United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 17-1930**
	)	**Issued: July 26, 2019**
DEPARTMENT OF THE ARMY, U.S. ARMY AEROMEDICAL CENTER, Fort Rucker, AL, Employer	)	

Appearances:
Lauren H. Shine, Esq., for the appellant[1]
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 12, 2017 appellant, through counsel, filed a timely appeal from an August 23, 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.[3]

[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.*

[3] The Board notes that following the August 23, 2037 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective December 22, 2014, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On November 4, 1997 appellant, then a 41-year-old paramedic, filed an occupational disease claim (Form CA-2) alleging low back, buttock, and bilateral lower extremity conditions that allegedly arose on or about October 21, 1997 due to factors of her federal employment. She indicated that her paramedic duties involved heavy lifting, bending, and stooping, which reportedly caused or contributed to her claimed condition(s).[4] Appellant stopped work on October 21, 1997 and returned to work shortly thereafter without wage loss. OWCP initially accepted her occupational disease claim for lumbar sprain, but later expanded the accepted conditions to include aggravation of degenerative disc disease, intervertebral disc disorder with myelopathy, herniated nucleus pulposus at L4-5, and pseudoarthrosis anteriorly at L4-5.[5]

On July 30, 1998 appellant underwent an OWCP-approved anterior discectomy at L4-5, interbody fusion with cortical threaded bone, and right autogenous iliac crest bone grafting. She received wage-loss compensation for periods of disability. In December 1998, appellant returned to light-duty work at the employing establishment without wage loss.

Appellant stopped work on April 23, 2002 after experiencing a flare-up of low back pain. OWCP paid her disability compensation on the daily rolls beginning April 23, 2002, and on the periodic rolls beginning June 16, 2002.

On July 11, 2002 Dr. Kevin Perdue, an attending osteopath Board-certified in orthopedic surgery, diagnosed several low back conditions including postlaminectomy syndrome. Appellant continued to report experiencing low back pain and received treatment from her attending physicians on a periodic basis.

The findings of an October 1, 2004 computerized tomography (CT) scan of appellant's low back contained an impression of no solid bony fusion at L4-5. In an October 13, 2004 report, Dr. Thomas N. Bernard, Jr., an attending Board-certified orthopedic surgeon, indicated that he felt that appellant's July 30, 1998 bone graft at L4-5 "never did take." He also noted that appellant had symptomatic bilateral carpal tunnel syndrome, right worse than left.

In an August 24, 2009 report, Dr. Bernard indicated that appellant still had residuals of chronic degenerative lumbar spondylosis and chronic lumbar pain related to her work injury. He opined that she was permanently disabled from returning to any type of meaningful work.

[4] Appellant previously injured her lower back on March 27, 1996 while carrying a patient on a stretcher. Under OWCP File No. xxxxxx289, her traumatic injury claim was accepted for a lumbar strain. Appellant resumed work on April 11, 1996 with a 10-pound lifting restriction.

[5] OWCP doubled the case files for OWCP File Nos. xxxxxx289 and xxxxxx510, and made OWCP File No. xxxxxx510 the master file.

In June 2012, OWCP referred appellant for a second opinion examination with Dr. Tai Q. Chung, a Board-certified orthopedic surgeon, and requested that he provide an opinion regarding work-related residuals and her ability to return to work.

In a July 18, 2012 report, Dr. Chung discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that the range of motion of appellant's lumbar spine was about 30 percent of normal for flexion, extension, lateral bending, and rotation, and he reported that straight leg testing in the seated and lying positions produced back and leg pain. Dr. Chung found that appellant continued to have residuals of her work injury which prevented her from working as a paramedic and noted that the October 1, 2004 CT scan showed that there was no solid bony fusion at L4-5. He indicated that appellant could work in a sedentary position if lifting was limited to 10 pounds and she had the ability to get up and move frequently during the work period.

Appellant received pain management treatment, including steroid injections in her lumbar spine, from Dr. Robert D. Shedden, an attending physician Board-certified in physical medicine and rehabilitation. In reports dated beginning in January 2013, Dr. Shedden noted appellant's findings on examination, including pain in her left lumbar region on palpation, and he diagnosed such conditions as chronic pain, cervicalgia, myofascitis, left sacroiliac joint pain, lumbago, spondylosis, and left radiculopathy with radiculitis.

In a June 12, 2013 report, Dr. Bernard indicated that appellant's current medical problems included lumbosacral spondylosis without myelopathy, degeneration of lumbar intervertebral disc, bilateral carpal tunnel syndrome, sprains and strains of her back and neck, degeneration of cervical intervertebral disc, and intervertebral lumbar disc disorder with myelopathy. He noted that appellant remained disabled from work due to her multiple medical conditions.

In June 2013, OWCP referred appellant for a second opinion examination to Dr. Richard C. Smith, a Board-certified orthopedic surgeon, and requested that he provide an opinion regarding work-related residuals and her ability to work.[6] It provided Dr. Smith with physical demand definitions for various levels of work, including sedentary work.[7]

In a November 11, 2013 report, Dr. Smith detailed appellant's factual and medical history and reported the findings of the physical examination he conducted on October 31, 2013. He noted that appellant presented with neck pain and low back pain radiating into her lower extremities, left worse than right, with tingling, numbness, and burning sensations. Dr. Smith observed that appellant ambulated with a cane and was slow to move, and noted that she was unable to sit still for the physical examination. He reported that appellant exhibited tenderness of her sacroiliac joints, paraspinal muscles, and lumbar spine midline, and that range of motion of her lumbar spine was significantly limited (forward flexion to 30 degrees, extension to 5 degrees, and right/left lateral flexion to 10 degrees). Appellant had decreased sensation down her left leg, 4/5 muscular strength in both legs, and positive straight leg testing at 40 degrees. Dr. Smith diagnosed

[6] The evidence of record reveals that Dr. Smith is licensed to practice medicine in Florida.

[7] The definitions indicated that sedentary work involved exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involved sitting most of the time, but might involve walking or standing for brief periods of time. Jobs might be defined as sedentary when walking and standing were required only occasionally and all other sedentary criteria are met.

postlaminectomy syndrome, lumbago, degeneration of lumbar or lumbosacral intervertebral disc, displacement of lumbar intervertebral disc without myelopathy, and nonunion of fracture. He found that appellant still suffered from her accepted work-related conditions as documented by the findings on physical examination, and he posited that these conditions prevented her from working as a paramedic. Dr. Smith indicated that appellant could work in a sedentary capacity with limited sitting, standing, and repetitive bending, and no lifting over 20 pounds. He advised that he had reviewed the physical demand definitions provided to him by OWCP and indicated that he believed appellant "could return to sedentary work."

In an October 31, 2013 work capacity evaluation form (Form OWCP-5c), Dr. Smith noted that appellant could not perform her usual job as a paramedic due to a lumbar condition which precluded heavy lifting. He indicated that appellant could work eight hours per day with permanent restrictions, including sitting for no more than two hours per day and standing for no more than two hours per day. Dr. Smith noted that appellant would have to take 30-minute breaks every two hours. He indicated that appellant could not engage in bending, pushing, or pulling, but was able to lift up to 20 pounds for no more than two hours per day.

On July 2, 2014 the employing establishment offered appellant a modified position as a medical support assistant on a full-time basis.[8] The position was located at Fort Rucker and involved performing a variety of receptionist, clerical, and recordkeeping duties associated with patient care and treatment.[9] The work as a medical support assistant required using both hands, sitting for up to eight hours per day, walking up to one hour per day, and lifting and/or carrying up to five pounds. Appellant would be allowed to sit or stand at her convenience for comfort. She did not accept the medical support assistant position offered by the employing establishment.

In an August 26, 2014 letter, OWCP advised appellant of its determination that the medical support assistant position offered by the employing establishment was suitable. It found that the weight of the medical opinion evidence with respect to appellant's ability to work rested with the opinion of Dr. Smith and noted that Dr. Shedden had not provided a medical opinion that she was totally disabled from all employment. OWCP informed appellant that her entitlement to wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.[10]

In a September 9, 2014 letter, appellant asserted that her pain symptoms, particularly her back and leg pain, prevented her from working as a medical support assistant. She indicated that her multiple pain medications made her drowsy and limited her ability to drive.

Appellant submitted additional medical evidence including August 25, September 15, and October 15, 2014 progress reports from Dr. Shedden, who described appellant's multiple pain complaints and prescribed pain medication. In a September 22, 2014 report, Dr. Shedden

[8] The employing establishment had previously offered appellant similar jobs as a medical support assistant in August 2013 and April 2014. Appellant did not accept the offered positions and noted, when declining the position offered in April 2014, that her physical condition prevented her from engaging in the extended sitting required by the position. OWCP did not take action after appellant declined to accept the jobs offered in August 2013 and April 2014.

[9] While sitting in a chair, appellant would input data into a computer, resolve administrative problems, relay messages, maintain medical records, and coordinate with other clinics in the facility to carry out clinical functions.

[10] OWCP advised appellant that she would still receive medical benefits related to her accepted medical conditions.

indicated that appellant had pain from severe osteoarthritis of her hands and noted that typing or use of a keyboard for any moderate period of time would exacerbate her condition, causing increased stiffness and pain. He felt that appellant should not accept an employment position where the job requirements included typing or keyboard use.

In a November 5, 2014 letter, OWCP advised appellant that her reasons for not accepting the medical support assistant position offered by the employing establishment were unjustified. It advised appellant that her entitlement to wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the position within 15 days of the date of the letter.

On December 19, 2014 the employing establishment advised that the medical support position was still available to appellant.

In a December 22, 2014 decision, OWCP terminated appellant's wage-loss and compensation and entitlement to a schedule award effective December 22, 2014 because she refused an offer of suitable work. It found that she was vocationally and medically capable of working as a medical support assistant. OWCP noted that the opinion of Dr. Smith showed that she could physically perform the duties of the medical support assistant position offered by the employing establishment.

Appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review regarding the December 22, 2014 decision. During the hearing, held on November 4, 2015, appellant testified that her pain prevented her from sitting for more than 15 minutes at a time. She argued that Dr. Smith's opinion did not show that she was physically capable of working as a medical support assistant.

Appellant continued to submit reports, dated between late 2014 and late 2015, in which Dr. Shedden reported appellant's continued pain complaints and treatment with pain medication.

In a September 17, 2015 report, Dr. Bernard discussed appellant's multiple medical problems and indicated that there was a very low likelihood that she could function in the workforce given her current medical state. In an October 2, 2015 report, he indicated that appellant had essentially been disabled from meaningful work for at least 10 years because of her chronic low back condition that required surgical intervention. Dr. Bernard noted that appellant took medications that would interfere with her ability to concentrate at work. He indicated, "It is my opinion that she is permanently disabled from meaningful gainful employment because of her orthopedic condition concerning her spine. I doubt that a formal functional capacity evaluation would alter this opinion."

By decision dated January 13, 2016, OWCP's hearing representative affirmed the December 22, 2014 decision terminating appellant's wage-loss compensation and entitlement to a schedule award, effective December 22, 2014 because she refused an offer of suitable work. She found that Dr. Smith's opinion represented the weight of the medical opinion evidence with respect to appellant's ability to work. The hearing representative found that the reports of Dr. Bernard and Dr. Shedden did not establish that appellant was unable to work in the capacity of a medical support assistant.

Appellant requested reconsideration of her claim and submitted reports, dated in 2016, in which Dr. Shedden reported appellant's continued pain complaints and treatment with pain medication. In a March 31, 2016 report, Dr. Shedden requested that OWCP reconsider appellant's

claim. In an April 7, 2016 report, Dr. John D. Dorchak, an attending Board-certified orthopedic surgeon, indicated that diagnostic testing showed advanced collapse of the L5-S1 disc space and that additional lumbar surgery was necessary.

By decision dated June 7, 2016, OWCP denied modification of its January 13, 2016 decision. It noted that the newly submitted medical evidence did not establish that appellant could not work as a medical support assistant in 2014.

Appellant, through counsel, requested reconsideration of her claim and submitted evidence showing that, on July 21, 2016, Dr. Dorchak performed an OWCP-approved posterior spinal fusion at L4-5 with use of local bone graft/morselized bone graft and pedicle screw/nonsegmental instrumentation at L3-4. On June 23, 2016 an OWCP medical adviser had provided an opinion that the surgery was necessary due to documented severe stenosis and instability of the lumbar spine.

In a May 12, 2017 report, Dr. Bernard indicated that, as far back as 2014, it had been his opinion that appellant was permanently and totally disabled from any meaningful and gainful employment. He advised that this still was his opinion based on the findings on physical examination and diagnostic testing. Dr. Bernard indicated that, even though the medical support assistant position did not require significant lifting, walking, standing, twisting, kneeling, squatting, or bending, appellant's low back condition was painful to the extent that she had to lie down several times during the day. He noted that she had been prescribed medications that would interfere with her ability to concentrate and perform the duties of a secretarial-type position. These medications would also preclude trying to operate an automobile to drive to and from work. Dr. Bernard noted that, given the severity and the global nature of appellant's low back condition and the associated degenerative changes that had occurred with the passage of time, he did not believe it was "feasible from a medical standpoint to reverse this condition to any degree that would allow her to return to the work force."

In a May 25, 2017 report, Dr. Shedden indicated that he disagreed with the opinions of Dr. Chung and Dr. Smith that appellant could perform sedentary work.[11] He requested that appellant be allowed to "recover her additional back payments and future payments" of FECA benefits.[12]

By decision dated August 23, 2017, OWCP denied modification of its June 7, 2016 decision. It noted that the medical opinion evidence of record established that appellant could work as a medical support assistant.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.[13] Section 8106(c)(2) of

[11] Dr. Shedden asserted that Dr. Chung was not qualified to render an opinion on medical care or work capability and that Dr. Smith was not licensed to practice medicine in Alabama.

[12] Appellant also submitted reports, dated in 2017, in which Dr. Shedden reported appellant's continued pain complaints and treatment with pain medication and steroid injections.

[13] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

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.[14] To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.[15] 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.[16]

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, has the burden of showing that such refusal or failure to work was reasonable or justified.[17] 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.[18]

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.[19] 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.[20] OWCP procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[21] In a suitable work determination, it must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.[22]

ANALYSIS

The Board finds that OWCP did not properly terminate appellant's wage-loss compensation and entitlement to a schedule award, effective December 22, 2014, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). The evidence of record does not establish that appellant was capable of performing the medical support assistant position offered by the employing establishment and determined to be suitable by OWCP in August 2014.

[14] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

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

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

[17] 20 C.F.R. § 10.517(a).

[18] *Id.* at § 10.516.

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

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

[21] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *see E.B.*, Docket No. 13-0319 (issued May 14, 2013).

[22] *See G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

In determining that appellant was physically capable of performing the medical support assistant position, OWCP improperly relied on the opinion of Dr. Smith, OWCP's referral physician.

In a November 11, 2013 report, Dr. Smith detailed appellant's factual and medical history and reported the findings of the physical examination he conducted on October 31, 2013 at his office in Ocoee, Florida.[23] He observed that appellant ambulated with a cane, was slow to move, and noted that she was unable to sit still for the physical examination. Dr. Smith reported that appellant exhibited tenderness of her sacroiliac joints, paraspinal muscles, and lumbar spine midline, and that range of motion of her lumbar spine was significantly limited (forward flexion to 30 degrees, extension to 5 degrees, and right/left lateral flexion to 10 degrees). He diagnosed postlaminectomy syndrome, lumbago, degeneration of lumbar or lumbosacral intervertebral disc, displacement of lumbar intervertebral disc without myelopathy, and nonunion of fracture. Dr. Smith indicated that appellant could work in a sedentary capacity with limited sitting and standing, no repetitive bending, and no lifting over 20 pounds.[24] In an October 31, 2013 work capacity evaluation form, Dr. Smith noted that appellant could not perform her usual job as a paramedic due to a lumbar condition which precluded heavy lifting. He indicated that appellant could work eight hours per day with permanent restrictions, including sitting for no more than two hours per day and standing for no more than two hours per day. Dr. Smith also noted that appellant would have to take 30-minute breaks every two hours.[25]

The Board finds that given the significant restrictions Dr. Smith placed on appellant's ability to sit and stand for two hours, he did not provide a clear opinion that appellant could work as a medical support assistant around the time the job was offered in mid-2014. The Board has held that a medical report is of limited probative value on a given medical matter if it does not contain a clear opinion on that matter.[26] Dr. Smith generally indicated that appellant could perform sedentary work so long as she had the ability to sit or stand and change positions as needed. However, he did not provide a clear opinion that appellant could tolerate the eight hours of sitting per day required by the medical support assistant position. As noted, Dr. Smith had indicated that appellant could sit for no more than two hours per day[27] and specifically determined that appellant would have to take 30-minute breaks every two hours, but the medical support assistant position offered by the employing establishment did not provide for such extensive breaks during the work day.

The Board therefore finds that OWCP has not met its burden of proof to establish that the medical support assistant position offered by the employing establishment in mid-2014 was a suitable position. Therefore, OWCP improperly terminated appellant's wage-loss compensation

[23] The Board notes that Dr. Shedden, an attending physician, later called Dr. Smith's qualifications into question. However, Dr. Smith is a Board-certified orthopedic surgeon who is licensed to practice medicine in Florida.

[24] Dr. Smith advised that he had reviewed the physical demand definitions provided to him by OWCP and indicated that he believed appellant "could return to sedentary work."

[25] Dr. Smith indicated that appellant could not engage in bending, pushing, or pulling, but was able to lift up to 20 pounds for no more than two hours per day.

[26] *See Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[27] Even when taking into account that the position ostensibly allowed appellant to sit or stand at her convenience for comfort, the position would require far more extensive sitting than allowed by Dr. Smith.

and entitlement to a schedule award, effective December 22, 2014, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).[28]

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective December 22, 2014, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 26, 2019
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

[28] *See supra* notes 13 through 20.