United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 16-1275**
U.S. POSTAL SERVICE, POST OFFICE, Fort Myers, FL, Employer	)	**Issued: September 27, 2017**

Appearances:
Joanne Marie Wright, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 3, 2016 appellant, through his representative, filed a timely appeal from a January 13, 2016 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.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective April 10, 2015 pursuant to 5 U.S.C. § 8106(c)(2).

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[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.*

FACTUAL HISTORY

OWCP accepted that on July 27, 2011 appellant, then a 57-year-old city letter carrier, sustained a lumbar sprain/strain, mid-back contusion, contusion of ribs, and chest wall contusion when he fell and struck the bumper of his vehicle. Appellant's physicians restricted him to sedentary duty with lifting, carrying, pulling, and pushing limited to 10 pounds. He did not return to work. The employing establishment confirmed that there was no work available within his restrictions as of September 9, 2011. Appellant received wage-loss compensation on the daily rolls beginning September 10, 2011, and on the periodic rolls beginning November 20, 2011. He remained under medical care.

On December 19, 2011 Dr. Dean D. Lin, an attending Board-certified neurosurgeon, found that appellant's continuing lumbar myofascial strain with mild spondylosis remained completely related to the accepted injuries. Appellant remained off work.

To determine appellant's work capacity, OWCP obtained a second opinion on May 12, 2012 from Dr. William Dinenberg, a Board-certified orthopedic surgeon, who opined that the accepted lumbosacral strain remained active and partially disabling. Dr. Dinenberg opined that appellant could perform full-time sedentary duty, with lifting, pushing, and pulling limited to 10 pounds.

In a July 5, 2012 report, Dr. Vidya P. Kini, an attending Board-certified physiatrist, diagnosed chronic low back pain with lumbar radiculopathy secondary to sacroiliac dysfunction from the accepted injury superimposed on spondylosis, and possible diabetic neuropathy. She found appellant able to perform full-time sedentary duty, with lifting limited to 10 pounds.

Dr. Neil R. Schultz, an attending Board-certified physiatrist, noted that a November 10, 2011 magnetic resonance imaging (MRI) scan showed multilevel chronic degenerative disc disease without significant stenosis. He diagnosed a back contusion and lumbar sprain. Dr. Schultz prescribed physical therapy, in which appellant participated through March 2013.

On April 12, 2013 Dr. Schultz found that appellant was approaching maximum medical improvement and was able to perform full-time sedentary work, with lifting, pulling, and pushing limited to 10 pounds. In an April 25, 2013 report, Dr. Schultz related that appellant had increased lumbar symptoms, and diagnosed a possible disc herniation. On May 16, 2013 he reviewed appellant's prescription medications, which included Tramadol and Hydrocodone. Dr. Schultz diagnosed lumbar radiculopathy. He found appellant able to perform full-time sedentary duty as of May 23, 2013.

OWCP obtained a second opinion on July 9, 2013 from a Dr. Fanourios L. Federigos, a Board-certified orthopedic surgeon. Dr. Federigos reviewed the medical record and a statement of accepted facts. On examination, he found lumbosacral paravertebral tenderness bilaterally, and decreased lumbar motion. Dr. Federigos diagnosed a lumbosacral sprain/strain, degenerative disc disease with spondylosis, narrowing of the right L4-5 foramina, and persistent muscle spasticity. He opined that appellant had persistent fasciitis due to the July 27, 2011 injury, which also exacerbated lumbar spondylosis and L4-5 foraminal stenosis. Dr. Federigos found that the accepted rib contusion had resolved. He found that appellant had attained maximum medical

improvement. Dr. Federigos permanently restricted appellant to sedentary duty, with lifting limited to 10 pounds and for no more than two hours a day. Appellant was not to twist, bend, or stoop. He could sit for up to five hours a day.

In a July 18, 2013 report, Dr. Schultz opined that appellant was "unable to drive due to sedation and drowsiness from the medications that he is prescribed," and could not operate a motor vehicle to or from work, or while working. He limited bending, stooping, and twisting to two hours a day. Dr. Schultz explained on October 9, 2013 that appellant was taking prescribed Meloxicam, Gabapentin, Cyclobenzaprine, Tramadol, and Hydrocodone. He noted that Gabapentin caused significant drowsiness and impaired concentration, and would negatively affect appellant's ability to operate a motor vehicle. Appellant had to take Hydrocodone during the workday, which caused significant drowsiness and dizziness. Dr. Schultz noted that appellant had not driven since May 2013 due to "significant drowsiness and poor concentration." He opined that appellant was "not capable of driving to any degree whatsoever," but could consider taking public transportation. Dr. Schultz submitted periodic reports through May 8, 2014 finding appellant able to perform full-time sedentary duty. He noted that appellant had advised the department of motor vehicles that he could not drive due to impairment from prescription narcotics and had surrendered his driver's license. Appellant remained off work.

Dr. Schultz noted on May 25, 2014 that the accepted injuries remained present and disabling. He diagnosed a lumbar sprain, mid-back contusion, lumbar radiculopathy, and L3-4, L4-5, and L5-S1 disc bulges. Dr. Schultz permanently restricted appellant to full-time sedentary duty, with lifting, pulling, and pushing up to 10 pounds. He reiterated this opinion through November 2014.

On November 4, 2014 the employing establishment offered appellant a permanent assignment as a modified mail processing clerk at Page Field Station in Fort Myers, working five days a week with Sunday and Thursday off. The position was available beginning November 8, 2014, with a start date of November 15, 2014. The job required occasional lifting, pushing, and pulling up to 10 pounds, with sedentary clerical duties. Appellant rejected the offer on November 19, 2014, contending that it was "not suitable."

In a January 15, 2015 letter, OWCP advised appellant that the offered modified mail processing clerk position was found to be suitable work in accordance with the medical limitations prescribed by Dr. Schultz. The position remained open and available to appellant. OWCP advised him of the penalty provisions under FECA for refusing an offer of suitable work and afforded him 30 days to either accept the position or provide good cause for his refusal.

In a January 16, 2015 report, Dr. Schultz noted that appellant took prescribed Meloxicam, Topiramate, Tramadol ER, Cyclobenzaprine, and Hydrocodone. He found appellant able to perform full-time sedentary duty. Dr. Schultz opined that the medications decreased appellant's pain levels and improved his daily functioning.

Appellant contended in a January 31, 2015 letter that the offered position was not suitable work as he was unable to drive due to medication side effects. He explained that he could not get to work without driving, as the offered position was in Fort Myers and he lived in Cape Coral, a 12- to 13-mile distance. Appellant contended that he lived in an area where the closest

bus stop was 1.1 miles from his home and that he could not walk that distance. Also, it was .9 miles from the nearest bus stop to the employing establishment, and he would have to change buses three times, with a 90-minute commute each way. The bus schedule would also cause appellant to be either early or late for the start of his shift. Appellant asserted that side effects from Hydrocodone, Topiramate, Tramadol and Cyclobenzaprine impaired his daily functioning such that he could not leave his home unaccompanied due to falling twice a week.

In a March 3, 2015 letter, the employing establishment advised that appellant had "retired on regular retirement" rather than accept the offered position.

In a March 17, 2015 letter, OWCP advised appellant that his reasons for refusing the offered position were not valid and that he had 15 days to accept and report to the position or his entitlement to wage-loss compensation and schedule award benefits would be terminated. It noted that the offered position remained open and available to him.

On March 26, 2015 appellant accepted the offered modified position, but noted that he would not report for work because he had submitted an application for retirement. He elected to receive retirement benefits in preference to FECA benefits effective April 1, 2015.

By decision dated April 10, 2015, OWCP terminated appellant's wage-loss compensation and schedule award eligibility effective that day under 5 U.S.C. § 8106(c)(2), finding that he refused an offer of suitable work.

On April 27, 2015 appellant requested a telephonic oral hearing, which was held on November 10, 2015. At the hearing, appellant's representative contended that OWCP should have referred appellant for limited vocational rehabilitation to determine if transportation costs could be reimbursed as a vocational rehabilitation expense. She also contended that OWCP should have investigated whether the narcotic side effects would adversely impact his ability to perform the offered position safely. Appellant submitted additional evidence.

In April 10, 2015 reports, Dr. Schultz reiterated prior diagnoses and work restrictions. He noted that appellant was only being followed for medication management. Dr. Schultz explained that appellant would "not be able to return to his prior position as a city carrier in the future and his work status will be permanently restricted to sedentary capacity with infrequent lifting, pulling, and pushing up to 10 pounds." He opined that the prescribed medications reduced appellant's pain symptoms and improved his ability to perform activities of daily living and work activities. Dr. Schultz affirmed that appellant would perform "[f]ull[-]time sedentary duty with occasional lifting, carrying, pulling, and pushing up to 10 pounds."

In a July 2, 2015 report, Dr. Schultz noted that appellant had increased dizziness during the past month when rising from a seated position. He opined that appellant's dizziness was likely orthostatic, that he might need better regulations of his blood pressure medications. Dr. Schultz increased appellant's Hydrocodone from 5 milligrams to 10 milligrams. He found appellant's orthopedic condition unchanged through December 21, 2015.

By decision dated January 13, 2016, an OWCP hearing representative affirmed the April 10, 2015 termination decision, finding that the medical evidence failed to establish that appellant could not travel to and from work or perform the duties of the offered position. He

noted that while appellant contended that taking a bus or taxi to and from work would be difficult or expensive, he did not contend that he was medically unable to do so. The hearing representative further found that OWCP was not obligated to refer appellant for limited vocational rehabilitation to investigate his transportation options as he had refused to return to work. However, had appellant agreed to return to work, OWCP would have investigated if taxi fare to and from work could be covered as a vocational rehabilitation expense.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered:

> "A partially disabled employee who -- refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation."

OWCP procedures provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee including the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[3] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.

The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed as it may bar entitlement to future wage-loss compensation.[4] 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 by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[5] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a final determination is made with respect to termination of entitlement to compensation.[6]

An acceptable reason, if supported by medical evidence, for refusing an offer of suitable work can be an inability to travel to work.[7] OWCP's procedures provide that the inability to travel to work is an acceptable reason if the inability is because of residuals of the employment

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

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

[5] 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

[6] *Id.* at § 10.516.

[7] *C.W.*, Docket No. 10-2074 (issued May 23, 2011); *Mary E. Woodard*, 57 ECAB 211 (2005); *Glen L. Sinclair*, 36 ECAB 664 (1985).

injury.[8] This holding is consistent with the Board's holding that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.[9]

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain/strain, mid-back contusion, contusion of ribs, and chest wall contusion when he fell and struck the bumper of his vehicle on July 27, 2011. Appellant stopped work on the date of injury and did not return. He received total disability compensation on the daily and periodic rolls beginning on September 10, 2011.

Dr. Schultz, an attending Board-certified physiatrist, held appellant off work. He prescribed narcotic medication to address ongoing symptoms of the accepted injuries. Dr. Schultz found that appellant was medically able to perform full-time sedentary work, as of May 23, 2013. On July 9, 2013 OWCP obtained a second opinion from Dr. Federigos, a Board-certified orthopedic surgeon, who concurred that the accepted lumbar strain continued to be active and partially disabling. Dr. Federigos agreed with Dr. Schultz that appellant could perform full-time sedentary duty with lifting, pulling, and pushing limited to 10 pounds.

In reports from July 18, 2013 through November 2014, Dr. Schultz noted that appellant could no longer drive due to drowsiness and impaired concentration from narcotic medications prescribed for the accepted injury, and that appellant had surrendered his driver's license as of March 12, 2014. On October 9, 2013 he found appellant capable of taking public transportation.

On November 4, 2014 the employing establishment offered appellant a permanent position as a modified mail processing clerk. The sedentary position involved clerical duties, requiring occasional lifting, pulling, and pushing up to 10 pounds. OWCP properly found that these duties conformed to the limitations given by Dr. Schultz and Dr. Federigos. The position was approximately 13 miles from appellant's residence, well within his commuting area.

Following OWCP's determination that the position was suitable, appellant provided his January 31, 2015 letter explaining that the nearest bus stop was 1.1 miles from his home, and the bus stop closest to the employing establishment was .9 miles away. He noted that the buses ran at times inconvenient to the start and end of his work shift. The Board has also held that an inability to travel to work should be considered as part of the suitability determination itself, independent of a claimant's acceptance or rejection of the job.[10]

Neither Dr. Schultz nor Dr. Federigos limited the physical activities needed for appellant to utilize public transportation, including walking, sitting, being outdoors at night, or in or out of hot or cold environments. Dr. Schultz opined that appellant should consider public transportation. Therefore, their opinions do not preclude appellant from walking to and from a bus, or riding the bus, as he described in his January 31, 2015 letter. OWCP properly considered appellant's inability to drive, the proposed commuting distance, and his ability to take public

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[8] *Supra* note 3 at Chapter 2.814.5(a)(3) (June 2013). *See also Donna M. Stroud*, 51 ECAB 264 (2000).

[9] *Edward J. Stabell*, 49 ECAB 566 (1998).

[10] *Id.*

transportation in finding the offered modified mail processing clerk position was suitable work. Therefore, OWCP discharged its burden of proof to terminate compensation under section 8106(c) of FECA.[11]

On appeal appellant's representative cites to the Board's holdings in *C.W.*,[12] and *Mary E. Woodard*,[13] in contending that OWCP did not properly address appellant's inability to drive when determining whether the offered position was suitable work. In *C.W.*, the claimant was unable to drive due to side effects of prescribed narcotic medications. OWCP found an offered position to be suitable work, without addressing whether appellant was capable of commuting to and from work by a means other than driving. The present case can be distinguished from *C.W.* as appellant's attending physician found him medically able to use public transportation. OWCP considered this evidence as part of its suitability determination.

Similarly, the present case may be distinguished from *Woodard*, where the Board found that OWCP mischaracterized the claimant's refusal of a night shift position due to a medical inability to drive at night as a personal desire to work a different schedule. The Board held that OWCP failed to consider the medical aspect of her claim in finding the position suitable work. In the present case, OWCP did review the medical evidence, which demonstrated that appellant could commute using public transportation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation benefits effective April 10, 2015 pursuant to 5 U.S.C. § 8106(c)(2).

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[11] *Cf. B.S.*, Docket No. 09-1067 (issued February 2, 2010) (the Board found that OWCP did not meet its burden of proof to terminate the claimant's compensation under 5 U.S.C. § 8106(c) because her attending physician restricted her to driving no more than four hours a day, whereas the offered position required a six-hour commute); *R.F.*, Docket No. 15-0506 (issued August 12, 2016) (the Board reversed OWCP's termination of the claimant's compensation benefits under 5 U.S.C. § 8106(c) because there was a conflict of medical opinion at the time of the termination as to whether the claimant was unable to drive due to side effects from prescribed narcotic medication); *L.D.*, Docket No. 12-0816 (issued April 9, 2013) (the Board reversed OWCP's termination of appellant's compensation benefits under 5 U.S.C. § 8106(c), finding OWCP failed to consider a driving limitation in determining whether an offered position was suitable work).

[12] Docket No. 10-2074 (issued May 23, 2011).

[13] 57 ECAB 211 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 13, 2016 is affirmed**.**

Issued: September 27, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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