

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.T., Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Teterboro, NJ, Employer** )  
\_\_\_\_\_ )

**Docket No. 19-0579**  
**Issued: October 22, 2019**

*Appearances:*  
*Stephen Larkin*, for the appellant<sup>1</sup>  
*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 January 20, 2019 appellant, through her representative, filed a timely appeal from a July 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the July 30, 2018 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 additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 2, 2017, due to her refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On February 6, 2016 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on that date, a restraint bar came off its tract, struck her in the stomach, pushed her into the corner of an all-purpose postal container, and caused her to fall to the floor while in the performance of duty. She stopped work on February 6, 2016 and has not returned. OWCP accepted the claim for contusion of abdominal wall, cervical disc herniation, thoracic disc herniation, and lumbar disc herniation. It paid appellant wage-loss compensation on the supplemental rolls as of March 23, 2016 and on the periodic rolls as of December 11, 2016.

In a December 6, 2016 report, Dr. Nunzio Saulle, Board-certified in physical medicine and rehabilitation, opined that appellant was totally disabled from work secondary to her accepted conditions. A January 9, 2017 electromyogram/nerve conduction velocity (EMG/NCV) study revealed evidence of right L5 radiculopathy.

On February 6, 2017 OWCP referred appellant to Dr. Timothy Henderson, a Board-certified orthopedic surgeon, for a second opinion examination to assess her status relative to her injury-related condition. In a February 21, 2017 report, Dr. Henderson related appellant's physical examination findings, and found objective findings of lumbar radiculopathy. He noted that her abdominal contusion had resolved, but she had not reached maximum medical improvement (MMI) relative to her cervical and lumbar spine conditions. Dr. Henderson opined that appellant was totally disabled from her regular duties, however, she was capable of performing full time, sedentary duty with a 10-pound lifting restriction. He completed a February 21, 2017 work-capacity evaluation (Form OWCP-5c) and provided work restrictions including walking no more than two hours, standing no more than two hours, and pushing/pulling/lifting no more than 10 pounds for eight hours a day. Dr. Henderson also requested EMG testing of the bilateral upper and lower extremities in response to the question of what treatment he would recommend for the improvement and amelioration of the accepted work-related conditions.

In a March 6, 2017 report, Dr. Andrew Cordiale, an osteopath specializing in orthopedic surgery, noted that appellant had an abnormal neurological examination of the cervical and lumbar spine. He diagnosed herniated cervical and lumbar discs, with left lumbar radiculopathy. Dr. Coriale indicated that appellant was to refrain from any activity that exacerbated symptoms, such as heavy lifting, carrying, or bending. Subsequently, he repeated his work restrictions in a May 1, 2017 report.

Dr. Albert Villafuerte, Board-certified in physical medicine and rehabilitation, opined in reports dated May 3, July 11, and August 22, 2017, that appellant was totally disabled from work due to her work-related cervical and lumbar conditions.

In a September 1, 2017 letter, the employing establishment requested that OWCP rule on the suitability of an August 25, 2017 job offer for the position of a modified mail handler. It

attached the job offer and indicated that it was based on the restrictions outlined by Dr. Henderson. The effective date of the job offer was August 28, 2017. The duties consisted of: platform-bid job scanning, dispatching, load and unload for two hours; prep flats into A1 (load machine with mail) for eight hours; and prepare empty equipment by type (trays, tubs, sacks) for two hours. The physical requirements included: scanning inbound/outbound dispatches while standing/walking for two hours, prep flats, lifting up to 10 pounds for eight hours and prepare/separate empty equipment while standing/walking for two hours.

In a letter dated September 11, 2017, OWCP advised appellant that the August 25, 2017 job offer was suitable in accordance with Dr. Henderson's February 21, 2017 medical restrictions and that the position remained available. It notified her that she had 30 days to accept the offered position or to provide her reasons for refusal. OWCP also informed appellant that failure to accept suitable work would result in the termination of wage-loss compensation benefits and entitlement to a schedule award pursuant to 5 U.S.C. § 8106(c)(2).

In a September 27, 2017 report, Dr. Demetrios Mikelis, a specialist in internal medicine, physical medicine and rehabilitation, noted appellant's diagnosed cervical and lumbar conditions, and instructed her to refrain from any activity that exacerbated her symptoms (*i.e.*, heavy lifting, carrying, bending, etc.) He noted a prior referral for EMG testing.

On October 12, 2017 the employing establishment indicated that appellant had not accepted the job offer and confirmed that the job offer remained available.

OWCP advised appellant on October 13, 2017 that her reasons for refusing the position were invalid. It provided her 15 days to accept the position or have her entitlement to wage-loss compensation and schedule award benefits terminated.

In an October 19, 2017 report, Dr. Villafuerte noted appellant's continued complaints of low back and neck pain, as well as complaints of bilateral knee pain. He continued to opine that she was totally disabled from work and again recommended EMG testing.

In an October 20, 2017 report, Dr. Faith Chang, a specialist in general surgery, diagnosed neck, back, and right leg sprain/strain. She opined that appellant was totally disabled from work due to restrictions on lifting, pushing, pulling, carrying, climbing, bending, kneeling, and repetitive movements.

On October 30, 2017 the employing establishment confirmed that the position remained open and available to appellant indefinitely as long as she had restrictions.

On November 2, 2017 OWCP received appellant's October 8, 2017 refusal of the August 25, 2017 job offer. Appellant indicated that she had severe back, neck, and leg pain and asserted that she could not stand or lift for eight hours.

By decision dated November 2, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, as she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

In an October 11, 2017 report, Dr. Margaret I. Griffith, Board-certified in occupational medicine, provided examination findings, noting that appellant's orientation and mental status was depressed, agitated, and anxious. She related appellant's symptoms opined that appellant was totally disabled from work.

In an October 20, 2017 report, Dr. Chang provided assessments of neck sprain, mid-back and low back sprains, bilateral shoulder internal derangement, bilateral hip, and knee pain, bilateral plantar fasciitis and post-traumatic stress disorder status post employment-related injury. She opined that appellant was totally disabled from work. Dr. Chang also provided restrictions of no heavy lifting, pushing, pulling, and repetitive motions and indicated that appellant had a weight limit of five pounds. She recommended that appellant see a psychologist.

On November 14, 2017 appellant requested a telephonic hearing before an OWCP hearing representative.

In reports dated November 5, 2017 and January 19, 2018, Dr. Jonathan Levinson, a licensed clinical psychologist, noted the history of appellant's February 6, 2016 employment injury and her continuing symptoms. He diagnosed adjustment disorder with anxiety and major depressive disorder, causally related to the employment injury. Dr. Levinson concluded that appellant was totally disabled from work.

In January 9 and 23, February 21, and April 4, 2018 reports, Dr. Joel H. King, a Board-certified psychiatrist, opined that appellant was totally disabled from work on the basis of psychiatric illness, causally and temporally related to the employment injury.

In a March 1, 2018 report, Dr. Silvia Geraci, an osteopath Board-certified in pain medicine, physical medicine, and rehabilitation, diagnosed cervical sprain, herniated cervical intervertebral disc, cervical radiculopathy, thoracic herniated nucleus pulposus, lumbar spine stain, herniated lumbar intervertebral disc, left lumbar radiculopathy, lumbosacral facet joint syndrome, and lumbar stenosis. Appellant was advised to refrain from any activity which exacerbated her symptoms, such as heavy lifting, carrying, or bending.

On May 5, 2018 OWCP received a copy of a January 22, 2018 EMG/NCV study of the upper extremities and a January 26, 2018 report from Dr. Villafuerte. The January 22, 2018 EMG/NCV study revealed evidence of bilateral median sensory demyelinating entrapment neuropathy with probable compression at or about the level of the transcarpal ligaments as in carpal tunnel syndrome. EMG/NCV study of the cervical spine failed to reveal evidence of radiculopathy.

In a February 12, 2018 report, Dr. Kevin Pak, Board-certified in physical medicine and rehabilitation, diagnosed lumbar radiculopathy, myofascial pain, cervical radiculopathy, and thoracic back pain. He opined that appellant should avoid strenuous activities.

A telephonic hearing was held before an OWCP hearing representative on May 15, 2018. Appellant testified that she did not return to work due to the pain in her back and shoulders. She also indicated that she would be unable to function at work due to anxiety and her inability to stay awake. Appellant indicated that she continued to be treated for both her physical and emotional

conditions. Her representative argued that OWCP failed to consider all of her medical conditions before terminating her compensation benefits.

Following the hearing, OWCP received additional evidence.

In a June 18, 2018 report, Dr. Levinson provided a timeline relative to the development of appellant's psychological condition and the impact it had on her ability to accept or reject a job offer. He opined that she was not able to accept the job offer and therefore she should not be held accountable for not accepting it. Dr. Levinson continued to opine that she remained totally disabled from work due to her emotional conditions.

In a June 5, 2018 report, Dr. Griffith provided an assessment of low back pain, knee pain, neck pain, and lumbar radiculopathy. She opined that appellant was capable of sedentary work (seated only) for four hours a day with lifting restrictions of five pounds.

By decision dated July 30, 2018, an OWCP hearing representative affirmed OWCP's November 2, 2017 decision. She found that the August 25, 2017 job offer was suitable based on restrictions provided by Dr. Henderson and that appellant was provided appropriate notice. The hearing representative found that appellant failed to provide well-rationalized medical documentation from her attending physicians to support why she was unable to perform the duties of the position.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

Section 10.517(a) of the implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of proof to show that such refusal or failure to work was reasonable or justified.<sup>8</sup> Pursuant to

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<sup>4</sup> *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> *See E.G.*, Docket No. 18-0710 (issued February 12, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>7</sup> *L.L.*, *supra* note 4; *Gloria G. Godfrey*, 52 ECAB 486 (2001).

<sup>8</sup> 20 C.F.R. § 10.517(a).

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.<sup>9</sup>

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.<sup>10</sup> The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 2, 2017, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP relied upon the February 21, 2017 findings of Dr. Henderson, the second opinion physician, to determine that the modified mail handler position offered on August 25, 2017 constituted suitable work.

In his February 21, 2017 report, Dr. Henderson indicated that appellant's abdominal contusion had resolved, but that she had not reached MMI for the cervical and lumbar spine conditions. While he opined that she was capable of working sedentary duties with pushing, pulling, and lifting restrictions of 10 pounds, and standing and walking two hours a day, he also requested EMG testing of the bilateral upper and lower extremities in response to the question of what treatment he would recommend for the improvement and amelioration of the accepted work-related conditions.

The Board therefore finds that OWCP terminated appellant's wage-loss compensation and schedule award benefits, effective November 2, 2017, without clarification regarding Dr. Henderson's request for diagnostic testing of the bilateral upper and lower extremities. Due to this lack of clarity OWCP failed to meet its burden of proof to terminate her compensation benefits.<sup>12</sup>

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<sup>9</sup> *Id.* at § 10.516.

<sup>10</sup> *See M.H.*, Docket No. 18-1727 (issued May 6, 2019); *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>11</sup> *C.M.*, Docket No. 14-0981 (issued April 17, 2015); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>12</sup> *E.G.*, *supra* note 6; *R.W.*, Docket No. 16-1053 (issued December 6, 2016); *see J.R.*, Docket No. 13-0720 (issued October 21, 2013); *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

**CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 2, 2017, due to her refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 22, 2019  
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