

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

C.C., Appellant)	
)	
and)	Docket No. 13-1964
)	Issued: April 8, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Greenville, SC, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 26, 2013 appellant, through her attorney, filed a timely appeal from a July 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation on the grounds that she refused suitable work.¹ Pursuant to Federal Employees' Compensation Appeals Act² (FECA) and 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective March 14, 2011 on the grounds that she refused an offer of suitable work.

¹ The record also contains a May 30, 2013 decision regarding whether a prescription was causally related and medically necessary due to the accepted work injury. Counsel did not appeal from this decision.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 1, 1999 appellant then a 40-year-old, rural carrier, was injured in an automobile accident in the performance of duty. She stopped work on October 1, 1999. OWCP accepted the claim for muscle strain, unspecified site; lower body muscle strain; low back strain; cervical whiplash and contusion to the head. It later accepted fibromyalgia. Appellant received wage-loss compensation and was placed on the periodic rolls.

In a report dated October 31, 2009, Dr. Ronald Januchowski, a Board-certified family practitioner and treating physician, noted that appellant reached maximum medical improvement and was capable of returning to work. He indicated that she could perform light office duties for eight hours a day. Dr. Januchowski provided restrictions to include: standing for no more than four hours; lifting, pushing, pulling, squatting, kneeling and climbing for no more than eight hours per day and a 20-pound weight restriction.

On January 12, 2010 OWCP referred appellant for vocational rehabilitation services, based upon the permanent restrictions provided by Dr. Januchowski.

Appellant was provided with a modified rural carrier job offers on June 21, 2010. She refused to accept the offer and noted that she did not believe that she was capable of working in the position. Appellant also indicated that her fibromyalgia medication prevented her from performing the position.

By letter dated November 12, 2010, OWCP advised appellant that the modified position had been found to be suitable to her capabilities and was currently available. It noted that the treating physician had examined her and provided work restrictions that were consistent with the offered position. Appellant was advised that she should accept the position or provide an explanation for refusing the position within 30 days. OWCP informed her that if she failed to accept the offered position or failed to demonstrate that the failure was justified, her compensation would be terminated.

OWCP subsequently received additional medical reports from Dr. Geera Desai, a psychiatrist, and Dr. Geneva Hill, a Board-certified internist to whom appellant was referred by Dr. Januchowski. In an August 27, 2010 report, Dr. Hill diagnosed fibromyalgia, insomnia, a rash and recommended medication. The reports did not address appellant's ability to work.

On December 8, 2010 appellant refused the offered position. She stated that her fibromyalgia condition and her medication precluded her from work.

On January 7, 2011 the employing establishment again offered appellant a permanent position as a modified rural carrier associate, with physical requirements incorporating the medical restrictions provided by Dr. Januchowski. They included: standing for no more than four hours; lifting, pushing, pulling, squatting, kneeling and climbing for no more than eight hours per day and a 20-pound weight restriction.

By letter dated January 19, 2011, OWCP advised appellant of the suitability of the modified position. Appellant was advised that she should accept the position or provide an explanation for refusing the position within 30 days. OWCP informed her that if she failed to

accept the offered position and failed to demonstrate that the failure was justified, her compensation would be terminated.

On January 24, 2011 appellant refused the offered position. She contended that she could not perform the offered position because of her fibromyalgia and the medication that she took for her condition.

In a March 14, 2011 decision, OWCP terminated appellant's entitlement to monetary compensation benefits, effective March 14, 2011, on the basis that she refused suitable work. It found that the position was suitable and in accordance with the work restrictions by her treating physician.

On April 4, 2011 appellant requested a telephonic hearing, which was held on August 9, 2011.

By decision dated October 24, 2011, the hearing representative affirmed the March 14, 2011 decision.

On December 4, 2011 appellant requested reconsideration. She provided a December 29, 2011 report from Dr. Scott Klosterman, an osteopath Board-certified in family medicine, who stated that she was limited in overhead reaching due to her fibromyalgia and totally disabled due to her depression with somatic complaints.

By decision dated February 13, 2012, OWCP denied modification of the October 24, 2011 OWCP decision.

On February 4, 2013 appellant's attorney requested reconsideration asserting that the termination for refusal of suitable work was erroneous. His arguments included whether OWCP accepted the correct diagnoses, whether Dr. Januchowski's work restrictions were stale such that the employer's job offer was not valid and that she had other conditions such as insomnia, memory concentration issues and foot conditions, which were not considered. OWCP also received additional medical evidence.

By decision dated July 5, 2013, OWCP denied modification of the February 13, 2012 decision.

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."³ However, to justify such termination, OWCP must show that the work offered was suitable.⁴ An employee who refuses or neglects to work after suitable work has been offered to he or she has the burden of showing that such refusal to work was justified.⁵

³ *Id.* at § 8106(c)(2).

⁴ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁵ 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

OWCP 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. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.⁶

ANALYSIS

The Board finds that OWCP denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c). When OWCP informed her in its January 19, 2011 notification that it had determined the modified rural carrier associate position offered by the employing establishment to be suitable, it informed her of a preliminary determination. By inviting appellant to write and give reasons for not accepting, OWCP acknowledged that its determination was not yet final and that a reasonable explanation would justify her refusal and result in the continuation of her 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.⁷ If a claimant refuses the employment offered and provides such a reason, OWCP will consider her refusal justified and will continue her compensation for disability.⁸

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 appellant an opportunity to accept or refuse an offer of suitable work. Only after it has finalized its decision on suitability can OWCP notify her that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.⁹

In this case, OWCP did not afford appellant an opportunity to accept the position offered after making a final determination that the position was suitable. It therefore denied her a reasonable opportunity to accept an offer of "suitable" work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of 5 U.S.C. § 8106(c).¹⁰ She noted her reasons for her refusal to accept the offered position within 30 days of January 19, 2011, the date that OWCP advised her that she had 30 days to accept the offered position or provide justification for not accepting it. On March 14, 2012 OWCP issued a decision in which it determined that appellant had refused an offer of suitable work. In issuing this decision, it implicitly determined that the evidence submitted by her in support of her refusal to accept the offered position was unacceptable and in doing so it finalized its preliminary decision on suitability. OWCP terminated appellant's compensation for disability, thereby

⁶ *Id.* at § 10.516.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5 (June 2013).

⁸ *Id.*

⁹ See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ A.W., Docket No. 13-1735 (issued December 17, 2013).

denying her an opportunity to accept the position after determining it to be suitable. As noted, OWCP's regulations provide that, if the employee presents reasons to counter OWCP's suitability finding and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that she has 15 days in which to accept the offered work without penalty.¹¹ OWCP did not notify appellant, before terminating her compensation, that it found her reasons for refusal to be unacceptable and allow her 15 days to accept the position without penalty.

For these reasons, OWCP improperly terminated appellant's entitlement to wage-loss compensation effective March 14, 2011 on the grounds that she refused an offer of suitable work.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective March 14, 2011 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the July 5, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 8, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹¹ See *supra* note 5.