

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

P.C., Appellant

and

**U.S. POSTAL SERVICE, SUMMERALL
STATION, Aiken, SC, Employer**

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**Docket No. 20-0935
Issued: February 19, 2021**

Appearances:

*Paul H. Felser, 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 25, 2020 appellant, through counsel, filed a timely appeal from a September 27, 2019 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 27, 2019 decision, OWCP received 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective January 9, 2018, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 8, 2003 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 5, 2003 she sustained a back injury when her vehicle was struck by another motor vehicle while in the performance of duty. She stopped work that day. OWCP accepted the claim for lumbar spinal stenosis, displacement of lumbar intervertebral disc without myelopathy, and sacroiliitis. It paid appellant wage-loss compensation on the supplemental rolls as of May 30, 2003 and on the periodic rolls, as of May 31, 2015.

At the request of OWCP, appellant underwent several second opinion examinations. A November 9, 2015 statement of accepted facts (SOAF) reported the accepted conditions as lumbar spinal stenosis, herniated lumbar discs, and sacroiliitis. It also noted that under closed OWCP claim, OWCP File No. xxxxxx633, date of injury August 2, 2002, a left hip strain had been accepted. This SOAF noted that it superseded all previously issued SOAFs. No other medical conditions, preexisting, concurrent or nonwork related, were mentioned.⁴

In a report dated December 1, 2015, second opinion physician Dr. John B. Bieltz, an osteopath specializing in orthopedic surgery, reviewed the November 9, 2015 SOAF and the medical record. He noted that appellant was in a pain management program and took multiple medications. Dr. Bieltz diagnosed lumbar spondylosis and degenerative disc disease with chronic pain and lumbar spinal stenosis. He opined that appellant's diabetes and obesity aggravated her chronic back issue. Dr. Bieltz also found that her subjective complaints significantly outweighed her objective findings. He opined that appellant could perform sedentary work for no more than four hours per day. Dr. Bieltz noted that he was concerned with the amount of medication she was on and whether she would be able to perform cognitive-type activities. In his December 1, 2015 work capacity evaluation (Form OWCP-5c), he opined that appellant had reached maximum medical improvement and that she had permanent restrictions of sitting no more than three to four hours, pushing, pulling and lifting no more than 10 pounds, and operating a motor vehicle no more than one to two hours a day. He further opined that she should not perform any reaching above shoulder, twisting, bending/stooping, squatting, kneeling, or climbing activities.

In a February 22, 2016 letter, OWCP requested appellant's treating physician, Dr. W. Blane Richardson, a Board-certified internist, comment on Dr. Bieltz's second opinion report. On March 2, 2016 Dr. Richardson reviewed the report from Dr. Bieltz and concurred with his assessment of appellant's work capacity.

In his most recent report of record dated May 3, 2016, Dr. Richardson continued to prescribe medication for appellant's lumbar radiculitis, lumbar spondylosis, and degenerative disc disease cervical spine conditions. He also noted that appellant was hesitant to have a spinal cord stimulator implanted. The record reflects that OWCP had previously authorized Dr. Richardson's

⁴ A March 7, 2013 SOAF indicated preexisting or concurrent medical conditions of diabetes mellitus.

request for appellant to undergo a psychological evaluation for a neurostimulator. In a November 4, 2015 report, Dr. M. Kevin Turner, a clinical psychologist, opined that appellant was a good candidate for placement of a neurostimulator. He diagnosed chronic pain disorder and persistent depression.

OWCP referred appellant to Dr. Mary D. Hughes, a neurologist, for a second opinion evaluation. It directed Dr. Hughes to use the November 9, 2015 SOAF as the only factual framework for her medical opinion. In her October 31, 2016 report, Dr. Hughes opined that appellant had ongoing residuals from the April 5, 2004 employment injury, but indicated that her subjective complaints were not consistent with objective findings. She opined that appellant was capable of performing sedentary work for up to four hours per day with a 15-pound lifting limit and with frequent breaks to allow for position changes.

In a February 21, 2017 report, Dr. Mark D. Netherston, a Board-certified anesthesiologist, diagnosed several lumbar spine conditions and Type 2 diabetes.

On March 7, 2017, OWCP expanded its acceptance of the claim to include a generalized anxiety disorder condition and referred appellant for a second opinion evaluation with Dr. Chiriyankandath S. Sebastian, a psychiatrist, to determine appellant's disability status. In its March 7, 2017 referral letter, OWCP indicated that the November 9, 2015 SOAF must be used as the factual framework in addressing its questions regarding appellant's ability to work. It also noted that appellant's accepted work-related medical conditions were: lumbar spinal stenosis, lumbar herniated discs, sacroiliitis, and generalized anxiety disorder. Specific questions regarding the generalized anxiety disorder condition were posed.

In an April 15, 2017 report, Dr. Sebastian opined that appellant's accepted generalized anxiety disorder condition had resolved. He advised that appellant suffered from nonwork-related major depressive disorder, recurrent, moderate severity. Dr. Sebastian noted that while moderate depression can impair productivity, it did not render appellant totally disabled from work. From a psychiatric standpoint, he opined that appellant was capable of regular-duty work for at least four hours a day with no restrictions based on any mental health issues.

On October 25, 2017 the employing establishment offered appellant a modified city carrier position on October 25, 2017.⁵ The duties entailed: answering the telephone with headset, package search and location duties, Enterprise Customer Care (ECC) case management and Webcam duties. The physical requirements entailed: sitting for three hours per shift, standing for one hour per shift and lifting occasionally 10 to 15 pounds. The work hours were from 8:00 a.m. to 12:00 p.m. with off days of Sundays and rotating. The November 3, 2017 cover letter from the employing establishment indicated that the revised modified job assignment was permanently available to appellant as long as medically indicated.

In a November 13, 2017 letter, counsel objected to the offered position and set forth several arguments. He also noted that surgical intervention was pending for her bilateral knee conditions.

⁵ A previous job offer dated June 29, 2017 as a modified city carrier was deemed invalid.

By letter dated December 5, 2017, OWCP advised appellant that the position offered was suitable in accordance with the medical limitations provided by Dr. Hughes on October 18, 2016.⁶ It notified her that, if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to 5 U.S.C. § 8106(c)(2), her right to compensation for wage loss or a schedule award would be terminated. OWCP afforded appellant 30 days to respond. No response was received

On January 9, 2018 the employing establishment confirmed that the job offer remained open and available for appellant.

By decision dated January 9, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2) , effective that day. It accorded the weight of the medical evidence to Dr. Hughes' October 18, 2016 opinion that appellant was capable of working up to four hours per day in a sedentary capacity.⁷

On January 23, 2018 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He subsequently changed his request to a review of the written record.

Evidence submitted included a December 18, 2017 note from the practice of Dr. R. Bauer Vaughters, III, a Board-certified internist, that appellant was scheduled for surgery on January 10, 2018 and a January 15, 2018 laboratory order and clinical summary of appellant's medications from Dr. Vaughters.

By decision dated July 23, 2018, an OWCP hearing representative affirmed the January 9, 2018 decision. He found that the position was medically and vocationally suitable and was reasonably available.

On July 22, 2019 appellant, through counsel, requested reconsideration. He continued to argue that the offered position was not medically suitable based on the entirety of appellant's medical conditions. Counsel additionally argued that Dr. Hughes' report dated October 31, 2016 was stale as it was almost a year old at the time of the October 25, 2017 job offer. No further evidence was received.

By decision dated September 27, 2019, OWCP denied modification of the July 23, 2018 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁸ 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

⁶ It noted that Dr. Hughes' report was the most recent assessment on file as there were no recent assessments from appellant's treating physicians within the past 12 months.

⁷ OWCP noted that appellant's treating physician had not commented on her work capacity in the past 18 months.

⁸ *T.M.*, Docket No. 18-1368 (issued February 21, 2019); *Linda D. Guerrero*, 54 ECAB 556 (2003).

employee is not entitled to compensation.⁹ To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.¹⁰ 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.¹¹

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 by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.¹² Section 10.516 provides 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 its 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. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.¹³

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.¹⁴ All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁵

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹⁶ OWCP's procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹⁷

⁹ 5 U.S.C. § 8106(c)(2); *see J.K.*, Docket No. 19-0064 (issued July 16, 2020); *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Y.A.*, 59 ECAB 701 (2008).

¹¹ *J.K.*, *supra* note 9; *Joan F. Burke*, 54 ECAB 403 (2003).

¹² 20 C.F.R. § 10.517(a); *J.S.*, Docket No. 19-1399 (issued May 1, 2020); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹³ *Id.* at § 10.516; *see S.M.*, Docket No. 19-1227 (issued August 28, 2020); *see Melvin James*, 55 ECAB 406 (2004).

¹⁴ *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.517(a).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a(4) (June 2013); *see J.K.*, *supra* note 9.

ANALYSIS

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 January 9, 2018, for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained lumbar spinal stenosis, displacement of lumbar intervertebral disc, without myelopathy, and sacroiliitis as a result of the April 5, 2003 employment injury. It subsequently expanded acceptance of the claim to include a generalized anxiety disorder.

On October 25, 2017 the employing establishment offered appellant a modified-duty letter carrier position consistent with Dr. Hughes' October 18, 2016 report. OWCP found that Dr. Hughes' report represented the weight of the medical evidence and established that the modified-duty position was suitable.

OWCP's procedures dictate that, when an OWCP medical adviser, second opinion specialist, or impartial medical examiner renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁸

The Board finds that OWCP provided Dr. Hughes a deficient SOAF, which did not identify the entirety of appellant's diagnosed conditions.¹⁹

As previously noted, all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.²⁰ OWCP did not update the November 9, 2015 SOAF to include the accepted generalized anxiety disorder condition. Furthermore, appellant has other preexisting or concurrent medical conditions that were not identified in the SOAF. For example, in his December 1, 2015 report, Dr. Bieltz reported that appellant had Type 2 diabetes and obesity, which aggravated her chronic back conditions, and OWCP had previously acknowledged the diabetic condition.²¹ In his November 4, 2015 report, Dr. Turner, diagnosed chronic pain disorder and persistent depression. Prior to the suitable work termination the record also contained evidence that appellant had bilateral knee conditions.

Based on the evidence of record, the Board finds that OWCP improperly determined that the October 25, 2017 modified letter carrier position offered to appellant constituted suitable work within her limitations and capabilities. The record does not substantiate that OWCP prepared a proper SOAF and properly considered the entirety of her medical conditions before terminating her wage-loss compensation and entitlement to a schedule award.²² Consequently, OWCP did not

¹⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see S.C.*, Docket No. 18-1011 (issued March 23, 2020).

¹⁹ *See S.M.*, Docket No. 19-1227 (issued August 28, 2020); *see also N.W.*, Docket No. 16-1890 (issued June 5, 2017).

²⁰ *See supra* note 15.

²¹ *See supra* note 4.

²² *S.M.*, Docket No. 19-1227 (issued August 28, 2020).

meet its burden of proof to justify the termination of appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c)(2).

CONCLUSION

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 January 9, 2018, as it improperly determined that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 19, 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