United States Department of Labor
Employees' Compensation Appeals Board

R.I., Appellant	)	
and	)	**Docket No. 21-0565**
	)	**Issued: July 20, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Harrisburg, PA, Employer	)	

Appearances:
Ronald Thomas Tomasko, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On December 8, 2020 appellant, through counsel, filed a timely appeal from a June 15, 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, following the June 15, 2020 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 whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 26, 2019, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On June 20, 2007 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 19, 2007 he injured his left knee when his left foot slipped off a deteriorating concrete step while in the performance of duty. He did not stop work. OWCP accepted the claim for left knee lateral meniscus tear and left chondromalacia patellae. It authorized left knee arthroscopic surgery, which was performed on October 15, 2007. Appellant returned to full-duty modified work on January 12, 2008. OWCP paid him compensation on the supplemental rolls for intermittent total disability commencing October 5, 2007 and on the periodic rolls for total disability commencing April 7, 2013.[4]

In a July 10, 2013 work capacity evaluation (Form OWCP-5c), Dr. Richard H. Hallock, a Board-certified orthopedic surgeon, provided permanent work restrictions for full-time work. He noted that appellant was taking medication which affected his concentration, attention to tasks and alertness, and which may impact his driving ability.

On November 13, 2014 the employing establishment offered appellant a modified clerk position based on the work restrictions provided by Dr. Hallock. Appellant refused the offered position on November 21, 2014 stating that he was unable to perform the job due to medical issues.

On December 8, 2014 OWCP referred appellant, together with the medical record, statement of accepted facts (SOAF), and list of questions, to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's work capacity. In a report dated January 13, 2015, Dr. Draper opined that appellant was capable of working eight hours per day with restrictions. In an attached Form OWCP-5c, he listed permanent restrictions which included up to two hours of walking or standing and six hours of sitting.

On January 28, 2016 Dr. Hallock advised that appellant was unable to return to work without restrictions due to his left knee condition, which required limited standing or walking. However, he noted that appellant had other orthopedic conditions unrelated to his accepted employment condition which precluded him from performing other physical activities.

On March 22, 2016 Dr. Hallock opined that appellant could return to work with restrictions of limited standing and walking, based upon appellant's left knee condition. He also recommended that a functional capacity evaluation (FCE) be performed.

On March 23, 2016 OWCP referred appellant, together with the medical record, SOAF, and list of questions, to Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's work capacity.

[4] Appellant retired effective January 23, 2012.

In a report dated April 5, 2016, Dr. Feinstein opined that appellant was capable of working a sedentary job with restrictions of no walking or standing for more than 15 minutes at a time. In an attached Form OWCP-5c, he related that appellant could work eight hours a day provided permanent work restrictions which included up to one hour of walking or standing a day, and no twisting, bending, squatting, kneeling, or climbing.

On September 2, 2016 the employing establishment offered appellant a modified clerk position, for eight hours of work per day. The physical requirements of the position were standing and walking for 10 minutes at a time, lifting, and separating different types of mail into tubs, trays, and containers for transport. It also noted that a chair/stool would be available for appellant to sit or stand as necessary or needed.

In a report dated October 3, 2016, Dr. John P. Welch, a Board-certified family medicine physician, diagnosed left knee degenerative arthritis/end-stage degenerative joint disease. Additionally, he reported that appellant had bilateral knee, chronic back pain, and cervical disc disease, which decreased his range of motion. Dr. Welch opined that appellant was precluded from any repetitive sitting, standing, walking, climbing, bending, kneeling, stooping, pulling, pushing, or twisting. Based on a review of the modified job offer, he concluded that it would be detrimental to appellant's health if he attempted to perform the job duties.

On October 7, 2016 the employing establishment advised that the offered position was within the work restrictions set by Dr. Feinstein.

An October 11, 2016 FCE indicated that appellant was capable of performing modified sedentary work for four hours per day.

On October 17, 2016 appellant refused the offered position noting that his primary care physician advised that he could not meet the requirements of the position.

On October 24, 2016 the employing establishment clarified that the physical requirements of the offered job would not require walking or standing for more than 15 minutes at a time and for no more than an hour total.

In letters dated October 25, 2016, OWCP requested that Drs. Welch and Feinstein review an enclosed job offer and provide a medical opinion as to whether appellant could perform the position for four or eight hours a day.

On November 2, 11, and 18 2016 Dr. Welch responded to OWCP's request for clarification. He noted that appellant continued to suffer severe osteoarthritis of the knees, intervertebral disc disorder of the cervical spine, and bilateral hip arthritis, which continued to limit appellant's ability to stand or walk for any length of time. Dr. Welch further explained that the cement floors in the lobby would aggravate appellant's limitations, that appellant would be unable to assist clients while sitting, and his current narcotic use may hamper thought processes and speech. He concluded that while appellant might be able to perform some tasks as noted in the FCE, he did not believe that appellant had the stamina to work in any of the offered job positions on a daily basis.

On March 24, 2017 OWCP referred appellant, together with the medical record, SOAF, and list of questions, to Dr. Craig W. Fultz, a Board-certified orthopedic surgeon, to serve as an

impartial medical examiner (IME) to resolve the conflict in the medical opinion evidence. It declared that the conflict arose between Dr. Feinstein, a second opinion physician, who opined that appellant was capable of working eight hours per day with restrictions, and Dr. Welch, an attending physician, who opined that appellant could only work part time in a very limited capacity and could not perform the job offered on October 24, 2016.

In a report dated June 8, 2017, Dr. Fultz, based upon a review of the medical record, SOAF, and physical examination, noted that the accepted conditions were left knee lateral meniscal tear and left knee chondromalacia. He opined that the June 19, 2007 work injury also aggravated appellant's preexisting osteoarthritis. Dr. Fultz opined that appellant was partially disabled and was capable of work with restrictions. In an attached Form OWCP-5c, he indicated that appellant was capable of working a maximum of four hours per day with restrictions of two hours of sitting and walking, one hour of standing, pulling, pushing, and lifting up to 20 pounds; no squatting, kneeling, or climbing, and breaks for 5 minutes every 30 minutes.

On June 12, 2017 OWCP expanded the acceptance of appellant's claim to include left knee traumatic osteoarthritis.

On July 17, 2017 the employing establishment offered appellant a permanent modified clerk job working four hours per day. The duties of the position were up to two hours of Unendorsed Bulk Business Mail (UBBM) verification, four hours of lobby director to include Mobile Point-of-Sale (MPOS) and Self-Service Kiosk (SSK), and up to two hours of second notices and boxing service as needed. The physical requirements of the position were standing for one hour, walking and sitting for two hours, and intermittent lifting of up to 20 pounds. It also noted that a chair/stool would be available for appellant to sit or stand as necessary or needed.

In a letter dated August 16, 2017, OWCP requested that Dr. Fultz provide a supplemental opinion. It noted that the employing establishment did not address the restrictions he had provided of a five-minute break every half hour and no squatting, kneeling, or climbing. OWCP requested that Dr. Fultz address Dr. Welch's concern regarding appellant's ability to drive 20 to 25 minutes from his home. It also requested that Dr. Fultz address appellant's ability to work on concrete floors for four hours per day.

In a September 5, 2017 supplemental report, Dr. Fultz responded to the questions posed by OWCP. He advised that appellant should not be driving while taking any medication impacting cognitive ability. Dr. Fultz also explained that standing or walking on a hard surface such as concrete can increase the stress on appellant's knee and potentially increase his symptoms. He concluded that appellant could tolerate working four hours per day with frequent five-minute breaks and changing positions as needed.

In a January 5, 2018 report, Dr. Hallock advised that appellant was capable of working a sedentary job with limited walking and standing. He did not specify the number of hours appellant could work.

On October 19, 2018 the employing establishment offered appellant a modified city carrier position working eight hours per day based on the restrictions noted by Dr. Hallock in his January 5, 2018 report. The duties of the position were described as UBBM verification, lobby director/MPOS/SSK, boxing section and red book maintenance, Enterprise Customer Care (ECC)

cases, and answering telephones. The physical requirements of the position noted eight hours of sitting and eight hours of simple grasping.

On October 26, 2018 appellant refused the offered position and enclosed Dr. Fultz' reports limiting appellant to working four hours per day with restrictions. He also noted that Dr. Hallock had not released him to return to work.

In a note dated November 14, 2018, Dr. Hallock advised that appellant could not return to work. In a January 4, 2019 report, he diagnosed left knee post-traumatic osteoarthritis. Dr. Hallock advised that appellant was capable of working in a sedentary job with limited walking and standing. He again did not specify the number of hours that appellant could work.

On February 6, 2019 the employing establishment confirmed that the offered position was still available.

In a February 6, 2019 letter, OWCP advised appellant that it had reviewed the modified-city carrier position offered on November 2, 2018 and found that it was suitable in accordance with the medical limitations provided by Dr. Hallock in his January 4, 2019 report. It notified him that, if appellant failed to report to work or failed to demonstrate that the failure was justified, pursuant to 5 U.S.C. § 8106(c)(2), his right to compensation for wage-loss compensation or a schedule award would be terminated. OWCP afforded appellant 30 days to respond.

In a report dated February 19, 2019, Dr. J. Kent L. Wagner, a Board-certified family medicine physician, diagnosed severe osteoarthritis from end-stage left knee degenerative joint disease and bilateral hip arthritis. He explained that these conditions limited appellant's ability to stand or work for any length of time as appellant needs to rest and sit frequently. Appellant also required both "ANSAIDS" and narcotic pain medication, which hampered his thought processes and speech. Dr. Wagner opined that appellant was unable to perform any of the offered job duties. Additionally, he did not believe that appellant had the stamina to work on a daily basis.

In a letter dated March 5, 2019, appellant's counsel advised that the offered position was not suitable as the medical evidence established that appellant was not capable of working an eight-hour day. Additionally, counsel asserted that both Dr. Hallock and Dr. Wagner found appellant disabled from work.

By letter dated April 10, 2019, OWCP notified appellant that his reason for refusing the position was not valid and provided him 15 days to accept the position or have his entitlement to wage-loss compensation benefits terminated. It advised him that the offered position remained available.

Dr. Wagner, in a report dated April 15, 2019, diagnosed left knee osteoarthritis and low back pain. He reported that appellant had decreased stamina as the result of limited mobility from his knee pain. Dr. Wagner also noted that appellant had problems with cognition due to his medication and occasional issues with simple instructions.

In a letter dated April 25, 2019, counsel again asserted that the medical evidence established that the offered position was not suitable as appellant could not work eight hours per day. He asserted that no physician had released appellant to return to any type of full-time work.

By decision dated May 17, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective May 26, 2019, as he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It noted that he had not accepted the offered position and resumed work following its 15-day letter. OWCP determined that the opinion of Dr. Hallock as provided in his January 4, 2019 report constituted the weight of the evidence and established that appellant could perform the duties of the offered position.

OWCP thereafter received reports dated May 20, June 20, July 22, and August 22, 2019 from Dr. Wagner, which repeated findings from prior reports.

On May 28, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on August 20, 2019.

By decision dated September 30, 2019, an OWCP hearing representative affirmed the May 17, 2019 decision.

Dr. Wagner continued to submit reports which were repetitive of his prior reports.

In a note dated November 27, 2019, Dr. Hallock indicated that appellant could not retum to work.

On March 27, 2020 appellant, through counsel, requested reconsideration. In a letter dated March 19, 2020, counsel asserted that the offered job was not suitable as appellant could not perform the duties of the offered position and could not work an eight-hour day.

By decision dated June 15, 2020, OWCP denied modification.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[5] It has authority undersection 8106(c)(2) of FECA 5 U.S.C. § 8106(c)(2), to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[6] In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.[7]

[5] *T.M.*, Docket No. 20-0401 (issued February 26, 2021); *E.W*, Docket No. 19-1711 (issued July 29, 2020); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[6] 5 U.S.C. § 8106(c)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

[7] 20 C.F.R. § 10.500(b).

Section 8106(c)(2) 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, 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]

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[11] Its procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[12]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 26, 2019, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

In terminating appellant's compensation benefits, OWCP primarily relied upon the January 4, 2019 report of Dr. Hallock, his attending physician. On January 4, 2019 Dr. Hallock opined that appellant was capable of working in a sedentary position, with limited standing and walking. In this report he did not specify whether appellant could work four or eight hours a day. Dr. Hallock had previously requested an FCE be performed to determine appellant's work capability and an October 11, 2016 FCE determined appellant was capable of performing modified sedentary work for four hours per day.

The Board notes that OWCP had also previously referred appellant to Dr. Fultz for an impartial medical examination to resolve the conflict in the medical opinion evidence, Dr. Feinstein, a second opinion, who opined that appellant was capable of working eight hours per day with restrictions, and Dr. Welch, an attending physician, who opined that appellant could only work part time in a very limited capacity. Dr. Fultz found that appellant could work four hours per day in a sedentary position with restrictions including four hours per day with frequent five-minute breaks and changing positions as needed.

Contrary to the recommendations of Dr. Hallock, appellant's treating physician, and Dr. Fultz, an IME, who found that appellant could only work four hours per day in a sedentary position with restrictions, the employing establishment offered him a full-time position as a

[8] *T.M.*, *supra* note 5; *E.W.*, *supra* note 5; *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[9] 20 C.F.R. § 10.517(a).

[10] *Id.* at § 10.516.

[11] *Id.* at § 10.517(a).

[12] *Supra* note 6 at Chapter 2.814.5a(4) (2013); *see D.C.*, Docket No. 19-1297 (issued October 5, 2021); *J.K.*, Docket No. 19-0064 (issued July 16, 2020).

modified city carrier on November 2, 2018, noting the job was sedentary. While the offered position was ostensibly based upon Dr. Hallock's sedentary work restrictions, Dr. Hallock did not specify the number of hours appellant was capable of working in his January 5, 2018 or January 4, 2019 reports. Moreover, OWCP failed to consider the evidence of record, including the reports from its IME, Dr. Fultz and the FCE which found that appellant was only capable of working four hours per day in a sedentary position.

The Board has held that, for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.[13] As a penalty provision, 5 U.S.C. § 8106(c)(2) must be narrowly construed.[14] The Board finds that OWCP has not established that appellant could perform the suitable work position for eight hours a day. Therefore, the Board finds that it has not met its burden of proof and thus erroneously terminated his compensation entitlement under 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 26, 2019, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

[13] *D.C.*, *id.*; *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Annette Quimby*, 49 ECAB 304 (1998).

[14] *D.C.*, *id.*; *A.F.*, *id.*; *Stephen A. Pasquale*, 57 ECAB 396 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 20, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board