United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 20-0341**
	)	**Issued: April 3, 2024**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Edison, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 20, 2019 appellant filed a timely appeal from a January 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

[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] *Order Dismissing Appeal*, Docket No. 20-0341 (issued June 15, 2021), *Order Granting Petition for Reconsideration and Reinstating Appeal*, Docket No. 20-0341 (issued February 5, 2024).

[3] 5 U.S.C. § 8101 *et seq*.

[4] The Board notes that, following the January 2, 2019 decision, appellant submitted additional evidence on appeal to the Board. However, the Board's *Rules of Procedures* 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.

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 April 28, 2018, for abandoning suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On February 13, 2015 appellant, then a 51-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on February 11, 2015 she broke bones in her right ankle when she slipped and fell on ice while in the performance of duty. She stopped work on the date of the claimed injury. OWCP accepted appellant's claim for fracture, dislocation, and sprain of the right ankle. It paid her wage-loss compensation on the supplemental rolls, effective March 29, 2015, and on the periodic rolls, effective May 31, 2015.

On February 11, 2015 appellant stopped work and underwent open reduction internal fixation of the right distal fibula and open reduction internal fixation of the right distal tibiofibular. On April 24, 2015 she underwent surgical removal of hardware from the February 11, 2015 surgery. Both of these procedures were authorized by OWCP. Appellant returned to limited-duty work on October 19, 2015 and stopped work again on March 4, 2016.

In August 2016, appellant began participating in a vocational rehabilitation program designed to return her to work.

On December 15, 2016 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions for a second opinion examination and evaluation with Dr. Arnold Goldman, a Board-certified orthopedic surgeon, to determine her injury-related medical condition and ability to work.

In a March 6, 2017 report, Dr. Goldman discussed appellant's factual and medical history, and indicated that she presented on that date with a chief complaint of right ankle pain. He reported the findings of his physical examination, noting that there was a well-healed incision adjacent to the right ankle with synovial thickening over the anterior talofibular ligament and sinus tarsi. Appellant had swelling in the right ankle but exhibited no pain medial to the right deltoid ligament. The range of motion of the right ankle was limited to 10 to 15 degrees of dorsiflexion and 20 to 25 degrees of plantar flexion. Dr. Goldman noted that appellant could squat and hop on the left leg, but could not squat on the right leg when asked to do so. Appellant had a mildly positive antalgic gait. Dr. Goldman indicated that appellant continued to have residuals of the February 11, 2015 employment injury and could not return to her date-of-injury job secondary to right ankle pain/swelling and an inability to fully stand up on her toes and backwards on her heels. He indicated that she could only perform light work with lifting up to 20 pounds and noted that further restrictions were delineated in an attached work capacity evaluation (Form OWCP-5c). In the attached Form OWCP-5c dated March 6, 2017, Dr. Goldman advised that appellant could perform light work on a full-time basis. He noted that she could sit for eight hours per day and perform each of the following activities for four hours per day: walking, standing, reaching, reaching above shoulder level, twisting, repetitive wrist movements, repetitive elbow movements, pushing up to 20 pounds, pulling up to 20 pounds, and lifting up to 20 pounds. Appellant could not engage in bending, stooping, squatting, kneeling, or climbing.

In September 22 and October 4, 2017 reports, appellant's vocational rehabilitation counselor advised that appellant was vocationally and physically capable of working as a customer care agent.

On October 4, 2017 the employing establishment offered appellant a modified position as a customer care agent (tier 1). The position involved using a computer and telephone while handling customer inquiries and helping customers resolve problems with postal products and services. The physical requirements of the position included sitting in an office-type chair with a supportive back for eight hours per day, walking/standing for four hours per day, pushing/pulling/lifting up to 20 pounds, simple grasping and pushing/pulling of a computer mouse, and fine manipulation or use of a single finger on a keyboard. The position allowed the flexibility to switch between sitting, walking, and standing as needed for comfort.

On October 23, 2017 the employing establishment advised OWCP that appellant had accepted the modified position of customer care agent, and on December 11, 2017 she returned to work in the offered position.

In a February 7, 2018 Form OWCP-5c, Dr. Goldman indicated that appellant could sit for eight hours per day and perform each of the following activities for four hours per day: walking, standing, reaching, reaching above shoulder level, and twisting. She could engage in repetitive elbow and wrist movements for eight hours per day, and push/pull/lift up to 20 pounds. Appellant could bend and stoop for two hours per day, but could not engage in squatting, kneeling, or climbing.

In a February 9, 2018 Form OWCP-5c, Dr. Goldman indicated that appellant could sit for eight hours per day, walk for four hours, stand for four hours, twist for four hours, and push/pull/lift up to 20 pounds. Appellant could bend and stoop for two hours per day, but could not engage in squatting, kneeling, or climbing. Dr. Goldman did not impose any restrictions on reaching or repetitive wrist and elbow movements.

On February 18, 2018 appellant stopped working as a customer care agent. On February 21, 2018 OWCP received a letter of the same date wherein counsel advised that appellant stopped work on February 18, 2018 due to an early retirement election she made through the Office of Personnel Management (OPM) effective February 18, 2018.

In a February 22, 2018 letter, OWCP advised appellant that the customer care agent position offered by the employment establishment was in accordance with the medical restrictions of Dr. Goldman and it had determined that it was suitable. It advised that the position remained available. Pursuant to 5 U.S.C. § 8106(c)(2), OWCP afforded appellant 30 days to return to the position or to provide adequate reasons for refusal. It informed her that an employee who refuses or abandons an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

On March 6, 2018 OWCP received a signed election form in which appellant elected to receive OPM benefits in lieu of FECA benefits effective February 18, 2018.

On March 28, 2018 OWCP received a partial copy of a February 15, 2018 report wherein Dr. David Weiss, an osteopath and Board-certified orthopedic surgeon, determined that appellant had 13 percent permanent impairment of the right lower extremity under the standards of the sixth

edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5]

In a March 28, 2018 letter, OWCP advised appellant that her reasons for abandoning the position offered by the employing establishment were unjustified. It informed her that her wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the position within 15 days of the date of the letter.

In statements dated March 29 and April 10, 2018, counsel noted that appellant had been approved for voluntary early retirement. He asserted that appellant would lose her ability to retire early if she returned to work as a customer care agent. Counsel argued that the customer care agent position was not appropriate for appellant. In an April 4, 2018 statement, appellant discussed the circumstances of her early retirement.

In an April 23, 2018 memorandum of telephone call (Form CA-110), the employing establishment advised OWCP that the customer care agent position remained available to appellant, but she had not returned to work.

By decision dated April 27, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective April 28, 2018, for abandoning suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On May 4, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on October 19, 2018, appellant asserted that she was unable to work in the customer carer agent position she returned to on December 11, 2017. She indicated that the position required her to use a computer and telephone while helping people with their problems. Appellant testified that she found the position to be horrible and stressful. She advised that she had resolved to retire long before her return to work in December 2017 and she felt that she had been unfairly penalized for retiring at a young age.

By decision dated January 2, 2019, OWCP's hearing representative affirmed the April 27, 2018 decision.

LEGAL PRECEDENT

Under FECA,[6] 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

[5] A.M.A., *Guides* (6th ed. 2009).

[6] *Supra* note 2.

[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 Geraldine Foster,* 54 ECAB 435 (2003).

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)(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.[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]

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 28, 2018, for abandoning suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record establishes that appellant was capable of performing the customer care agent position offered by the employing establishment on October 4, 2017 and determined to be suitable by OWCP in February 2018. The customer care agent position was selected by appellant's vocational rehabilitation counselor and OWCP properly relied on the opinion of appellant's counselor in determining that she was vocationally capable of performing the position.[16] The position involved using a computer and telephone while addressing inquiries and helping postal customers resolve problems. The physical requirements of the position included sitting in an office-type chair with a supportive back for eight hours per day, walking/standing for four hours per day, pushing/pulling/lifting up to 20 pounds, simple grasping and pushing/pulling

[9] *See Ronald M. Jones,* 52 ECAB 190 (2000).

[10] *M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Joan F. Burke,* 54 ECAB 406 (2003).

[11] 20 C.F.R. § 10.517(a).

[12] *Id.* at § 10.516.

[13] *M.J., supra* note 10; *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 also 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).

[16] *See supra* note 14 at Chapter 2.814.4 (June 2013).

of a computer mouse, and fine manipulation or use of a single finger on a keyboard. The position allowed the flexibility to switch between sitting, walking, and standing as needed for comfort. The record does not reveal that the customer care agent position was temporary in nature.[17]

In a March 6, 2017 report of physical examination and an accompanying Form OWCP-5c, produced prior to the offering of the customer care agent position, Dr. Goldman, the OWCP referral physician, provided work restrictions, noting that appellant could sit for eight hours per day and perform each of the following activities for four hours per day: walking, standing, reaching, reaching above shoulder level, twisting, repetitive wrist movements, repetitive elbow movements, pushing up to 20 pounds, pulling up to 20 pounds, and lifting up to 20 pounds. She could not engage in bending, stopping, squatting, kneeling, or climbing. Dr. Goldman also assessed appellant's ability to work around the time she stopped working in the customer care agent position on February 18, 2018. In Form OWCP-5c reports dated February 7 and 9, 2018, Dr. Goldman provided work restrictions similar to those provided in his March 6, 2017 Form OWCP-5c. He continued to indicate that appellant could perform various activities consistent with the duties of the customer care agent position, including sitting for eight hours per day, walking/standing for four hours, and pushing/pulling/lifting up to 20 pounds.

The Board finds that, in determining that appellant is physically capable of performing the customer care agent position, OWCP properly relied on the opinion of Dr. Goldman. OWCP properly accorded the weight of the medical opinion evidence to Dr. Goldman who found that appellant was capable of performing light-duty work. It is noted that Dr. Goldman's work restrictions would allow appellant to perform the duties of a customer care agent. Dr. Goldman based his opinion on a proper factual and medical history and physical examination findings, and provided medical rationale for his opinion that appellant was capable of working under specified restrictions. Accordingly, OWCP properly relied on his opinion relative to work tolerances and limitations in terminating appellant's wage-loss compensation and entitlement to a schedule award, effective April 28, 2018, due to her abandonment of suitable work.[18]

Appellant submitted a February 15, 2018 report wherein Dr. Weiss, an attending physician, determined that she had 13 percent permanent impairment of the right lower extremity. The Board finds that this report does not provide an opinion on appellant's ability to work as a customer care agent, and this report is insufficient to outweigh the well-rationalized report of Dr. Goldman who addressed both the accepted and concurrent conditions.[19]

Appellant asserted that it was permissible for her to stop working in the customer care agent position on February 18, 2018 without penalty because she had taken early retirement through OPM, effective the same date. However, OWCP procedures provide that such retirement status is not a valid reason for refusing or abandoning suitable work.[20]

[17] If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. *Id.* at Chapter 2.814.4c(5) (June 2013).

[18] *See A.F.,* Docket No. 16-0393 (issued June 24, 2016).

[19] *See V.R.,* Docket No. 20-1478 (issued November 28, 2022).

[20] *See supra* note 14 at Chapter 2.814.5c(4) (June 2013). *See also Stephen R. Lubin*, 43 ECAB 564 (1992).

The Board finds that, therefore, OWCP has established that the customer care agent position offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified. The Board has reviewed the evidence and argument submitted by appellant in support of her abandonment of the modified position of customer care agent and finds that it is insufficient to justify her abandonment of the position.[21]

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 28, 2018, for abandoning suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[21] The Board finds that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing her with an opportunity to accept the position offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid. *See generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.,* 43 ECAB 818 (1992).