United States Department of Labor
Employees' Compensation Appeals Board

S.V., Appellant	)	
	)	
and	)	**Docket No. 17-1268**
	)	**Issued: March 23, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Jamaica Plains, MA, Employer	)	
	)	

Appearances:
Stephanie N. Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2017 appellant, through counsel, filed a timely appeal from an April 21, 2017 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.

[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.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective May 3, 2015, based on his refusal of an offer of temporary suitable employment pursuant to 20 C.F.R. § 10.500(a).

On appeal counsel contends that the employing establishment's job offer was not valid because it was temporary, that it did not comply with OWCP procedures, and that it was not within appellant's medical restrictions. She further contends that OWCP erred by not providing a preliminary notice following a second, revised job offer by the employing establishment.

FACTUAL HISTORY

On October 17, 2012 appellant, then a 38-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that being on his feet all day at work caused left foot plantar fasciitis. In an attached statement, he wrote that his left foot pain began in November 2011 which increased despite treatment by a podiatrist who diagnosed plantar fasciitis. Appellant indicated that delivering mail exacerbated his left foot condition.

In an undated letter, Dr. Lindsay Johnson, a podiatrist, noted treating appellant since April 2012 for left foot and heel pain. She described his treatment and diagnosed plantar fasciitis. Dr. Johnson recommended decreased physical activity including limited-work duty.

On January 2, 2013 OWCP accepted left foot plantar fasciitis.

A January 13, 2013 magnetic resonance imaging (MRI) scan of the left foot demonstrated mild plantar fasciitis.

Appellant filed Form CA-7 claims for compensation for the period November 24 to 30, 2012, and January 12 to 25, 2013 and continuing. OWCP paid appropriate compensation, and placed appellant on the periodic compensation rolls in April 2013.

On August 29, 2013 Dr. Bobby Kuruvilla, a podiatrist, performed authorized microtenotomy of the left plantar fascia. He saw appellant monthly for follow-up appointments. On a work capacity evaluation (Form OWCP-5c) dated September 27, 2013, Dr. Kuruvilla advised that appellant could not walk or stand, and that he could not work, but could return to an eight-hour workday on December 1, 2013.

In December 2013 OWCP referred appellant to Dr. Gary Count, a podiatrist, for a second opinion evaluation. Dr. Count was specifically asked to comment on appellant's work capabilities.

By report dated February 18, 2014 with a February 19, 2014 addendum, Dr. Count described appellant's employment duties and recounted the treatment he had received for the diagnosed left plantar fasciitis. The left foot examination demonstrated pain to palpation of the heel and central and medial plantar aspects and mild sensitivity with calcaneal compression. Dr. Count diagnosed equinus deformity of the left foot, foot pain, pes planus, pronation syndrome, and plantar fasciitis of the left foot. He noted that appellant continued to have left

foot pain despite not working since November 2012. Dr. Count advised that maximum medical improvement had been reached, and that appellant's prognosis was guarded. In an attached work capacity evaluation, he advised that appellant could work eight hours of modified duty daily with restrictions. Dr. Count limited walking, standing, and climbing to one hour daily, with a 25-pound weight restriction.

In an April 2, 2014 report, Dr. Kuruvilla noted appellant's complaint of continued left foot pain, even when sitting. He commented that he agreed with Dr. Count's assessment, advising that appellant was a candidate for reemployment. Dr. Kuruvilla indicated that appellant's symptoms did not entirely fit a picture of plantar fasciitis, and referred appellant to pain management. In reports dated June 4 and July 16, 2014, he reiterated his findings and conclusions. Dr. Kuruvilla noted that appellant did not want alternative care. He did not enumerate physical restrictions in either report.

On July 1, 2014 OWCP referred appellant to Christopher Wood, Ph.D., for vocational rehabilitation services.

The employing establishment offered appellant a modified position as a member of the sales retention team on July 8, 2014, which was available on July 16, 2014 at the Boston Processing and Distribution Center (P&DC). The job duties consisted of contacting customers by telephone for six to eight hours intermittently, with light typing/data entry, answering telephone, and back office administrative assistance/computer-type duties for four to eight hours intermittently. Physical requirements were sitting in an office chair with a supportive back and occasional standing for eight hours intermittently, simple grasping/pushing/pulling one pound (computer mouse, telephone) for four to eight hours intermittently, and fine manipulation (computer keyboard) and lifting telephone (up to two pounds) to speak for six to eight hours intermittently. Attached correspondence from the employing establishment to appellant indicated that the position was temporary, effective July 16, 2014, and that training would be provided. The employing establishment informed appellant that, if he believed he was unable to perform the job duties, he must provide supportive written medical evidence no later than July 8, 2014.

Appellant did not respond to the job offer. On August 6, 2014 the employing establishment confirmed that the position was still available.

In reports dated July 13 and August 4, 2014, Dr. Wood, the rehabilitation counselor, noted appellant's belief that he could not do even sedentary work. He also reported that appellant was caring for his six-year-old daughter while his wife worked.

In a notice dated August 8, 2014, OWCP proposed to terminate appellant's wage-loss compensation. It advised him that it had reviewed the work restrictions provided by Dr. Count and determined that the position offered appellant was within his restrictions. OWCP informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised him that his entitlement to wage-loss compensation would be terminated under this provision if he did not accept the offered temporary assignment or provide a written explanation with justification for his refusal within 30 days. It noted that upon acceptance, as appellant's pay would be equal to or greater

than the current pay of the job held on the date of injury, he would have no loss of wage-earning capacity.

On September 4, 2014 counsel responded that medical evidence of record indicated that appellant could not perform the physical requirements of the offered position.[3] She further indicated that, as appellant was limited to one hour standing and walking, the job offer indicated occasional standing for eight hours intermittently, and because his doctor indicated he must keep the left foot elevated, the offered position was outside his restrictions. Counsel also maintained that appellant was not capable of travelling to the workplace, noting that the facility was large and would require 30 minutes to get inside and 30 minutes to return to his car. She further indicated that, as the offered position was temporary and appellant's date-of-injury position was permanent, it was unsuitable, and that Dr. Count did not base his opinion on the statement of accepted facts (SOAF).

On November 17, 2014 OWCP asked the employing establishment if the offered position remained available. The employing establishment notified OWCP that a daily shuttle brought employees from the parking lot to the work facility, and that the position offered was sedentary.

The employing establishment again offered appellant the modified position on November 18, 2014. The job duties and physical requirements were exactly the same. The attached correspondence from the employing establishment to appellant indicated that the position was temporary. It noted that regular bus transportation was scheduled from the parking lot to the P&DC. The employing establishment asked that appellant respond no later than November 26, 2014. On March 10, 2015 the employing establishment notified OWCP that appellant did not respond to the job offer.

By decision dated April 23, 2015, OWCP terminated appellant's wage-loss compensation in accordance with 20 C.F.R. § 10.500(a), effective May 3, 2015. It noted that he had not accepted the temporary modified position which was within the restrictions provided by Dr. Count.

Appellant timely requested a hearing before a representative of OWCP's Branch of Hearings and Review.

In a May 8, 2015 report, Dr. Johnson noted seeing appellant for a foot evaluation. She reported that appellant had not been seen for heel pain in a year. Dr. Johnson's examination demonstrated mild pain at the insertion of the plantar fascia of the left foot with no pain along the course of the plantar fascia, no pain at the Achilles insertion, no pain with medial/lateral compression of the heel, no bursa, no ecchymosis, and no edema. She noted that she reviewed an MRI scan and diagnosed plantar fasciitis, pain, pes planus, and equinus deformity of the left foot. Dr. Johnson discussed treatment options and exercise recommendations and advised appellant to follow-up on an as needed basis. Information relating to a diagnosis of plantar fasciitis with recommended exercises and shoes was attached.

[3] Appellant authorized Stephanie N. Leet, Esquire, to represent him on August 19, 2014.

At the hearing, held on December 15, 2015, counsel maintained that Dr. Count was not provided a SOAF and the medical record, and that his medical restrictions were not specific enough on which to base a suitable position. She further asserted that a great deal of walking was necessary to enter the employing establishment, including just to get to the shuttle, and that the July and November job offers were different. Counsel concluded that Dr. Kuruvilla's restriction of sedentary work with the ability to elevate his foot periodically conflicted with those of Dr. Count such that a conflict in medical evidence had been created. The hearing transcript was forwarded to appellant and the employing establishment on December 28, 2015. The employing establishment was given 20 calendar days to respond.

In correspondence dated January 13, 2016, counsel reiterated her arguments that the offered position was not suitable, noting that the job offer did not state that it was a sedentary position or describe the duties that required one hour of walking, standing, and climbing each day. She further maintained that Dr. Count's restrictions were vague and in conflict with those provided by Dr. Kuruvilla.

By letter dated January 15, 2016, scanned received by OWCP on Tuesday, January 19, 2016, an employing establishment health and resources management specialist provided comments to the December 15, 2015 hearing. She indicated that the second job offer was only a continuation of the initial job offer as time had passed and noted that appellant did not respond to either the July or November 2014 offer. The specialist maintained that the offer was within the restrictions provided by Dr. Count and indicated that appellant would be able to change positions and elevate his foot at work. She related that, while occasional standing was required, there was no walking required for the position, noting that any walking would be in the parking lot, to the workstation, and to the men's room. The specialist further noted that handicapped parking was located directly across from the shuttle stop, and that the shuttle stopped directly in front of the employing establishment building.

In correspondence dated January 27, 2016, counsel maintained that the January 15, 2016 letter from the employing establishment should be excluded because it was not submitted until more than 20 calendar days from the December 28, 2015 transmittal of the hearing transcript. She reiterated her arguments that the position offered was not suitable.

By decision dated February 24, 2016, an OWCP hearing representative affirmed the April 23, 2015 decision. He noted that the record contained only one opinion of appellant's work capacity in the past two years, and credited the opinion of Dr. Count. The hearing representative indicated that, although counsel argued that Dr. Kuruvilla restricted appellant to sedentary work with his left foot elevated, the record contained no such report, noting that Dr. Kuruvilla indicated that he agreed with Dr. Count's assessment. He found counsel's further contentions without merit and concluded that OWCP properly terminated appellant's wage-loss compensation on May 5, 2015 in accordance with 20 C.F.R. § 10.500.

On February 16, 2017 appellant, through counsel, requested reconsideration. Counsel reiterated her contentions that, based on the medical evidence including the opinions of Dr. Count and Dr. Kuruvilla, the offered position was unsuitable. She continued to argue that the January 15, 2016 response to hearing testimony should be excluded because it was submitted late and concluded that the termination of benefits should be reversed.

Counsel attached a July 16, 2014 report in which Dr. Kuruvilla advised that appellant was seen that day and reported symptoms not consistent with plantar fasciitis. There was very mild tenderness on palpation. Appellant's weight-bearing was limited to one hour per day. Counsel also submitted Dr. Kuruvilla's April 2, 2014 treatment note which indicated his agreement with Dr. Count's assessment and a portion of Dr. Count's report. On April 19, 2016 Dr. Christopher Teitleman, a Board-certified internist, completed a retirement form for appellant. He checked "yes," indicating that, because of appellant's medical condition, he could not perform his current job duties and the condition was expected to continue for at least one year.

On February 21, 2017 Dr. Robert Sands, Board-certified in internal medicine and rheumatology, advised that appellant had been under his care since October 21, 2014 for a connective tissue disease. He advised that appellant was unable to sit, stand, or walk for greater than 30 minutes, could not drive long distances, was unable to lift more than 25 pounds, and lifting was limited to one hour a day. Dr. Sands indicated that appellant had trouble with fatigue, kneeling, squatting, and pulling, had intermittent ankle swelling, widespread aches and pains, including chronic coccygeal pain, and was being followed by a pain clinic.

In a February 28, 2017 report, Dr. Johnson advised that appellant had continued pain in his left heal. She noted that appellant was being seen by Dr. Sands for diagnoses of lupus and fibromyalgia. Dr. Johnson described examination findings, and reiterated her diagnoses. She indicated that she had advised appellant that it was possible that autoimmune disease and fibromyalgia contributed to his lower extremity pain and discussed the importance of weight loss. Dr. Johnson concluded that patients usually did not remain out of work for plantar fasciitis. A left foot x-ray that day showed flattening of plantar arch, narrowed lateral aspect of the fifth tarsometatarsal joint, and a tiny inferior calcaneal spur. A March 31, 2017 MRI scan of the lower left ankle demonstrated slight thickening of the plantar fascia adjacent to the calcaneus.

In a merit decision dated April 21, 2017, OWCP denied modification of the prior decisions.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[4]

Section 10.500(a) of the Code of Federal Regulations provides:

> "(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available;

[4] *I.J.*, 59 ECAB 408 (2008).

> and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing establishment had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee's work restrictions. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph.)"[5]

OWCP procedures also provide that if the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions is available, and the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the duration of light-duty availability, since such benefits are payable only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.[6] The claims examiner must provide a pretermination notice if the claimant is being removed from the periodic rolls.[7] When a temporary light-duty assignment either ends or is no longer available, the claimant is entitled to compensation and should be returned to the periodic rolls immediately as long as medical evidence supports any disabling residuals of the work-related condition.[8]

ANALYSIS

OWCP accepted appellant's occupational disease claim for left foot plantar fasciitis. It also authorized left foot surgery performed by Dr. Kuruvilla on August 29, 2013. OWCP paid appellant wage-loss compensation for total disability, and he was placed on the periodic compensation rolls in April 2013.

On July 8, 2014 the employing establishment offered appellant a temporary modified assignment as a sales retention team member on a full-time basis at the Boston P&DC. The assignment involved contacting customers by telephone for six to eight hours intermittently per day, light typing and data entry for one hour intermittently, answering the telephone for four to eight hours intermittently, providing administrative assistance to the back office, and engaging in computer-type duties for four to eight hours intermittently. The assignment required sitting in an office chair with supportive back and occasional standing for eight hours intermittently per day, simple grasping/pushing/pulling of one pound (computer mouse, telephone) for one hour intermittently, fine manipulation (computer keyboard) for one hour intermittently, and lifting telephone (up to two pounds) to speak for six to eight hours intermittently.

Following further development of the record regarding concerns raised by appellant, on November 18, 2014, the employing establishment again offered appellant the position. In

[5] 20 C.F.R. § 10.500(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1)(a) (June 2013).

[7] *Id*. at Chapter 2.814.9c(1)(b).

[8] *Id*. at Chapter 2.8149c(1)(d).

correspondence sent to appellant by the employing establishment with the November 18, 2014 job offer indicated that regular bus transportation was provided from the parking lot to the P&DC.

The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[9]

The Board finds that the medical evidence of record shows that appellant could perform the temporary limited-duty assignment offered by the employing establishment in July and November 2016. The physical requirements of the offered temporary limited-duty assignment were within the medical restrictions as provided by Dr. Count in his February 18, 2014 reports.[10] Furthermore, Dr. Kuruvilla, an attending podiatrist, advised on April 2, 2014 that he agreed with Dr. Count's assessment. The Board finds that the medical restrictions provided by Dr. Count and agreed to by Dr. Kuruvilla constitute the best picture of appellant's ability to work at the time the employing establishment offered him the temporary limited-duty assignment.[11]

The Board further finds that OWCP complied with its procedural requirements by advising appellant that the offered assignment was suitable, providing him the opportunity to accept the assignment or provide reasons for his refusal, and notifying him that his wage-loss compensation would be reduced or terminated if he failed to submit sufficient evidence showing such reduction was not justified.[12]

As noted, the Board finds that medical evidence supports that appellant could have performed the duties on the sales retention team. Furthermore, as noted by the employing establishment, shuttle bus transportation was furnished from the parking lot to the P&DC, and handicapped parking was available adjacent to the parking lot bus stop. Counsel further asserted that the position was not suitable as it was temporary, and that OWCP did not provide appellant with a second notice of proposed termination following the November 2015 job offer. OWCP, however, did not invoke the penalty provision of 5 U.S.C. § 8106(c) and terminate appellant's compensation for refusing suitable work, but instead reduced his wage-loss compensation under 20 C.F.R. § 10.500(a). As discussed, it complied with the procedural requirements prior to the reduction, as appellant was previously notified in writing that this same modified job was available. A reduction of compensation based on a temporary position is allowed under section 10.500(a).[13]

[9] *See N.D.*, Docket No. 15-0027 (issued February 4, 2016).

[10] Dr. Count advised that appellant could work eight hours of modified duty daily with restrictions. He limited walking, standing, and climbing to one hour daily, with a 25-pound weight restriction.

[11] *J.J.*, Docket No. 17-0885 (issued June 16, 2017).

[12] Federal (FECA) Procedure Manual, *supra* note 6; *id.*

[13] 20 C.F.R. § 10.500(a); *B.W.*, Docket No. 16-0120 (issued July 22, 2016).

The evidence of record reflects that appellant declined the temporary limited-duty assignment offered by the employing establishment, which was suitable and would have paid him wages equal to those of his date-of-injury job.[14] Therefore, OWCP properly terminated appellant's wage-loss compensation, effective May 3, 2015, under 20 C.F.R. § 10.500(a) based on his earnings had he accepted the temporary limited-duty assignment.[15]

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 met its burden of proof to terminate appellant's wage-loss compensation, effective May 3, 2015, based on his refusal of an offer of temporary suitable employment pursuant to 20 C.F.R. § 10.500(a).

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[14] The record supports that, had appellant accepted the position, his pay would have been equal to or greater than the current pay of the job held on the date of injury. As such, he would have no loss of wage-earning capacity.

[15] *G.C.*, Docket No. 17-0140 (issued April 13, 2017).