

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

_____)	
T.H., Appellant)	
)	
and)	Docket No. 19-1143
)	Issued: May 13, 2022
DEPARTMENT OF THE NAVY, NAVAL BASE)	
KITSAP, Keyport, WA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*John Eiler Goodwin, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On April 22, 2019 appellant, through counsel, filed a timely appeal from an October 23, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, counsel asserted that oral argument should be granted because OWCP's decision was invalid as it was unsigned. He also asserted that the employing establishment's light-duty job offer was invalid. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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 January 8, 2014, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 11, 2013 appellant, then a 54-year-old firefighter, filed an occupational disease claim (Form CA-2) alleging bilateral hearing loss and tinnitus due to factors of his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on December 14, 2012.⁵ OWCP accepted the claim for bilateral hearing loss.

On June 13, 2013 appellant was advised of the employing establishment's inability to accommodate him in his firefighter position. On July 23, 2013 the employing establishment offered him the position of security clerk (office automation) as a permanent reasonable accommodation. The accompanying position description noted that the physical requirements of the position included work that was primarily sedentary; however, some standing, bending, lifting, and walking were required. The position also required "a great deal of visual computer contact." The position was located in the pass and identification office, which was "an office setting involving everyday risks or discomforts which require normal safety precautions typical of such places" and the work area was noted to be "adequately lighted."

Appellant declined the job offer on August 14, 2013.

In a letter dated September 10, 2013, OWCP advised appellant that the offered position of security clerk was found to be suitable to his capabilities and was currently available. It found the position suitable and in accordance with his medical limitations for his date-of-injury job as a firefighter because it did not involve any significant noise exposure or the need for normal hearing, with or without hearing aids. Appellant was provided 30 days to accept the position or provide written reasons for his refusal. OWCP informed him that if he failed to accept the offered position

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 16-0800 (issued December 15, 2017).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx016. Appellant also has a prior claim under OWCP File No. xxxxxx133, accepted for bilateral hearing loss. His claims under OWCP File Nos. xxxxxx016 and xxxxxx133 have been administratively combined by OWCP with the latter serving as the master file.

and failed to demonstrate that the refusal of the offer of suitable work was justified, his compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2).

In a November 19, 2013 letter, OWCP advised appellant that the offered position remained suitable and available to him, and that his reasons for refusing to accept the offered position were not valid. It afforded him 15 additional days to accept and report to that position or his entitlement to wage-loss compensation and schedule award benefits would be terminated. No response was received.

By decision dated January 8, 2014, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective January 8, 2014 as he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It noted that he had not accepted the position within the allotted 15-day time period. OWCP determined that the job was suitable as the position may be performed within the prescribed restrictions. It found that appellant's failure to report to the offered position was not justified as he had not submitted evidence that the position was beyond his ability or required him to be exposed to excessive noise.

On January 10, 2014 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings & Review. The hearing was held June 27, 2014.

By decision dated September 11, 2014, the hearing representative affirmed the January 8, 2014 OWCP decision.

On November 18, 2014 appellant requested reconsideration. Additional evidence regarding noise exposure was submitted.

By decision dated April 23, 2015, OWCP denied modification of the September 11, 2014 decision.

On September 28, 2015 appellant requested reconsideration. In a September 23, 2015 report, Dr. Michael McManus, Board-certified in occupational medicine, opined that appellant should not be exposed to any levels of hazardous noise at the workplace.

By decision dated November 17, 2015, OWCP denied appellant's request for reconsideration.

Appellant, through counsel, filed a timely appeal to the Board. By decision dated December 15, 2017, the Board set aside OWCP's November 17, 2015 nonmerit decision, finding that he had submitted relevant and pertinent new evidence on reconsideration that was not previously considered by OWCP. The Board remanded the case to OWCP for an appropriate merit decision.⁶

By decision dated October 23, 2018, OWCP denied modification of its April 23, 2015 decision.

⁶ *Id.*

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.⁷ 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.⁸ 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.⁹ 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.¹⁰

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.¹¹ 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.¹²

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.¹³ 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.¹⁴ In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹⁵

⁷ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁸ 5 U.S.C. § 8106(c)(2); see also *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *Geraldine Foster*, 54 ECAB 435 (2003).

⁹ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁰ *Y.J.*, Docket No. 20-1562 (issued December 14, 2021); *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

¹¹ 20 C.F.R. § 10.517(a).

¹² *Id.* at § 10.516.

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

¹⁴ 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).

¹⁵ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective January 8, 2014, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

Appellant worked for the employing establishment as a firefighter. OWCP accepted his claim for bilateral hearing loss. On June 13, 2013 appellant was advised of the employing establishment's inability to accommodate him in his firefighter position. On July 23, 2013 the employing establishment offered him the position of security clerk (office automation) as a permanent reasonable accommodation. The accompanying position description noted that the physical requirements of the position included work that was primarily sedentary, however, some standing, bending, lifting, and walking were required. The position also required "a great deal of visual computer contact." It was located in the pass and identification office, which was "an office setting involving everyday risks or discomforts which require normal safety precautions typical of such places" and the work area was noted to be "adequately lighted."

The case record does not contain medical evidence establishing that appellant was totally disabled from work or otherwise incapable of performing the duties listed in the job offer. Thus, OWCP properly found the offered position suitable.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c)(2), OWCP advised appellant on September 10, 2013 that it found the job offered position to be suitable and afforded him an opportunity to provide reasons for refusing the position within 30 days. In a November 19, 2013 letter, it advised him that the offered position remained suitable and available to him, and that his reasons for refusing to accept the offered position were not valid. OWCP afforded appellant 15 additional days to accept and report to that position or his entitlement to wage-loss compensation and schedule award benefits would be terminated. The Board finds that OWCP followed the established procedures prior to the termination of his wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2).

The Board, therefore, finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award based on his refusal to accept the offered position.

On appeal counsel argues that OWCP's decision was invalid as it was unsigned. However, the decision was properly signed, pursuant to FECA Bulletin No. 18-07 (issued August 17, 2018). Counsel further argues OWCP erroneously terminated appellant's compensation. As explained above, OWCP met its burden of proof in terminating appellant's wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective January 8, 2014, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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