United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 16-1647**
	)	**Issued: September 12, 2017**
U.S. POSTAL SERVICE, MERCHANDISE MART POST OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 9, 2016 appellant filed a timely appeal from a May 19, 2016 merit decision 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.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation effective May 19, 2016 pursuant to 5 U.S.C. § 8106(c)(2), for refusing an offer of suitable work.

FACTUAL HISTORY

On May 12, 2010 appellant, then a 40-year-old sales service and distribution associate, injured her lower back when she lifted a package weighing approximately 15 pounds. OWCP accepted her traumatic injury claim (Form CA-1) for temporary aggravation of lumbar back sprain

[1] 5 U.S.C. § 8101 *et seq.*

and lumbar disc degeneration (OWCP File No. xxxxxx267).[2] Appellant stopped work on May 27, 2010 and received wage-loss compensation on the periodic rolls beginning July 11, 2010.

In an August 10, 2010 report, Dr. Harold T. Pye, a specialist in preventative medicine, advised that appellant was experiencing pain in her lower back and in her feet. He reported that June 10, 2010 lumbar spine x-rays showed moderate-to-severe spinal spondylolysis at L5 and L5-S1 and a May 28, 2008 magnetic resonance imaging (MRI) scan revealed a central disc herniation at L4-5, superimposed on circumferential disc bulge, and facet arthropathy and degenerative disc disease. In addition, Dr. Pye reported that a June 23, 2010 MRI scan reflected fluid in the posterior tibiotalar joint and synovitis in the first metatarsal-phalangeal joint of the right foot and a June 10, 2010 MRI scan showed osteochondral lesion in the medial talar dome of the left foot. He diagnosed bilateral plantar fascial fibromatosis, aggravation of displacement of lumbar intervertebral disc without myelopathy, bilateral foot tenosynovitis, left foot osteochondral lesion, and bilateral *pes planus*.

On or about October 16, 2010 appellant returned to work in a limited-duty capacity.

In an April 4, 2012 report, Dr. Francisco Espinosa, Board-certified in neurosurgery, advised that lumbar MRI scans showed an intact anatomical lordosis, disc desiccation and loss of the disc space height with end plate changes at both L4-5 and L5-S1. He noted that there were circumferential and left paracentral bulging discs at those levels which were causing lateral recess stenosis, greater on the left. Dr. Espinosa also reviewed an electromyogram/nerve conduction velocity (EMG/NCV) studies, the results of which were normal, with no evidence of radiculopathy. He diagnosed lumbar degenerative disc disease, causing bilateral lower extremity pain and paresthesias, as well as chronic low back pain. Dr. Espinosa recommended surgical decompression and laminectomy from L4 to S1 in order to decompress the nerves and improve her leg pain.

On May 10, 2012 Dr. Espinosa performed ameliorative lumbar surgery, a procedure which involved insertion of a spinal cord stimulator at level T9-10 and insertion of an Eon pulse generator in the left flank.

OWCP paid appellant wage-loss compensation beginning May 10, 2012 and placed her on the periodic compensation rolls effective August 26, 2012.[3]

In order to determine whether appellant was currently totally disabled and whether she could perform gainful employment, OWCP referred her for a second opinion examination with Dr. Allan M. Brecher, Board-certified in orthopedic surgery. In a report dated November 21, 2012, Dr. Brecher diagnosed a permanent aggravation of her preexisting degenerative lumbar disease and, based on appellant's pain and the results of her recent functional capacity evaluation

[2] Appellant has a previously accepted occupational disease claim (Form CA-2) for herniated disc at L5-S1, which arose on or about May 23, 1993 (OWCP File No. xxxxxx288). OWCP combined the case records of her two lumbar-related employment injuries and assigned File No. xxxxxx288 as the master file.

[3] Effective May 11, 2012, the Office of Personnel Management approved appellant's disability retirement.

(FCE), he opined that appellant was not capable of performing her usual job as a sales service and distribution associate and provided restrictions of lifting, pulling, or pushing over 25 pounds.

OWCP found a conflict in medical opinion between Dr. Brecher and appellant's treating physician, Dr. Pye.[4] In order to resolve this conflict, it referred appellant to Dr. G. Klaud Miller, Board-certified in orthopedic surgery, for an impartial medical examination.

In his February 14, 2014 report, Dr. Miller found that appellant was not totally disabled. He reported that appellant's EMG tests were negative and her FCE's documented minimum, but not maximum, levels of function. Other than some minor limitations of motion, Dr. Miller found her examination essentially normal. He advised that, other than mild bulging discs and stenosis, appellant's diagnostic studies showed no serous pathology. Dr. Miller opined that she was capable of returning to work full time with a maximum lifting limit of 25 pounds on a frequent basis.

On November 25, 2014 the employing establishment offered appellant a job as a modified sales services and distribution associate based on the restrictions set forth by Dr. Miller. The restrictions were no lifting more than 20 pounds for more than six hours per day; no standing, walking, simple grasping, and fine manipulation for more than six hours per day; no pushing or pulling for more than 20 pounds for more than six hours per day; and no sitting or reaching above the shoulder for more than two hours per day. The employing establishment advised appellant that the position was for five days per week, from 9:50 a.m. to 6:50 p.m. at the employing establishment. The position was available as of December 1, 2014 at an annual salary of $54,257.00 per year. The job entailed servicing customers at the window with letters, packages, mailing options, retrieving accountable mail, counting money, and clearing carriers of accountables.

Appellant rejected the job offer on December 2, 2014, indicating that she was not medically fit to perform the position.

By letter dated December 23, 2014, OWCP advised appellant that the modified manual distribution position was suitable and that, pursuant to 5 U.S.C. § 8106(c)(2), she had 30 days to either accept the job or provide a reasonable explanation for refusing the offer, otherwise her entitlement to compensation benefits would be terminated.

On December 30, 2014 appellant noted her refusal of the job offer because she had permanent restrictions which limited her to mainly sedentary duties which were no pushing, pulling, lifting, or carrying more than 15 to 20 pounds.

Appellant submitted the March 13, 2013 FCE report, received by OWCP on January 6, 2015, which provided a summary of her ability to perform numerous physical activities.

[4] On April 24, 2013 OWCP provided Dr. Pye a copy of Dr. Bercher's November 21, 2012 report, and asked that he clarify any discrepancies between the identified work restrictions and those identified by Dr. Pye in his most recent March 4, 2013 duty status report (Form CA-17). Dr. Pye did not respond to OWCP's April 24, 2013 request for clarification.

In a January 21, 2015 attending physician's report (Form CA-20), Dr. Baljinder S. Bathla, Board-certified in pain medicine, indicated that appellant was partially disabled, but was capable of working with restrictions of no lifting, pushing, pulling, or carrying over 15 to 20 pounds, no prolonged standing, walking, or bending, and frequent breaks.[5]

By decision dated January 23, 2015, OWCP terminated appellant's compensation benefits because she had refused an offer of suitable work. It found that the position offered by the employing establishment was within Dr. Miller's work restrictions and that the medical evidence established that she was capable of performing the modified sales services and distribution associate position. OWCP also noted that appellant had been afforded the requisite 30-day notice and opportunity to comply with 5 U.S.C. § 8106(c).

In a January 30, 2015 letter, appellant asked OWCP to expand the instant claim to include the conditions affecting her feet, as identified in Dr. Pye's narrative report of August 10, 2010.

On February 4, 2015 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

In a March 4, 2015 report, Dr. Espinosa advised that appellant was experiencing neck and upper extremity pain. He noted that, based on her description, she had sustained an ulnar neuropathy or possible cervical radiculopathy. Dr. Espinosa recommended that appellant undergo an updated EMG/NCV study of the upper extremities and a computerized axial tomography (CAT) scan of the cervical spine to confirm those conditions.

A March 20, 2015 EMG/NCV report indicated mild left C6 chronic radiculopathy.

In a March 24, 2015 report, Dr. Espinosa reviewed the results of appellant's cervical CAT scan and the EMG/NCV testing. He advised that she continued to have bilateral upper extremity symptoms, particularly shoulder pain, and bilateral arm pain, worse on the right side than on the left. Dr. Espinosa reported that, while the EMG/NCV study showed chronic left C6 radiculopathy with no evidence of any cervical radiculopathy on the right upper extremity, appellant's symptoms were worse on the right. He advised that the CAT scan showed degenerative disease, particularly at C5-6, with small bulging disc at C5-6 on the left and mild, degenerative foraminal stenosis at C6-7. Dr. Espinosa opined that there was no significant abnormality requiring surgery.

By decision dated August 4, 2015, an OWCP hearing representative set aside the January 23, 2015 decision because OWCP had failed to send appellant the letter affording 15 days to accept the modified job offer. In addition, he found that appellant had submitted medical evidence suggesting that she was unable to perform the modified job offer which Dr. Miller, the

[5] Dr. Bathla first examined appellant on October 7, 2013 and had diagnosed low back pain, lumbosacral radiculopathy, and myofascial pain. At the time, he noted that she had reached maximum medical improvement and that her disabilities were permanent. Dr. Bathla further indicated that appellant would likely be unable to achieve gainful employment during her lifetime.

impartial medical examiner, had not considered. The hearing representative found that this required additional development of the medical evidence regarding appellant's work capacity.

OWCP's hearing representative specifically noted that Dr. Miller had not considered the March 13, 2013 FCE which, he found, suggested that appellant was unable to perform the duties of the offered position. He found that Dr. Miller had partially based his opinion on the negative EMG studies but noted that cervical EMG studies appeared to be positive for C6 radiculopathy. Finally, the hearing representative noted that OWCP needed to consider all medical conditions affecting a claimant's work capacity when evaluating the suitability of an offered position, including those that were not work related. He, therefore, directed on remand that appellant should be referred to Dr. Miller, for an updated examination. The hearing representative specifically requested that Dr. Miller be provided with all relevant medical evidence and be asked to provide a detailed discussion of her work-related and nonoccupational conditions that could have affected her ability to work and to discuss the findings of the March 13, 2013 FCE.

In e-mails dated October 13 and 18, 2015, OWCP indicated that Dr. Miller had declined to reexamine appellant. Consequently, it scheduled a new referee examination with Dr. J.S. Player, Board-certified in orthopedic surgery.

In his November 16, 2015 report, Dr. Player reported that appellant complained of no nonoccupational conditions that could have impacted her ability to work. He opined, however, that appellant displayed very high symptom magnification and overstatement of pain as the examination documented no positive objective neurologic findings for the upper extremity and cervical spine, no positive objective neurologic findings for the lower extremity and lumbar spine, and no musculoskeletal or neurologic problems that could negatively impact her ability to work. Dr. Player opined that her cervical spine, upper extremity, and bilateral foot conditions were not accepted conditions and were not related to the May 12, 2010 work injury or any factors of her employment. He advised that the primary and persisting pathology caused by the May 12, 2010 work injury was a lumbar strain, which should have resolved within three months.

Dr. Player advised that the March 13, 2013 FCE revealed that appellant was capable of working in the medium physical demand category, consistent with lifting and carrying 20 to 50 pounds occasionally and 10 to 25 pounds frequently. He noted that, while she was not able to perform full duty as a mail processor which required 70 pounds of lifting and carrying, her assertions of being unable to perform frequent lifting, or prolonged standing were not substantiated by positive objective physical findings. Dr. Player opined that there was no musculoskeletal or neurological reason as to why appellant could perform frequent lifting up to 25 pounds and occasional lifting up to 50 pounds. He advised that although the March 4, 2015 cervical spine EMG did reveal a mild C6 radiculopathy and that the accompanying CAT scans documented degenerative disc disease, Dr. Player noted that these conditions were preexisting. He opined that, given all of appellant's occupational and nonoccupational conditions, she was capable of performing work activities that fell within the lift/carry restrictions of frequent lifting of up to 25 pounds and occasional lifting up to 50 pounds.

Dr. Player submitted a November 16, 2015 work capacity evaluation (Form OWCP-5c) in which he indicated that appellant could perform sedentary work for eight hours per day, with restrictions of no pushing, pulling, or lifting more than 25 pounds.

By letter dated February 4, 2016, OWCP informed appellant that the offered position was suitable, advised her of the sanctions for refusal of suitable work, and allowed her 30 days to reply. It noted that the employing establishment had advised on January 14, 2016 that its December 2014 job offer was still valid.

By letter dated February 9, 2016, appellant informed OWCP that she was refusing the modified sales services and distribution job offer. She asserted that she was not medically fit for the position and that it was not suitable for her because she was unable to sit, stand, or walk for prolonged period, or lift, push, or pull, or perform simple grasping and fine manipulation on a frequent basis. Appellant asserted that her limitations were due to both work-related and nonwork-related lumbar and cervical conditions, as indicated by various diagnostic tests.

By letter dated March 10, 2016, OWCP advised appellant that the modified sales services and distribution associate position was suitable and remained available and that, pursuant to 5 U.S.C. § 8106(c)(2), she had 15 days to either accept the position or provide a reasonable explanation for refusing the offer. If she failed to comply her entitlement to compensation benefits would be terminated.

By decision dated May 19, 2016, OWCP terminated appellant's compensation benefits because she refused an offer of suitable work. It found that the position offered by the employing establishment was within Dr. Player's work restrictions and that the medical evidence of record established that she was capable of performing the modified sales services and distribution associate job. OWCP also noted that appellant had been afforded the requisite 15-day notice and opportunity to comply with 5 U.S.C. § 8106(c).

LEGAL PRECEDENT

Once OWCP accepts a claim it bears the burden of proof to justify termination or modification of compensation benefits.[6] This includes cases where OWCP terminates compensation under 5 U.S.C. § 8106(c) for refusal of suitable work.[7] Section 8106(c) is a penalty provision and shall be narrowly construed.[8]

A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.[9] It is the employee's burden to show that this refusal or failure to work was reasonable or justified.[10] Whether an employee has the ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.[11] In evaluating the suitability of a particular position,

[6] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[7] *Y.A.*, 59 ECAB 701, 706 (2008); *Henry W. Sheperd, III*, 48 ECAB 382, 384 (1997); *Shirley B. Livingston*, 42 ECAB 855, 860 (1991).

[8] *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

[9] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517.

[10] 20 C.F.R. § 10.517.

[11] *Gayle Harris*, 52 ECAB 319, 321 (2001).

OWCP must consider the employment-related condition(s), as well as preexisting and subsequently acquired medical conditions.[12] If medical reports in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not work related.[13]

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford her 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.[14] If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days within which to accept the offered work without penalty.[15] After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.[16] However, the employee remains entitled to medical benefits.[17]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[18] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[19] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[20]

ANALYSIS

On May 12, 2010 appellant injured her lower back in the performance of duty. Her accepted conditions included lumbar back sprain and temporary aggravation of lumbar degenerative disc disease. Following OWCP-approved surgery on May 10, 2012 appellant received wage-loss compensation for temporary total disability. It ultimately placed her on the periodic compensation rolls. Effective May 19, 2016 OWCP terminated appellant's

[12] *Id*.; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers & Return to Work*, Chapter 2.814.4c(7) (June 2013).

[14] 20 C.F.R. § 10.516.

[15] *Id.* The 15-day notification need not explain why OWCP found the employee's reasons for refusal unacceptable. *Id.*

[16] *Id*. at § 10.517(b).

[17] *Id.*

[18] 5 U.S.C. § 8123(a); *see id.* at § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[19] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[20] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

compensation benefits pursuant to 5 U.S.C. § 8106(c) for refusal of suitable work. It found that the special weight of the medical evidence established that the modified sales service and distribution associate position was within the physical restrictions set forth by Dr. Player, the impartial medical examiner.

The Board finds that OWCP properly terminated appellant's monetary compensation, effective May 19, 2016, pursuant to 5 U.S.C. § 8106(c)(2) because she refused an offer of suitable work.

On or about November 25, 2014 the employing establishment offered appellant a full-time modified position as a sales services and distribution associate. The position involved servicing customers at the window with letters, packages, and mailing options. Additional duties included counting money, retrieving accountable mail, clearing carriers of accountable mail, and casing mail.[21] OWCP determined that the duties were consistent with Dr. Player's November 16, 2015 work restrictions. It also verified that the position remained available as of January 14, 2016.

The evidence of record shows that appellant is capable of performing the sales services and distribution associate position offered by the employing establishment and which was determined to be suitable by OWCP on February 4 and March 10, 2016. OWCP properly afforded the weight of the medical evidence to Dr. Player, the impartial medical examiner and Board-certified orthopedic surgeon. On November 16, 2015 Dr. Player indicated that, based on the March 13, 2013 FCE, appellant was capable of working in the medium physical demand category, consistent with lifting and carrying 20 to 50 pounds occasionally and 10 to 25 pounds frequently. He opined that, while she was unable to perform full duty as a mail processor, her assertions of being unable to perform frequent lifting, or prolonged standing were not substantiated by positive objective physical findings. Dr. Player advised that there was no musculoskeletal or neurological reason to prevent appellant from frequent lifting up to 25 pounds and occasional lifting up to 50 pounds. He provided a review of her lengthy medical history and opined that, given all of her occupational and nonoccupational conditions, she was capable of performing eight hours of sedentary work per day, including work activities that fell within the lift/carry restrictions of frequent lifting of up to 25 pounds and occasional lifting up to 50 pounds, and pushing and pulling no more than 25 pounds.

Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[22]

The Board finds that the work restrictions of the modified sales services and distribution associate met Dr. Player's physical restrictions. Dr. Player's opinion is sufficiently probative,

[21] The physical requirements of the position included up to six hours of frequent lifting not to exceed 20 pounds, up to six hours of standing, walking, simple grasping, and fine manipulation, and up to six hours of pushing/pulling, not to exceed 20 pounds. Lastly, the modified assignment required up to two hours of sitting and reaching above shoulder.

[22] *Supra* note 20.

rationalized, and based upon a proper factual background. Therefore, OWCP properly found that his opinion represented the special weight of the medical evidence.

The record does not reveal that the sales services and distribution associate position offered by the employing establishment was temporary in nature.[23] The Board therefore finds that OWCP has established that the position offered by the employing establishment is suitable.

After OWCP established that the offered position was suitable, the burden shifted to appellant to establish that her refusal was reasonable or justified.[24] Appellant has provided no evidence sufficient to establish that the suitable work required performance of any duties beyond the work restrictions imposed by Dr. Player.

An employee who refuses or neglects to work, after suitable work has been offered, has the burden of proof to show that such refusal to work was justified.[25] Appellant has not submitted medical evidence sufficient to show that her refusal to accept the February 4, 2016 modified job offer was reasonable or justified. The Board finds that OWCP properly terminated her monetary compensation due to her refusal of suitable work and that she did not thereafter establish that her refusal of suitable work was justified. The Board, therefore, affirms OWCP's May 19, 2016 decision which terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(c)(2), for refusing an offer of suitable work.

[23] If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c)(2) cannot be applied. *See supra* note 13 at Chapter 2.814.4c(5), 9 (June 2013).

[24] *M.S.*, 58 ECAB 328 (2007).

[25] 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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