

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

_____)
B.P., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Carol Stream, IL, Employer)
_____)

Docket No. 21-0614
Issued: December 30, 2021

Appearances:

Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 12, 2021 appellant, through counsel, filed a timely appeal from a September 22, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 September 22, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* 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.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 5, 2020, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 17, 2012 appellant, then a 58-year-old automation clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral hip osteoarthritis, greater on the left, due to factors of her federal employment including repetitive lifting, pulling, sitting, and standing over a 13-year period. She noted that she first became aware of her condition on April 18, 2011 and realized its relation to her federal employment on November 26, 2012. OWCP assigned OWCP File No. xxxxxx830.⁴

By decision dated April 5, 2013, OWCP accepted a left hip sprain. On May 23, 2013 it expanded its acceptance of the claim to include a left iliofemoral hip sprain, and permanent aggravation of osteoarthritis of both hips. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing May 6, 2013.

On May 6, 2014 Dr. Eugene Lopez, a Board-certified orthopedic surgeon, performed an OWCP-authorized total left hip arthroplasty.

In a July 31, 2016 report, Dr. Lopez noted appellant's medical history of questionable anemia and depression, as well as preexisting bilateral hip osteoarthritis, necessitating bilateral total hip arthroplasties. He opined that the physical demands of appellant's employment duties significantly aggravated preexisting bilateral hip osteoarthritis, necessitating bilateral total hip arthroplasties.

A May 8, 2017 functional capacity evaluation (FCE) indicated that appellant could perform work at the sedentary physical demand level, with lifting up to 11.5 pounds, occasional bending, squatting, standing and walking and frequent overhead reaching.

Dr. Lopez performed OWCP-authorized total right hip arthroplasty on May 16, 2017. He submitted periodic reports through November 30, 2017 finding appellant totally disabled from work due to her bilateral hip conditions.

On April 11 2018 OWCP obtained a second opinion evaluation regarding appellant's work capacity by Dr. Allan Brecher, a Board-certified orthopedic surgeon. Dr. Brecher reviewed a statement of accepted facts (SOAF) and the medical record and responded to the questions posed

⁴ Under OWCP File No. xxxxxx068, appellant had previously filed a traumatic injury claim (Form CA-1) on March 29, 2004 alleging that on March 28, 2004 she sustained a left groin strain while in the performance of duty when she stepped on a label that was laying on the workroom floor and her left foot slid forward. OWCP accepted that claim for a left groin strain. Appellant's claims have not been administratively combined.

form OWCP. He noted that appellant had “[n]o medical problems” in her past medical history. Dr. Brecher found her capable of full-time sedentary duty.

In a report dated August 21, 2018, Dr. Lopez found appellant totally disabled from work due to continued bilateral hip symptoms.

OWCP found a conflict in the medical opinion evidence between Dr. Brecher and Dr. Lopez regarding appellant’s work capacity. To resolve the conflict, it referred appellant, the medical record, and an updated SOAF to Dr. Mark A. Neault, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an October 29, 2018 report, Dr. Lopez noted a medical history of anemia and depression, as well as preexisting bilateral hip osteoarthritis, necessitating bilateral total hip arthroplasties. He found that from an orthopedic perspective, appellant could return to full-time sedentary duty.

Dr. Neault submitted an October 30, 2018 report in which he reviewed the medical record and SOAF, and noted findings on orthopedic examination. He opined that based on the results of the May 8, 2017 FCE, appellant could perform full-time sedentary duty with lifting, carrying, pulling, and pushing up to 11.5 pounds, standing and walking up to 3 hours a day in 30-minute intervals, and no climbing, kneeling, operating machinery or overhead reaching.

On January 29, 2019 the employing establishment, based on Dr. Neault’s October 30, 2018 report, offered appellant a full-time modified position as a mail processing clerk, casing mail for up to eight hours a day. The position required eight hours of sitting or standing, lifting less than 10 pounds, grasping with the right hand, and holding with the left hand. Appellant signed the job offer on February 5, 2019 and indicated that she had accepted the position. She did not, however, return to work.

On February 6, 2019 OWCP advised appellant that it found the January 29, 2019 job offer to constitute suitable work within the work limitations provided by Dr. Neault. It afforded her 30 days to accept the offered position or to provide valid reasons for refusal. Appellant did not respond to OWCP and did not return to work.

On June 12, 2019 OWCP notified appellant that the job remained available to her and that she had 15 days to accept the offered modified mail processing clerk position and report for work. It further notified appellant that if she either did not provide a valid reason for accepting the job offer, or failed to report for work, it would terminate her compensation benefits and entitlement to a schedule award, pursuant to 5 U.S.C. 8106(c)(2).

In response, appellant submitted an August 6, 2019 report by Dr. Lopez noting a history of bilateral hip osteoarthritis, anemia, and depression. Dr. Lopez opined that appellant had attained maximum medical improvement (MMI). He returned her to sedentary work within the restrictions noted by Dr. Neault.

In an August 30, 2019 letter to OWCP regarding a financial issue, appellant noted that she had been on leave since mid-February 2019 for an unspecified nonoccupational condition, and had submitted medical reports regarding that condition to the employing establishment.

On January 27, 2020 the employing establishment confirmed that the offered modified mail processing clerk position remained open and available.

By decision dated February 5, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, under 5 U.S.C. § 8106(c)(2) as she refused an offer of suitable work. It accorded Dr. Neault's opinion the special weight of the medical evidence. OWCP found that appellant's reasons for refusing the offered position were not justified as the referenced emotional condition had not been accepted as work related.

On March 4, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 10, 2020. During the hearing, appellant testified that Dr. David Schilling, a Board-certified psychiatrist and neurologist, held her off work as of February 5, 2019 and told her she was unable to report to the offered modified mail processing clerk position. She explained that on December 26, 2016, she returned home to find that her son had passed away in her bathroom, precipitating severe major depression for which she sought treatment with Dr. Schilling. Appellant subsequently submitted reports dated February 6, 2019 through July 9, 2020 by Dr. Schilling, holding her off from work.

In a report dated July 9, 2020, Dr. Schilling noted appellant's history of depression beginning in 2001. He began treating appellant in 2006 and had prescribed medication and therapy. Dr. Schilling opined that appellant had been disabled from work since December 26, 2016, when she discovered her son's body in her home. Appellant's severe depression continued through 2017. She was hospitalized for three days in November 2018. At appellant's February 5, 2019 appointment, she cried during most of the session. Dr. Schilling opined that based on appellant's presentation on February 5, 2019, her "depression and her emotional state would prevent her from performing her responsibilities in her post office job." He found that she remained disabled from work.

In an August 4, 2020 letter, counsel contended that Dr. Schilling's reports established that appellant was totally disabled from work at the time the employing establishment offered her the modified clerk position.

By decision dated September 22, 2020, the hearing representative affirmed the February 5, 2020 termination decision.⁵

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.⁶ Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable

⁵ The hearing representative, however, also remanded the claim for a additional development on the issue of whether appellant was disabled from performing the offered modified-duty position due to a nonoccupational emotional condition.

⁶ See *K.S.*, Docket No. 19-1650 (issued April 28, 2020); *J.R.*, Docket No. 19-0206 (issued August 14, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

work is offered to, procured by, or secured for the employee is not entitled to compensation.⁷ 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.⁸ 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.⁹

Section 10.517(a) of FECA's implementing regulations provides 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.¹⁰ 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.¹¹

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.¹² 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.¹³ In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹⁴ The Federal (FECA) Procedure Manual provides that, if medical reports document a condition, which has arisen since the compensable injury and disables an employee from the offered job, the job will be considered unsuitable, even if the subsequently-acquired condition is not employment related.¹⁵

⁷ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁸ *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁹ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

¹⁰ 20 C.F.R. § 10.517(a).

¹¹ *Id.* at § 10.516.

¹² *See K.W.*, Docket No. 19-0860 (issued September 18, 2019); *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹³ *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).

¹⁴ *D.P.*, Docket No. 21-0596 (issued August 31, 2021); *see G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.814.4(c)(7) (June 2013); *R.M.*, Docket No. 19-1236 (issued January 24, 2020).

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 5, 2020.

The issue of whether a claimant is able to perform the duties of the offered employment position is a medical question that must be resolved by probative medical evidence.¹⁶ In the February 5, 2020 decision terminating her compensation benefits, OWCP found that the referenced emotional condition was not a sufficient reason for refusing the offered modified position as it had not been accepted as work related. The Board notes, however, that all conditions must be considered in determining whether an offered position is suitable work, and whether or not they are employment related.¹⁷

In denying appellant's claim for recurrence of disability, OWCP relied on Dr. Neault, a physician serving as impartial medical examiner in the case, who provided orthopedic work restrictions based on a May 8, 2017 FCE. While it found that Dr. Neault's opinion contained sufficient medical rationale to support that appellant could perform the physical duties required by the offered position, the Board finds that his opinion is insufficient for OWCP to have met its burden of proof to terminate as he failed to consider all of her conditions in the assignment of the work restrictions.¹⁸

The Board finds that the evidence of record establishes that OWCP failed to properly consider the entirety of appellant's medical conditions and restrictions before terminating her wage-loss compensation and entitlement to a schedule award.¹⁹ As a penalty provision, the termination of compensation benefits is narrowly construed.²⁰ Although OWCP's hearing representative concluded that further development of the record was required to determine whether appellant was disabled from performing the offered modified-duty position due to nonoccupational major depression, the proper and appropriate remedy was to reverse the termination of wage-loss compensation benefits until such time as a physician had resolved the medical issue.²¹ Consequently, the Board finds that OWCP did not meet its burden of proof to justify the termination of appellant's compensation benefits pursuant to section 8106(c)(2).

¹⁶ *R.M., id.; L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

¹⁷ *Supra* note 14.

¹⁸ *Id.*

¹⁹ *See K.W., supra* note 12; *K.S.*, Docket No. 19-0082 (issued July 29, 2019); *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

²⁰ *R.M., supra* note 15; *R.A., supra* note 8; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

²¹ *R.M., supra* note 15.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective February 5, 2020.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 30, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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