United States Department of Labor
Employees' Compensation Appeals Board

L.A., Appellant	)	
and	)	**Docket No. 20-0946**
	)	**Issued: June 25, 2021**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Stockton, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 30, 2020 appellant, through counsel, filed a timely appeal from a February 19, 2020 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 OWCP received additional evidence following the February 19, 2020 decision. 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 met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 25, 2019, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On November 22, 1999 appellant, then a 39-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel syndrome (CTS) due to factors of her federal employment, including reaching. She noted that she first became aware of her condition and realized that it was caused or aggravated by factors of her federal employment on October 14, 1999.[4] OWCP accepted the claim for bilateral CTS. Appellant underwent a right carpal tunnel release surgery on December 3, 1999 and an April 17, 2013 left carpal tunnel release on May 13, 2010. She stopped work as a result of the left carpal tunnel surgery. OWCP paid appellant wage-loss compensation on the supplemental rolls as of May 13, 2010. On June 28, 2010 appellant was released to modified-duty work; however, she did not return to work with the employing establishment because they were unable to accommodate her restrictions. OWCP paid appellant wage-loss compensation on the periodic rolls as of October 24, 2010.

Appellant was referred to vocational rehabilitation services by OWCP on September 17, 2010, based on sedentary work restrictions provided by her treating physician. Vocational rehabilitation services terminated on June 25, 2012 because of a change in work restrictions.

On January 14, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. William P. Curran, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions and disability.

In an April 2, 2019 report, Dr. Curran reviewed the SOAF and noted appellant's history of injury and medical treatment. He examined appellant, provided findings, and diagnosed post-operative bilateral carpal tunnel releases, and low back pain, etiology undetermined. Dr. Curran noted that appellant continued to suffer residuals of the bilateral CTS and the thoracic or lumbosacral neuritis or radiculitis. He found that appellant had decreased sensation in her second and third digits in both hands, a recent electrical analysis compatible with a sensory component bilateral CTS, and residuals of her lumbosacral radiculitis in the form of low back pain. Dr. Curran advised that appellant had reached maximum medical improvement (MMI) for her bilateral carpal tunnel syndrome effective June 13, 2013. He further advised that his examination revealed essentially normal limits, outside of very minor atrophy, bilaterally, and opined that appellant was not temporarily totally disabled, was able to work, and could participate in a vocational rehabilitation program. Dr. Curran noted that appellant underwent a functional capacity evaluation on June 6, 2011 and that he would incorporate those restrictions based upon his examination. He

[4] Appellant has a prior claim for a July 3, 2005 traumatic injury. It assigned that claim OWCP File No. xxxxxx187 and accepted right shoulder and cervical strain. Under OWCP File No. xxxxxx253, OWCP accepted that appellant sustained an occupational disease as of November 27, 1995, which caused lumbar neuritis or radiculitis. These files have been administratively combined with the present claim, OWCP File No. xxxxxx107, with the latter serving as the master file.

completed an April 12, 2019 work capacity evaluation (Form OWCP-5c) and provided work restrictions of sitting, standing, and twisting for up to 4 hours, reaching above shoulder for up to 6 hours, repetitive wrist movements for up to 6 hours, pushing, pulling, and lifting for up to 8 hours, with no more than 10 pounds, and breaks of 10 to15 minutes every hour.

By letter dated May 17, 2019, the employing establishment offered appellant a full-time, modified mail processing clerk position consistent with the work tolerance limitations provided by Dr. Curran. The position was available effective May 28, 2019. The assignment was for six hours at the will-call door and up to two hours of working P.O. Box mail. The physical requirements of the modified position required: sitting up to four hours per day; standing and walking intermittently, up to four hours per day; simple grasping up to eight hours per day; and lifting, pushing, and pulling no more than 10 pounds.

On May 20, 2019 OWCP referred appellant for vocational rehabilitation services to facilitate her return to work.

In a memorandum of telephone call (Form CA-110) dated May 28, 2019, an employing establishment representative informed OWCP that appellant informed them that she was not going to accept the job offer and had filed papers for voluntary retirement.

In a letter dated May 28, 2019, the employing establishment indicated that appellant reported to the work location on May 28, 2019, spoke with the manager, and stated that she would not be returning, as she had retired effective May 24, 2019. It attached a notice of separation, which indicated that appellant had notified the employing establishment of her retirement on May 22, 2019 and that the effective date of separation was May 24, 2019. The employing establishment confirmed that the limited-duty job offer remained available.

In a May 29, 2019 rehabilitation action report, the vocational rehabilitation counselor noted that appellant refused the employing establishment's job offer as she was retiring.

By letter dated May 31, 2019, OWCP advised appellant that it had determined that the offered position was suitable, pursuant to 5 U.S.C. § 8106(c)(2), and afforded her 30 days to accept the position or provide reasons for the refusal. It informed her that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation. OWCP noted that retirement was not a valid reason for refusing a suitable offer of employment and she was expected to accept the offered position and return to work if medically capable.

On June 10, 2019 appellant informed OWCP that she had not refused the job offer. She noted that she had planned to retire since January because she had not received a job offer and that she could not do the job because she had a back condition and the second opinion physician could not "have her bend or anything."

In a June 11, 2019 Form CA-110, appellant indicated that she wanted to take Office of Personnel Management (OPM) retirement, rather than return to work.

On June 14, 2019 OWCP received a letter from appellant indicating that she had retired with OPM benefits as of May 24, 2019.

On July 9, 2019 the employing establishment confirmed that the modified job offer remained available.

By letter dated July 9, 2019, OWCP advised appellant that retirement was not a valid reason for refusal to accept the offered position of a modified mail processing clerk. It informed her that the offered position remained available and provided appellant 15 days to accept the position or have her benefits terminated.

On July 12, 2019 appellant contended that she had not refused the job offer because she had retired on May 24, 2019, "which is different." OWCP noted that appellant was again informed that retirement was not a valid reason to refuse a job offer. Appellant further argued that she wanted to work, but the employing establishment "won't take her back."

On July 15, 2019 appellant related that she could not reach her supervisor, but an employing establishment human resource specialist informed her that the job was not available. However, OWCP noted that the position remained available. Appellant requested that OWCP delay the decision and indicated that she would accept the offer, but had already planned a vacation, and did not want to cancel her flights. OWCP contended that a vacation was not a valid reason to refuse a job offer.

On July 24, 2019 the employing establishment confirmed that the job offer remained available. It further related that appellant had informed them that she was going on vacation and wanted an extension.

By decision dated July 25, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective July 25, 2019, as she had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It noted that she had not accepted the offered position of a modified mail processing clerk and had not resumed work following its 15-day notice letter. OWCP determined that the opinion of Dr. Curran constituted the weight of the evidence and established that appellant could perform the duties of the offered position.

On July 29, 2019 OWCP received a July 12, 2019 statement from appellant, indicating that on May 28, 2019 she reported to work and informed her supervisor that she had retired effective May 24, 2019. Appellant further related that the supervisor shook her hand and congratulated her, that she was advised by OPM not to report to work, that the process was confusing, that she would be happy to go back to work, but that she was informed by the employing establishment that they could not accommodate her restrictions. She further noted "I would also be glad to go back and work my job offer since my letter from you remains available to me." Appellant attached a copy of OWCP's July 9, 2019 letter.

On August 6, 2019 OWCP received a copy of appellant's election of OPM benefits, dated June 2, 2019.

In an August 9, 2019 statement, appellant related that she was following the instructions that OPM provided, that the employing establishment informed her not to report for duty, that she was never contacted and was waiting for their call, and that she had retired and had not refused the job offer.

On August 23, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Appellant indicated that she had always wanted to go back to work, that she even reported after she retired, and that the supervisor "shook my hand, she congratulated me, and she led me out the door." She further indicated that she did not understand why the employing establishment would offer her a job now, that they had told her, "don't go back to work you already retired. You know it's already done and over," and that she would "gladly go back and work."

OWCP received a copy of Dr. Curran's April 12, 2019 Form OWCP-5c.

A hearing was held on December 6, 2019. By decision dated February 19, 2020, OWCP's hearing representative affirmed the July 25, 2019 termination decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] 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.[6] 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.[7] 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.[8]

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[9] 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.[10]

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.[11] In other words, to justify termination

[5] *See J.V.*, Docket No. 17-1944 (issued December 18, 2018); *Linda D. Guerrero*, 54 ECAB 556 (2003).

[6] 5 U.S.C. § 8106(c)(2); *J.S.*, Docket No. 19-1399 (issued May 1, 2020); *see also Geraldine Foster*, 54 ECAB 435 (2003).

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

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

[9] 20 C.F.R. § 10.517(a).

[10] *Id.* at § 10.516.

[11] *K.W.*, Docket No. 19-0870 (issued September 18, 2019); *see Linda Hilton*, 52 ECAB 476 (2001).

of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.[12]

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[13] 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.[14] OWCP's procedures provide that acceptable reasons for refusing an offered position include medical evidence of an inability to do the work.[15]

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 25, 2019.

By letter dated May 17, 2019, the employing establishment offered appellant a full-time, modified mail processing clerk position consistent with the work tolerance limitations provided by Dr. Curran. By letter dated May 31, 2019, OWCP advised appellant that it had determined that the offered position was suitable, pursuant to 5 U.S.C. § 8106(c)(2), and afforded her 30 days to accept the position or provide reasons for the refusal. Appellant initially declined the job offer as she had planned to retire. By letter dated July 9, 2019, OWCP advised appellant that retirement was not a valid reason for refusal to accept the offered position of a modified mail processing clerk. It informed her that the offered position remained available and provided appellant 15 days to accept the position or have her benefits terminated. On July 12, 2019, within the 15-day period, appellant asserted that she wanted to work, but the employing establishment "won't take her back." On July 15, 2019 appellant again asserted that she would accept the offer, but noted that she had already planned a vacation, and did not want to cancel her flights. On July 24, 2019 the employing establishment confirmed that the job offer remained available. The employing establishment further related that appellant had informed them that she was going on vacation and wanted an extension. However, by decision dated July 25, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective July 25, 2019, finding that she had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

As noted, OWCP's regulations provide that before imposing the penalty of termination of wage-loss and schedule award compensation under section 8106(c), OWCP should advise the claimant that the position is suitable and afford her 30 days to accept the position or provide reasons for her refusal.[16] If the claimant provides reasons and OWCP determines that the reasons

[12] *Id.*

[13] 20 C.F.R. § 10.517(a).

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

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

[16] *Id.* at § 10.516.

are not acceptable, it should notify her of the determination and afford her 15 days to accept the offered position without penalty.[17]

OWCP terminated appellant's entitlement to wage-loss and schedule award compensation on July 25, 2019, after appellant had timely responded to the 15-day letter, accepting the offered position. The Board accordingly finds that OWCP failed to follow established procedures with respect to termination of compensation under 5 U.S.C. § 8106(c)(2).[18] The Board has recognized that section 8106(c)(2) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[19] It is OWCP's burden of proof to terminate compensation and, due to the above-noted procedural error, the Board finds that OWCP failed to meet its burden of proof.[20]

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 25, 2019.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 25, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

[17] *Id.*

[18] *See L.S.*, Docket No. 15-1246 (issued September 8, 2016).

[19] *See R.G.*, Docket No. 15-0492 (issued November 16, 2015); *H. Adrian Osborne* , 48 ECAB 556 (1997).

[20] *See S.B.*, Docket No. 17-1797 (issued April 11, 2018); *S.M.*, Docket No. 16-1913 (issued April 11, 2017).