United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Jacksonville, FL, Employer**	)	**Docket No. 21-0596** **Issued: August 31, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 3, 2021 appellant filed a timely appeal from October 1 and 8, 2020 merit decisions 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.[2]

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective October 2, 2020, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether appellant has met his

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the October 8, 2020 decision, appellant submitted 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.*

burden of proof to establish entitlement to continuation of pay (COP) for the period August 5 through September 1, 2020.

FACTUAL HISTORY

On July 22, 2020 appellant, then a 55-year-old heavy truck driver, filed a traumatic injury claim (Form CA-1) alleging that on July 18, 2020 when picking up mail in his tractor trailer he moved and maneuvered a manual dock plate and strained his back while in performance of duty. OWCP accepted the claim for strain of muscle fascia and tendon of the lower back. Appellant requested continuation of pay on July 22, 2020.

In reports dated July 27, August 4 and 13, 2020, Dr. Marc Thorpe, a Board-certified family practitioner, treated appellant for a work-related injury that occurred on July 18, 2020 when he was lifting a heavy dock plate. Findings on examination revealed back pain and tenderness of the lower thoracic area through the lumbar spine. Dr. Thorpe diagnosed lumbosacral strain, initial encounter and referred appellant for a magnetic resonance imaging (MRI) scan of the lumbar spine. He released appellant to work with restrictions of lifting up to five pounds and no bending or stooping on July 27, 2020. In injury status discharge instructions dated July 27 and August 4, 2020, Dr. Thorpe diagnosed lumbosacral strain and returned appellant to work with restrictions of lifting up to five pounds and no bending or stooping. In form reports dated July 27, August 4 and 13, 2020, he noted that appellant sustained a work-related injury on July 18, 2020. Dr. Thorpe diagnosed lumbosacral strain and affirmed that the diagnosed conditions were due to a work-related injury. He returned appellant to work with lifting restrictions of five pounds and no bending or stooping.

On August 17, 2020 OWCP accepted appellant's claim for strain of the muscle, fascia and tendon of lower back.

On August 5, 2020 the employing establishment offered appellant a position as a modified tractor trailer operator. The duties included: surface visibility scanning for eight hours per day; post surface visibility reporting for 1 to 2 hours per day; check surface visibility mobile devices for latest updates for 1 to 2 hours per day; and safety talks in the postal vehicle service office for 30 minutes to 1 hour per day. The tour of duty was from 11:00 p.m. to 7:30 a.m. The physical requirements included: no lifting over five pounds; no bending; and no stooping.

An MRI scan of the lumbar spine dated August 17, 2020 revealed mild multilevel degenerative changes, straightening of the lumbar lordosis, broad-based disc protrusion with an annular tear at L4-5, mild-to-moderate foraminal stenosis bilaterally, and mild foraminal stenosis bilaterally at L2-3 and L3-4.

On August 18, 2020 appellant rejected the modified tractor trailer operator job offer. In a separate statement, he indicated that he was unable to work the shift from because his wife had underlying conditions that prohibited him from working those hours.

In injury status discharge instructions dated August 19, 2020, Dr. Thorpe diagnosed annular tear of the lumbar disc and lumbosacral strain and returned appellant to work with restrictions of lifting up to 10 pounds and no bending or stooping. In a form report dated

August 19, 2020, he noted that appellant sustained a work-related injury on July 18, 2020. Dr. Thorpe diagnosed annular tear of the lumbar disc and lumbosacral strain and responded affirmatively that the diagnosed conditions were due to a work-related injury. He returned appellant to work with lifting restricted to 10 pounds and no bending or stooping.

In an August 19, 2020 report, Dr. Jeffery Crick, a family practitioner, recommended that appellant avoid working the overnight shift from 12:00 a.m. to 6:00 a.m. because he was the primary caregiver to his wife and needed to be present during the overnight sleeping hours due to her condition.

By notice dated August 24, 2020, OWCP advised appellant that it had determined that he refused or failed to report to the offered position as a modified tractor trailer operator. It informed him that it had reviewed the offered position and found it was suitable and in accordance with the medical restrictions provided by Dr. Thorpe's August 4, 2020 report. Pursuant to 5 U.S.C. § 8106 (c)(2), OWCP afforded appellant 30 days to accept the position or provide adequate reasons for refusal. It informed him that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

OWCP received additional evidence. On July 23, 2020 appellant was treated in the emergency room by Dr. Anthony Richa, a Board-certified internist, for back pain. He reported an onset of symptoms five days earlier when he was lifting and pulling at work and experienced low back pain. Dr. Richa diagnosed acute back pain and low back sprain.[3]

In a report dated August 19, 2020, Dr. Thorpe treated appellant in follow up for a July 18, 2020 work injury and noted an MRI scan of the lumbar spine revealed a new annular tear at L4-5 with a disc protrusion. He diagnosed annular tear of the lumbar disc and lumbosacral strain. Dr. Thorpe released appellant to work with restrictions of lifting up to 10 pounds and no bending or stooping. In an August 28, 2020 duty status report (Form CA-17), he noted clinical findings of limited range of motion of the lumbar spine and diagnosed acute low back pain. Dr. Thorpe noted that appellant could return to work regular duty with a lifting restriction of 20 pounds.

Dr. Paul Roberts, a Board-certified family practitioner, treated appellant on September 3, 2020 for a long history of anxiety that recently increased due to his wife's medical condition. He indicated that appellant was his wife's primary caregiver and she experienced panic attacks when left alone at home in the evenings. Dr. Roberts advised that, since appellant was assigned the 12:00 a.m. to 6:00 a.m. shift, he has developed worsening anxiety. He recommended that appellant be accommodated with an alternative shift that does not require him to be away from his spouse from 12:00 a.m. to 6:00 a.m.

On September 9, 2020 Dr. Crick noted that appellant needed off work because he was the caregiver to his wife from 12:00 a.m. to 6:00 a.m. daily. He indicated that appellant could not work during this time because of his wife's condition.

[3] Appellant submitted reports from Dr. Thorpe dated July 27, August 4 and 13, 2020, form reports dated August 13 and 19, 2020, an MRI scan of the lumbar spine dated August 17, 2020, an August 19, 2020 note from Dr. Crick, a copy of his statement refusing the modified job, and a copy of the job offer, all previously of record.

By decision dated October 1, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 2, 2020, based on his refusal of suitable work. It explained that appellant's treating physician, Dr. Thorpe's August 4, 2020 report indicated that appellant was partially disabled as a result of his employment injury, but that he could work subject to restrictions of lifting up to five pounds and no bending or stooping. OWCP further noted that Dr. Thorpe increased the lifting restriction to 10 pounds in his August 19, 2020 report and on August 28, 2020 provided lifting restrictions of 20 pounds. It found that Dr. Thorpe's reports provided a well-reasoned opinion as to appellant's current work limitations and the employing establishment offered him a job well within those restrictions.

By decision dated October 8, 2020, OWCP denied COP for the period August 5 through September 1, 2020, finding that a limited-duty job offer was available to appellant that met his work limitations and his refusal of the job offer was determined not to be justified. It noted that appellant's desire for another work schedule due to a family member's condition was not a valid reason for refusal under FECA. OWCP added that the denial of COP did not preclude him from filing a claim for disability due to the effects of the claimed July 18, 2020 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.[4] 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.[5] 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 or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.[6] 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.[7]

Section 10.517(a) of FECA's implementing regulations provides 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.[8] 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.[9]

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[4] *See K.S.,* Docket No. 19-1650 (issued April 28, 2020); *J.R.,* Docket No. 19-0206 (issued August 14, 2019); *R.P.,* Docket No. 17-1133 (issued January 18, 2018); *S.F.,* 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

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

[6] *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

[7] *S.D.,* Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

[8] 20 C.F.R. § 10.517(a).

[9] *Id.* at § 10.516.

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.[10] OWCP's 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.[11] In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[12]

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 2, 2020, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On August 5, 2020 the employing establishment offered appellant a position as a modified tractor trailer operator and on August 24, 2020 OWCP determined that the position was suitable. The duties of the position included surface visibility scanning for eight hours a day, post surface visibility reporting for one to two hours a day, check surface visibility mobile devices for latest updates for one to two hours a day, and safety talks in the postal vehicle service office for 30 minutes to 1 hour a day. The physical requirements of the position included no lifting over five pounds, no bending, and no stooping. The tour of duty was from 11:00 p.m. to 7:30 a.m.

The Board finds that the August 6, 2020 job offer was within the restrictions as prescribed by appellant's treating physician, Dr. Thorpe. Dr. Thorpe released appellant to work with restrictions of lifting up to five pounds and no bending or stooping.

The Board finds that OWCP properly accorded the weight of medical opinion to the reports of Dr. Thorpe who opined that, while appellant required work restrictions including no lifting over five pounds and no bending or stooping, he was capable of returning to work. The Board notes that Dr. Thorpe, as appellant's treating physician, had complete knowledge of the relevant facts and had numerous opportunities to examine appellant and to evaluate the course of his condition. Dr. Thorpe clearly opined that appellant could return to work subject to the restrictions set forth in the report of August 4, 2020. His opinion, therefore, must be considered reliable. The Board finds that Dr. Thorpe's opinion with respect to appellant's work limitations is based on a proper factual background and is sufficient to establish that the position is medically suitable to her work restrictions.[13]

Appellant submitted a September 3, 2020 report from Dr. Roberts who treated him for a long history of anxiety that recently increased due to his wife's medical condition. Dr. Roberts

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[10] *M.A.,* Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

[11] *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).

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

[13] *See generally Melvina Jackson,* 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

indicated that appellant's wife was having panic attacks when left alone at home in the evenings. He advised that, since appellant was asked to work the overnight shift he had developed worsening anxiety. Dr. Roberts recommended that appellant be accommodated with an alternative shift that did not require him to be away from his spouse overnight.

The Federal (FECA) Procedure Manual indicates that, if medical reports document a condition, which has arisen since the compensable injury and disables an employee from the offered job, the job will be considered unsuitable, even if the subsequently acquired condition is not employment related.[14] However, Dr. Roberts' report is insufficient to establish that the position offered appellant was unsuitable as the physician did not provide a reasoned opinion explaining how or why appellant's diagnosed anxiety or emotional condition prevented him from performing the modified job duties at the time his compensation was terminated.

Similarly, in a September 9, 2020 report, Dr. Crick noted that appellant needed off work because he was the caregiver to his wife from 12:00 a.m. until 6:00 a.m. daily. The Board finds that this report is insufficient to establish that the position offered appellant was unsuitable as the physician did not explain how any specific diagnosed conditions prevented him from performing the job duties of the modified position on or after August 6, 2020 when OWCP notified him of the offered position.

The Board finds that OWCP properly followed its established procedures prior to the termination of appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2), including providing him with an opportunity to accept the position offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid.[15]

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 2, 2020, because he refused an offer of suitable work.[16]

LEGAL PRECEDENT -- ISSUE 2

Section 8118(a) of FECA authorizes COP, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of

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

[15] *See K.S., supra* note 4; *C.H.,* Docket No. 17-0938 (issued November 27, 2017).

[16] *See M.H.*, Docket No. 17-0210 (issued July 3, 2018).

this title.[17] This latter section provides that written notice of injury shall be given within 30 days.[18] The context of section 8122 makes clear that this means within 30 days of the injury.[19]

FECA's implementing regulations provide in pertinent part:

"An employer shall continue the regular pay of an eligible employee without a break in time for up to 45 calendar days, except when, and only when:

(a) The disability was not caused by a traumatic injury;

(b) The employee is not a citizen of the United States or Canada;

(c) No written claim was filed within 30 days from the date of injury;

(d) The injury was not reported until after employment has been terminated;

(e) The injury occurred off the employing agency's premises and was otherwise not within the performance of official duties;

(f) The injury was caused by the employee's willful misconduct, intent to injure or kill himself or herself or another person, or was proximately caused by intoxication by alcohol or illegal drugs; or

(g) Work did not stop until more than 45 days following the injury."[20]

The Board has held that section 8122(d)(3) of FECA,[21] which allows OWCP to excuse failure to comply with the time limitation provision for filing a claim for compensation because of exceptional circumstances, is not applicable to section 8118(a), which sets forth the filing requirements for COP.[22] Thus, there is no provision in the law for excusing an employee's failure to file a claim within 30 days of the employment injury.[23]

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[17] *Supra* note 1 at § 8118(a).

[18] *Id*.

[19] *C.C.*, Docket No. 18-0912 (issued July 11, 2019); *J.S.,* Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey,* 40 ECAB 762, 763-64 (1989); *Myra Lenburg,* 36 ECAB 487, 489 (1985).

[20] 20 C.F.R. § 10.220. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.11 (June 2012).

[21] *Supra* note 1 at § 8122(d)(3).

[22] *C.C.*, and *J.S., supra* note 19; *William E. Ostertag,* 33 ECAB 1925 (1982).

[23] *Id.*; *Dodge Osborne,* 44 ECAB 849 (1993).

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was not entitled to continuation of pay.

By decision dated October 8, 2020, OWCP denied appellant's request for COP for the period August 5 through September 1, 2020 because he refused an offer of suitable work. It explained that a limited-duty job offer was available to appellant that met his work limitations and his refusal of the job offer was determined to be not justified and as a result he would not be entitled to COP.

The Board notes that 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.[24] A claimant who refuses suitable work is not entitled to further compensation, including payment of a schedule award, for the permanent impairment of a scheduled member.[25] However, this does not preclude appellant from obtaining COP for the period prior to the termination for refusal of suitable work on October 1, 2020. The Board thus finds that OWCP improperly denied appellant continuation of pay, as the denial was not based on any of the categories outlined in section 10.220 of FECA's implementing regulations.[26] Upon return of the case record, OWCP shall pay continuation of pay compensation as set forth in this decision.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 2, 2020, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds appellant has established entitlement to continuation of pay.

[24] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[25] *D.S.,* Docket No. 08-885 (issued March 17, 2009); *Sandra A. Sutphen*, 49 ECAB 174 (1997).

[26] 20 C.F.R. § 10.220. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.11 (June 2012).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2020 decision of the Office of Workers' Compensation Programs is affirmed. The October 8, 2020 decision is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 31, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board