United States Department of Labor
Employees' Compensation Appeals Board

J.V., Appellant	)	
and	)	**Docket No. 17-1944**
	)	**Issued: December 18, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Wayne, NJ, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 18, 2017 appellant filed a timely appeal from an August 4, 2017 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 compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusal of suitable work, effective November 7, 2016.

FACTUAL HISTORY

On April 25, 2006 OWCP accepted that appellant, then a 46-year-old letter carrier, sustained a lumbar strain and aggravation of herniated disc at L5 and L5-S1 as a result of lifting in the performance of duty. She also claimed a traumatic injury on January 19, 2005 which had

[1] 5 U.S.C. § 8101 *et seq.*

been accepted for a lumbar sprain/strain, under File No. xxxxxx303. Appellant returned to limited-duty work as a modified city carrier on May 3, 2006. OWCP subsequently accepted that she sustained two recurrences of total disability on May 9 and 19, 2006. It placed appellant on the periodic rolls and she received appropriate compensation benefits, including three authorized lumbar surgeries on September 11, 2006, August 20, 2007, and June 22, 2009. Appellant participated in a vocational rehabilitation program, but did not secure a job.

In an August 8, 2014 report, Dr. Arash Emami, a Board-certified orthopedic surgeon, noted that appellant was status post spinal surgery and was not capable of returning to work as she had difficulty with sitting, standing, and walking for more than 10 to 20 minutes at a time.

On February 18, 2015 OWCP referred appellant to Dr. Timothy Henderson, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions. In his March 19, 2015 report, Dr. Henderson provided a detailed medical history, reviewed appellant's medical records, and performed a physical examination. He opined that appellant suffered residuals of her accepted conditions, but did not need further treatment. Dr. Henderson advised that appellant was capable of working in a full-time sedentary position with a 10-pound lifting restriction.

Appellant underwent a functional capacity evaluation (FCE) on April 14, 2015, which indicated that she was capable of lifting up to 25 pounds occasionally, 20 pounds frequently, and 10 pounds constantly in a full-time employment position.

In an April 20, 2015 addendum report, Dr. Henderson reviewed the April 14, 2015 FCE report and concurred with appellant's ability to perform full-time, light duty with a 25-pound lifting restriction.

On May 29, 2015 Dr. Emami noted that appellant's FCE was not available for his review and requested a copy in order to be more accurate with regard to her work capacity.

In a November 5, 2015 letter, OWCP notified appellant that a conflict existed between the medical opinion evidence between her treating physician, Dr. Emami, and its second opinion physician, Dr. Henderson, regarding her continuing disability. It referred her to Dr. Michael Wujciak, a Board-certified orthopedic surgeon, in order to resolve the conflict.

In a January 30, 2016 independent medical examination, Dr. Wujciak found that appellant continued to suffer permanent residuals from her work-related conditions, but was not totally disabled and could be gainfully employed with activities in the sedentary to light range. He opined that appellant was capable of working sedentary duty for eight hours per day and light duty for four hours per day. Appellant's restrictions included lifting a maximum of 25 pounds with 10 to 15 pounds frequently and 20 pounds occasionally.

On March 8, 2016 the employing establishment offered appellant a full-time modified customer care agent position which was available that day. The sedentary position required pushing and pulling four hours each up to 20 pounds and lifting four hours per day with 10 to 15 pounds frequently and 20 pounds occasionally.

In a June 7, 2016 report, Dr. Emami opined that appellant was capable of returning to work in a light-duty, part-time position which would be a more sedentary position. He provided the following restrictions: no prolonged sitting, standing, and walking for more than 20 to 30 minutes at a time and no lifting over 20 pounds.

By letter dated July 11, 2016, OWCP advised appellant that the customer care agent job offer was consistent with her physical limitations and remained open. It afforded her 30 days to accept the job or provide a reasonable, acceptable explanation for reusing the offer. OWCP noted that, if she refused this employment, or failed to report to work when scheduled, without reasonable cause, her compensation benefits would be terminated pursuant to 5 U.S.C. § 8106(c)(2). It noted that her right to continued medical treatment would not be terminated.

In response, appellant refused the offer and resubmitted a June 7, 2016 report from Dr. Emami providing a 20-pound lifting restriction.

In a September 29, 2016 letter, OWCP advised appellant that it had considered her reasons for refusal and found them unacceptable. It afforded her 15 days in which to accept the position or her compensation benefits would be terminated. OWCP noted that no further reasons for refusal would be considered.

On October 6, 2016 appellant called OWCP to report that she had accepted the job offer, but would be pursuing retirement and indicated that the employing establishment would be sending in supporting documentation.

In an October 26, 2016 letter, the employing establishment notified appellant that she had been scheduled to report to a call center to begin training for the customer care agent position she accepted. The training was to be held from Monday through Friday from 8:00 a.m. to 4:30 p.m. for four consecutive weeks commencing October 31, 2016.

On November 1, 2016 the employing establishment called OWCP to report appellant's intention of staying on retirement and not returning to work or attending the training session identified in the October 26, 2016 notice.

By decision dated November 7, 2016, OWCP terminated appellant's compensation benefits effective that day as had she refused suitable employment.

On November 27, 2016 appellant requested an oral hearing by a representative of OWCP's Branch of Hearings and Review.

Appellant submitted a December 9, 2016 report from Dr. Emami who noted that she had difficulty going back to work because it was more physically demanding than she could perform.

A telephonic hearing was held before an OWCP hearing representative on June 13, 2017. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a June 16, 2017 report from Dr. Emami who diagnosed spinal stenosis of lumbar region and failed back syndrome and reiterated his opinion that appellant

had difficulty going back to work because it was more physically demanding than she was able to perform.

By decision dated August 4, 2017, OWCP's hearing representative affirmed the prior decision, noting that electing to receive retirement is not a valid reason for refusing an offer of suitable work.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] 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 employee is not entitled to compensation.[3] To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4] 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.[5]

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.[6] 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.[7]

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[8] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.[9]

[2] *See Linda D. Guerrero*, 54 ECAB 556 (2003).

[3] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[4] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[5] *See Joan F. Burke*, 54 ECAB 406 (2003).

[6] 20 C.F.R. § 10.517(a).

[7] *Id.* at § 10.516.

[8] *See Linda Hilton*, 52 ECAB 476 (2001).

[9] *Id.*

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[10] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[11] OWCP procedures provide that acceptable reasons for refusing an offered position include medical evidence of an inability to do the work.[12]

ANALYSIS

The Board finds that OWCP properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusal of suitable work, effective November 7, 2016.

OWCP accepted that appellant sustained a lumbar strain and aggravation of herniated disc at L5 and L5-S1 while in the performance of duty. Dr. Emami, an attending Board-certified orthopedic surgeon, found appellant totally disabled. Dr. Henderson, a Board-certified orthopedic surgeon and second opinion physician, submitted an April 20, 2015 report finding that appellant was able to perform full-time, light-duty work with a 25-pound lifting restriction. OWCP found a conflict in medical opinion between Dr. Emami and Dr. Henderson and selected Dr. Wujciak, a Board-certified orthopedic surgeon, as impartial medical examiner. On January 30, 2016 Dr. Wujciak concluded that appellant was capable of working full-time, sedentary duty with a lifting restriction of 25 pounds with 10 to 15 pounds frequently and 20 pounds occasionally.

On March 8, 2016 the employing establishment offered appellant a full-time modified customer care agent position which was available that day. The sedentary position required pushing and pulling four hours each up to 20 pounds and lifting four hours per day with 10 to 15 pounds frequently and 20 pounds occasionally. OWCP found the position to be suitable work. Appellant accepted the offer, but did not report to the position because she was electing to retire. OWCP terminated her compensation benefits effective November 7, 2016 because she had refused an offer of suitable work.

The Board finds that the offered limited-duty customer care agent position was within appellant's physical limitation as set forth by Dr. Wujciak on January 30, 2016.[13] There is no indication in the job offer as written that any of the described sedentary duties exceeded Dr. Wujciak's restrictions. Moreover, appellant submitted a June 7, 2016 report from her attending physician, Dr. Emami, who opined that she was capable of going back to work in a light-duty, part-time position with a 20-pound lifting restriction. The Board further finds that the March 8, 2016 job offer was procedurally correct, as it was made in writing, provided a detailed description of the assigned duties and their physical requirements, and instructed appellant when

[10] 20 C.F.R. § 10.517(a).

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

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

[13] *See Richard P. Cortes*, 56 ECAB 200 (2004).

to report for work.[14] The Board therefore finds that OWCP met its burden of proof to establish that the position was suitable work.[15]

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), 20 C.F.R. § 10.516, and Board precedent,[16] OWCP advised appellant on July 11, 2016 that it found the job offer of modified customer care agent to be suitable and gave her an opportunity to provide reasons for refusing the position within 30 days. It advised her in a September 29, 2016 letter that her reason for refusing based her decision to elect retirement was insufficient and that she had 15 additional days to accept the offered position. The Board had long held that electing to retire is not a justifiable reason to refuse an offer of suitable work.[17] The Board finds that OWCP properly followed the established procedures prior to the termination of compensation pursuant to section 8106(c)(2).[18]

In support of her claim, appellant submitted reports dated December 9, 2016 and June 16, 2017 from Dr. Emami who diagnosed spinal stenosis of lumbar region and failed back syndrome and opined that she had difficulty going back to work because it was more physically demanding than she could perform. It is well established that OWCP must consider preexisting and subsequently-acquired conditions in evaluating the suitability of an offered position.[19] At the time that it terminated appellant's compensation, however, Dr. Emami had advised that she was capable of going back to work in a light-duty, part-time position with a 20-pound lifting restriction. Therefore, the Board finds that the reports from Dr. Emami lack probative value and fail to establish appellant's claim that the offered position was not suitable.

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 pursuant to 5 U.S.C. § 8106(c)(2) for refusal of suitable work, effective November 7, 2016.

[14] *See* 20 C.F.R. § 10.507.

[15] *See Marilou Carmichael*, 56 ECAB 451 (2005).

[16] *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[17] *Robert P. Mitchell*, 52 ECAB 116 (2000); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(c) (June 2013).

[18] *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

[19] *See supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2018
Washington, DC

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

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

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