United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 20-0401**
	)	**Issued: February 26, 2021**
U.S. POSTAL SERVICE, PLANO MAIN POST OFFICE, Plano, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 10, 2019 appellant filed a timely appeal from July 17 and 23, and October 30, 2019 merit decisions 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 has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 21, 2019, as he refused

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the issuance of OWCP's decisions, appellant submitted additional evidence. 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 evidence for the first time on appeal. *Id.*

an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether OWCP properly exercised its discretion in denying appellant's request to change his treating physician.

FACTUAL HISTORY

On September 3, 1998 appellant, then a 23-year-old city carrier, filed a traumatic injury (Form CA-1) alleging that on August 1, 1998 he was injured while in the performance of duty. OWCP accepted the claim for a back sprain, displacement of the lumbar intervertebral disc without myelopathy, and bilateral thoracic or lumbosacral neuritis or radiculitis. The record reflects that OWCP paid him wage-loss compensation on the supplemental rolls commencing December 3, 2013 and on the periodic rolls commencing October 19, 2014.

On July 1, 2014 appellant underwent an unsuccessful spinal cord stimulator implant and remained off work following the procedure.

In a December 21, 2016 report, Dr. Robert Helsten, Board-certified in family medicine, noted that appellant complained of severe lower back pain radiating down his right leg and foot from a work injury and that he was walking with a cane. Associated symptoms included sensory-motor loss and sleep disruption, and pain exacerbated by standing and alleviated by lying down or sitting. A physical examination of appellant's lower back revealed severe tenderness and a range of motion of 30 degrees flexion, 10 degrees extension, 30 degrees right lateral flexion, and 20 degrees left lateral flexion. He diagnosed a herniated disc and right sciatica and indicated that appellant should permanently work light duty. Dr. Helsten referred appellant to Dr. Daniel Keelen, Board-certified in pain management, for further medical treatment.

In a December 21, 2016 work capacity evaluation (Form OWCP-5c), Dr. Helsten indicated that appellant was not capable of performing his usual job without restrictions. He further indicated that appellant had difficulty walking, bending, and lifting and could work eight hours per day with permanent physical restrictions, however he noted that appellant had not reached his maximum medical improvement (MMI). Dr. Helsten related that appellant could work at the sedentary, light, and medium strength levels, and he listed work restrictions as including a maximum of two hours of walking, two hours of standing, two hours of pushing up to 40 pounds, two hours of pulling up to 40 pounds, two hours of lifting up to 40 pounds, two hours of squatting, and no climbing.

In a March 8, 2018 work status report, Dr. Helsten indicated that appellant was able to return to work with restrictions and he noted that he had listed appellant's restrictions in a December 21, 2016 Form OWCP-5c. In an attached February 12, 2018 report, signed by Dr. Helsten on March 8, 2018, he related that appellant injured his low back when lifting a heavy tray of mail and he listed lumbar tenderness, limited range of motion, and limited lifting ability as clinical findings. Dr. Helsten noted appellant's diagnoses of intervertebral disc displacement of the lumbar region, sprain of the ligaments of the lumbar spine, and radiculopathy of the lumbar region. He related that appellant could work eight hours per day and indicated that he did not anticipate that appellant would need a functional capacity evaluation (FCE) or other vocational rehabilitation services. Dr. Helsten concluded that appellant's restrictions were permanent and that he had reached MMI on December 21, 2016.

A May 11, 2018 offer of modified duty from the employing establishment indicated that the position of customer care specialist was offered to appellant with an effective date of May 11, 2018. The duties of the position were listed as case resolution/working with customers for six to seven hours per day and answering telephones for one to two hours per day. The physical requirements included sitting for six to eight hours per day, standing/walking for one to two hours per day, and keyboarding for one to six hours per day. The employing establishment signed the offer on May 16, 2018. The offer indicated that it had considered documentation from Dr. Helsten from December 21, 2016 and March 8, 2018. It listed appellant's permanent work restrictions as including walking and standing for up to two hours per day; pushing, pulling, lifting and squatting for up to two hours per day with a 40-pound weight limit; and no climbing.

A May 16, 2018 priority for assignment worksheet from the employing establishment indicated that appellant could not perform carrier duties with his current restrictions. It related that appellant could perform work that was within his restrictions, which included handling customer issues and answering telephones, which could be performed while sitting for the majority of the day for 40 hours per week.

A May 16, 2018 letter from the employing establishment requested that appellant accept the modified job offer and report to work no later than May 24, 2018. It stated that if appellant declined the modified job offer he should provide his reasons for doing so, and that the offer would remain available until OWCP issued a decision regarding whether the offer complies with his medical restrictions.

On May 22, 2018 appellant rejected the employing establishment's offer of modified assignment dated May 11, 2018 and signed by the employing establishment on May 16, 2018. He contended that it did not adhere to his current work restrictions provided by Dr. Keelen.

OWCP subsequently received a May 22, 2018 medical report, wherein Dr. Helsten indicated that appellant complained of lower back pain radiating down his right leg and lower left leg pain. Dr. Helsten listed appellant's date of injury as August 1, 1998 and noted that appellant had a medical history of multiple back surgeries. He further noted that appellant's pain was exacerbated by getting up and down and alleviated by changing position and using a transcutaneous electrical nerve stimulation (TENS) unit. Dr. Helsten's associated symptoms included sleep disturbance. He stated that appellant was off of work and was offered a job, but Dr. Keelen did not want appellant to drive, due to his prescribed medication. A physical examination revealed severe tenderness in appellant's lower back and a range of motion of 40 degrees flexion, 10 degrees extension, 30 degrees right lateral flexion, and 20 degrees left lateral flexion. Dr. Helsten noted appellant's diagnoses of lumbar strain, lumbar disc displacement, lumbar radiculopathy, a herniated disc, and sciatica. He opined that appellant could work light duty permanently and that he had referred appellant to Dr. Keelen for pain management.

In a May 22, 2018 patient pain drawing signed by Dr. Helsten, appellant indicated that he was off of work and was experiencing severe pain, which he rated a 6 out of 10. He stated that he was using his TENS unit for 30 minutes per day, and that it relieved his pain by 25 percent. Appellant related that he experienced pain in his lower back, buttocks, right upper leg, and left lower leg.

A May 23, 2018 Form OWCP-5c signed by Dr. Keelen indicated that appellant could not perform his usual job without restrictions because he was in severe continuous pain and was not improving. Dr. Keelen also related that appellant could not work eight hours per day with restrictions because he was unable to sit or stand due to swelling and pain, and he indicated that appellant could work less than two hours per workday. He stated that he did not anticipate an increase in the number of hours appellant could work and that it was unknown when appellant would be able to work eight hours per day. Dr. Keelen opined that appellant had reached MMI and was not able to work at the light, medium, heavy, or very heavy strength levels. He listed appellant's restrictions as including sitting, walking, standing, reaching, reaching above the shoulder, twisting, bending/stooping, and operating a motor vehicle to/from work for less than two hours per day, and no repetitive wrist or elbow movements, pushing, pulling, lifting, kneeling, climbing, squatting, or operating a motor vehicle at work. Dr. Keelen additionally noted that appellant should take a break every 15 minutes. He also asserted that other factors needed to be taken into consideration in finding appellant a suitable job including past nerve damage and the fact that appellant was prescribed opiate medication and had not been cleared for driving.

A March 21, 2019 medical report by Dr. Helsten indicated that appellant presented with sharp lower back pain radiating down his right leg into his right foot and toes. He listed appellant's date of injury as August 1, 1998 and related that a physical examination revealed moderate tenderness in appellant's lower back and a range of motion of 30 degrees flexion, 10 degrees extension, 30 degrees right lateral flexion, and 20 degrees left lateral flexion. Dr. Helsten noted appellant's diagnoses of lumbar sprain, lumbar disc displacement, lumbar radiculopathy, a herniated disc, and sciatica. He concluded that appellant could perform light-duty work.

In a March 21, 2019 patient pain drawing signed by Dr. Helsten, appellant indicated that he was off work and was experiencing severe pain which he rated a 6 out of 10. He noted that he was using his TENS unit for 30 minutes per day, and that it relieved his pain by 15 percent. Appellant related that he experienced pain in his lower back, buttocks, right leg and foot, and left lower leg.

An April 5, 2019 memorandum from the employing establishment to OWCP indicated that appellant refused a May 11, 2018 job offer. It noted that it had based the job offer on appellant's March 8, 2018 medical report from Dr. Helsten. The employing establishment contended that appellant's medical records from multiple doctors dating back to 2015 demonstrated that appellant could return to work, but he has refused to do so. It noted that the position offered remained available to appellant, provided work for the number of hours for which appellant has been released to work, and is located within his commuting area. The employing establishment requested that OWCP rule on the suitability of the job offer or send appellant for a second opinion or impartial medical evaluation if there were questions about the medical evidence. It noted that both appellant's treating physician and his pain specialist had opined that he could return to work.

In a letter dated April 23, 2019, OWCP advised appellant that the employing establishment had confirmed that the offered position remained available. It determined that the customer care specialist position was suitable and in accordance with the medical restrictions set forth in Dr. Helsten's March 8, 2018 report and other medical documentation since 2015. OWCP indicated that the case would be held open for 30 days for evaluation of the evidence. It further advised appellant that if he failed to accept the position or provide adequate reasons for refusing the job offer, his right to compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2).

In letter dated April 30, 2019, OWCP instructed appellant to disregard its April 23, 2019 letter. It noted a corrected letter would be sent soon.

In a May 5, 2019 letter, appellant requested that his treating physician be changed to Dr. Keelen. He indicated that he had been seeing Dr. Keelen since he was referred to him in 2014, and he related that Dr. Keelen has been handling all of his restrictions, medications, and procedures. Appellant noted that, while Dr. Helsten was listed as his treating physician, he had only completed paperwork for him.

In a June 13, 2019 e-mail, OWCP asked the employing establishment to confirm whether appellant's job offer remained available.

In a June 14, 2019 letter, the employing establishment asserted that appellant's "long-term treating physician" stated that he could work eight hours a day. It requested an update on OWCP's position on the suitability of its job offer and appellant's request to change his physician. The employing establishment also stated that there appeared to be a material difference between the work restrictions provided by Dr. Helsten and those provided by Dr. Keelen, and it asked OWCP if it was appropriate to refer appellant for a second opinion examination.

In an e-mail dated June 26, 2019, the employing establishment confirmed that its modified-duty offer remained available for appellant.

In a letter dated July 12, 2019, OWCP informed appellant that the offered position remained available and was suitable and in accordance with the medical restrictions set forth in Dr. Helsten's December 21, 2016 and March 8, 2018 reports. It indicated that the case would be held open for 30 days, with the expectation that appellant would accept the position within 30 days. OWCP further advised appellant that if he failed to accept the position or provide adequate reasons for refusing the job offer, his right to compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2).

A July 17, 2019 OWCP compensation termination sheet indicated that appellant's compensation was terminated, effective July 21, 2019, because "an 8106(c) was issued."[3] By decision dated July 23, 2019, it denied appellant's request to change his treating physician, finding that the evidence of record was insufficient to establish that the current medical treatment he was receiving was improper or inadequate.

OWCP subsequently received additional medical evidence. In a July 23, 2019 report, Dr. Helsten indicated that appellant presented with constant lower back pain radiating down into both of his thighs and into his right foot. He listed appellant's date of injury as August 1, 1998 and related that a physical examination revealed severe tenderness in appellant's lower back and a range of motion of 30 degrees flexion, 10 degrees extension, 20 degrees right lateral flexion, and 20 degrees left lateral flexion. Dr. Helsten noted appellant's diagnoses of lumbar strain, a herniated disc, and sciatica. He indicated that appellant was currently not working and he opined that appellant could perform light-duty work.

[3] A July 16, 2019 e-mail from the employing establishment indicated that appellant had applied for retirement, effective May 30, 2019.

In a July 23, 2019 patient pain drawing signed by Dr. Helsten, appellant indicated that he was off of work and was experiencing severe pain which he rated a 6 out of 10. He also noted that he was using his TENS unit for 30 minutes per day, and that it relieved his pain by 10 percent. Appellant reported that he experienced pain in his lower back, buttocks, and thighs.

A June 23, 2019 duty status report (Form CA-17) by Dr. Keelen listed appellant's date of injury as August 1, 1998. His clinical findings included back pain and leg paralysis, and he listed appellant's diagnosis as chronic pain syndrome. Dr. Keelen advised appellant not to return to work. He listed appellant's work restrictions as continuously lifting a maximum of 10 pounds and intermittently lifting a maximum of 15 pounds for two hours per day, sitting and standing for two hours per day, simple grasping, fine manipulation including keyboarding, reaching above the shoulder, exposure to temperature extremes, high humidity, chemicals, fumes/dust, and noise for four hours per day, and no walking, climbing, kneeling, bending/stooping, twisting, pushing, or pulling. Dr. Keelen additionally noted that appellant walked with a cane due to his leg paralysis and frequently changed positions. He related that appellant required medication management for nerve damage and was unable to drive due to his medication.

On August 9, 2019 appellant requested reconsideration of the July 23, 2019 decision. In an accompanying statement, he indicated that Dr. Helsten's office was located 37 minutes further away from his home than Dr. Keelen's office, and that the extra travel caused increased pain and stiffness. Appellant asserted that while Dr. Keelen was a certified anesthesiologist and pain management specialist, Dr. Helsten was a family practice physician who did not practice pain management. He related that OWCP had approved all of his appointments and procedures with Dr. Keelen, and he indicated that he felt that Dr. Keelen was best suited to serve as his treating physician.

OWCP received additional medical evidence. In an August 9, 2019 report, Dr. Helsten indicated that appellant presented with back pain radiating down into the toes of his right foot. He listed appellant's date of injury as August 1, 1998 and related that a physical examination revealed severe tenderness in appellant's lower back and a range of motion of 30 degrees flexion, 10 degrees extension, 20 degrees right lateral flexion, and 20 degrees left lateral flexion. Dr. Helsten noted appellant's diagnoses of lumbar strain, herniated disc, and sciatica. He indicated that appellant could perform light-duty work permanently.

In an August 9, 2019 patient pain drawing signed by Dr. Helsten, appellant indicated that he was off of work and was experiencing severe pain which he rated a 7 out of 10. He stated that he was using his TENS unit for 30 minutes per day, and that it relieved his pain by 20 percent. Appellant related that he experienced pain in his lower back, buttocks, and right lower leg and foot.

In an August 9, 2019 Form OWCP-5c, Dr. Helsten indicated that appellant was not capable of performing his usual job without restrictions because he had difficulty walking, bending, and lifting. He related that appellant could work an eight-hour day with permanent physical restrictions. Dr. Helsten stated that appellant had not reached MMI and was capable of working at the sedentary, light, and medium strength levels. He listed appellant's restrictions as including squatting, sitting, and walking for up to two hours, pushing, pulling, and lifting a maximum of 40 pounds for up to two hours, and no climbing.

By decision dated October 30, 2019, OWCP denied modification.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[4] It has authority under 5 U.S.C. § 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[5] In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.[6]

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.[7]

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.[8] 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.[9] 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.[10]

[4] *E.W*, Docket No. 19-1711 (issued July 29, 2020); *Bernadine P. Taylor,* 54 ECAB 342 (2003).

[5] 5 U.S.C. § 8106(c)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (the claims examiner (CE) must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2), and allow the claimant 30 days to submit his or her reasons for refusing or abandoning the position. If the claimant submits evidence and/or reasons for refusing or abandoning the position, the CE must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid); *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones,* 52 ECAB 190, 191 (2000); *see also Maggie L. Moore,* 42 ECAB 484, 488 (1991), *reaff'd on recon.,* 43 ECAB 818, 824 (1992).

[6] 20 C.F.R. § 10.500(b).

[7] *Supra* note 5 at Chapter 2.814.5a (June 2013).

[8] *E.W., supra* note 4; *Joan F. Burke,* 54 ECAB 406 (2003); *see Robert Dickerson,* 46 ECAB 1002 (1995).

[9] 20 C.F.R. § 10.517(a); *Ronald M. Jones, supra* note 5.

[10] *Id*. at § 10.516.

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 21, 2019, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

In a letter dated July 12, 2019, OWCP advised appellant that the May 11, 2018 modified job offer remained available, and was suitable and in accordance with the medical restrictions set forth in Dr. Helsten's December 21, 2016 and March 8, 2018 reports. It indicated that the case would be held open for 30 days acceptance of the position or submission of additional evidence. OWCP further advised appellant that if he failed to accept the position or provide adequate reasons for refusing the job offer, his right to compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2). A July 17, 2019 compensation termination sheet indicated that it terminated appellant's compensation, effective July 21, 2019, because "an 8106(c) was issued."

As stated above, to justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[11] It did not issue a final termination decision, showing that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment, and that he was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position was not suitable. Rather, OWCP summarily terminated appellant's compensation on July 17, 2019, just five days after it provided the July 12, 2019 letter to appellant. As such, the Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 21, 2019, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT -- ISSUE 2

When the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval.[12] In all other instances, however, the employee must submit a written request to OWCP with his or her reasons for desiring a change of physician.[13]

Any transfer of medical care should be accomplished with due regard for professional ethics and courtesy. No transfer or termination of treatment should be made unless it is in the best interest of the claimant and the government. Employees who want to change attending physicians must explain their reasons in writing and OWCP must review all such requests. OWCP may approve a change when the original treating physician refers the claimant to another physician for further treatment; the claimant wants to change from the care of a general practitioner to that of a specialist in the appropriate field or from the care of one specialist to another in the appropriate

[11] *Supra* note 5.

[12] 20 C.F.R. § 10.316(a).

[13] *Id*.

field; or the claimant moves more than 50 miles from the original physician (since OWCP has determined that a reasonable distance of travel is up to a roundtrip distance of 100 miles). It must use discretion in cases where other reasons are presented.[14]

The Board has recognized that OWCP, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from her injury to the fullest extent possible in the shortest amount of time. It, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to show merely that the evidence could be construed to produce a contrary conclusion.[15]

ANALYSIS -- ISSUE 2

The Board finds that OWCP abused its discretion in denying appellant's request to change his treating physician.

The December 21, 2016 medical report from Dr. Helsten, who is Board-certified in family medicine and appellant's treating physician, referred appellant to Dr. Keelen, who is Board-certified in pain management. A May 22, 2018 medical report by Dr. Helsten also referred appellant to Dr. Keelen for pain management.

As previously noted, when the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval.[16] Both the December 21, 2016 and May 22, 2018 medical reports by Dr. Helsten, appellant's attending physician, indicate that he referred appellant to Dr. Keelen, Board-certified in pain management, for further medical care. Therefore, the Board finds that OWCP abused its discretion in denying appellant's request to change his treating physician.

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 July 21, 2019, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2). The Board also finds that OWCP abused its discretion in denying appellant's request to change his treating physician.

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.6(c)(1) (February 2012).

[15] *K.T.*, Docket No. 15-1202 (issued August 19, 2015); *see T.R.*, Docket No. 14-1514 (issued January 8, 2014); *R.G.*, Docket No. 12-0811 (issued June 15, 2012); *Daniel J. Perea*, 42 ECAB 221 (1990).

[16] *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 30 and July 23 and 17, 2019 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: February 26, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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