Dr. Vanapalli noted that, upon examination, appellant complained of pain throughout the right shoulder and jumped with anxiety when palpated. He indicated that, during testing for range of motion of the right shoulder, appellant engaged in voluntary inhibition and limitation. Dr. Vanapalli further noted that appellant exhibited normal sensation and 5/5 strength in her upper extremities. He concluded that she could work on a full-time basis with restrictions of no reaching above shoulder level for more than one hour a day, and no pushing, pulling, or lifting more than 20 pounds. The Board notes that these restrictions would allow appellant to work in the position of a customer retention agent.

The Board finds that OWCP properly accorded the weight of medical opinion evidence with Dr. Vanapalli who based his opinion on a proper factual and medical history and physical examination findings and provided medical rationale for his opinion. The Board finds that Dr. Vanapalli provided a well-rationalized opinion regarding appellant's ability to work and that his evaluation of appellant's ability to work was the most comprehensive evaluation conducted around the time that the customer retention agent position was offered to appellant. Accordingly, OWCP properly relied on his March 30, 2017 report relative to work tolerances and limitations in terminating appellant's wage-loss compensation and entitlement to schedule award compensation effective the date she refused an offer of suitable work.[15]

The Board finds that, therefore, OWCP has established that the customer retention agent position offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified. The Board has reviewed the evidence submitted by appellant in support of her refusal of the customer retention agent position and finds that it is insufficient to justify her refusal of the position.[16]

Appellant submitted medical reports from around the time that the employing establishment offered the customer retention agent position. She submitted June 13 and July 11, 2017 reports from Dr. Bender who indicated that she had significant deficits and objective examination findings that warranted total temporary incapacitated status. Dr. Bender did not provide an explanation for this opinion on disability. Appellant also submitted a June 15, 2017 form report from Dr. Jordan, who indicated "Restrictions per the FCE [functional capacity evaluation]." However, Dr. Jordan did not elaborate on the nature of these restrictions. The Board finds that the evidence submitted by appellant is insufficient to outweigh the well-rationalized report of Dr. Vanapalli who addressed both the accepted and concurrent conditions.

After the termination of her compensation effective August 11, 2017, appellant submitted additional medical reports from attending physicians, including Dr. Bender and Dr. McGowan. However, these reports did not contain an opinion on appellant's ability to work around the time that the employing establishment offered the customer retention position in May 2017. In reports

[15] *See A.F.*, Docket No. 16-0393 (issued June 24, 2016).

[16] The Board finds that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant 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 D.M,* Docket No. 19-0686 (issued November 13, 2019); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

dated January 22 and 23, 2020, Dr. Osisanya opined that appellant's cervical condition, including cervical disc degeneration, would have prevented appellant from working in mid-2017. However, this opinion is of limited probative value because Dr. Osisanya failed to provide medical rationale in support of his opinion on appellant's ability to work at that time. The Board has held that a report is of limited probative value if it does not contain medical rationale explaining its conclusions regarding a given medical condition/level of disability.[17]

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective August 11, 2017, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

IT IS HEREBY ORDERED THAT the April 7, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[17] *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).