

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

C.G., Appellant)	
)	
and)	Docket No. 24-0210
)	Issued: August 27, 2024
DEPARTMENT OF COMMERCE, U.S.)	
CENSUS BUREAU, Tampa, FL, Employer)	
)	

Appearances:
Appellant, pro se
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 4, 2023 appellant filed a timely appeal from June 27 and July 17, 2023 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 properly suspended appellant's wage-loss compensation benefits, effective June 18, 2023, for failure to complete an EN-1032 form as requested; and (2) whether OWCP properly terminated appellant's wage-loss compensation and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 17, 2023 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. 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.*

entitlement to schedule award compensation, effective July 17, 2023, because she 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 on different issues.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 2, 2010 appellant, then a 58-year-old census enumerator, filed a traumatic injury claim (Form CA-1) alleging that on July 13, 2010 she sustained bruising to both knees when she tripped and fell while in the performance of duty. She stopped work on July 14, 2010. OWCP accepted appellant's claim for sprains of the neck, lumbar spine, and lateral collateral ligaments of both knees. It subsequently expanded the acceptance of her claim to include bilateral internal knee derangement, left knee medial meniscus tear, and left knee Baker's cyst. OWCP paid appellant wage-loss compensation on the supplemental rolls, effective October 25, 2010, and on the periodic rolls, effective July 3, 2011.

Appellant continued to receive medical treatment. She underwent OWCP-approved left knee arthroscopic surgery on December 28, 2011 and right knee arthroscopic surgery on November 6, 2013.

In July 2014 appellant began participating in an OWCP-sponsored vocational rehabilitation program designed to return her to work. These vocational rehabilitation efforts did not result in a successful job placement.

On May 13, 2022 OWCP referred appellant along with the case record, a statement of accepted facts (SOAF), and a series of questions, for a second opinion examination and evaluation with Dr. Omar Hussamy, a Board-certified orthopedic surgeon. It requested that Dr. Hussamy provide an opinion regarding appellant's injury-related residuals and ability to work.

In a June 24, 2022 report, Dr. Hussamy discussed appellant's factual and medical history, noting that she presently primarily complained of pain in her neck, low back, and knees. He noted that, upon physical examination, appellant exhibited tenderness to palpation of the cervical spine, lumbar spine, and knees, and indicated that she had a positive McMurray's test and 2+ patellofemoral crepitus in each knee. Dr. Hussamy advised that appellant had limited range of motion of the cervical spine and lumbar spine. He opined that her accepted work conditions had not resolved. Dr. Hussamy indicated that appellant could not work as an enumerator/crew leader but was "able to work in a sedentary capacity." In an attached June 24, 2022 work capacity evaluation (Form OWCP-5c), he checked a box indicating that she could perform "sedentary" work, but he also checked a box indicating that she could not work for eight hours per day with restrictions. Dr. Hussamy did not complete the limitations portion of the form.

In a January 25, 2023 report, Dr. Victor Silva, Board-certified in family medicine, discussed appellant's factual and medical history, and noted that, upon physical examination, she exhibited tenderness on palpation of the cervical spine, shoulders, thoracic spine, lumbar spine, and knees. Appellant had 2/5 or 3/5 muscle strength in various muscle groups of the upper and

³ Docket No. 13-36 (issued April 9, 2013); Docket No. 21-0171 (issued November 29, 2021).

lower extremities. Dr. Silva diagnosed cervical sprain/strain, thoracic sprain/strain, lumbosacral sprain/strain, shoulder sprain, cephalalgia, cervicalgia, lumbosacral radiculopathy, and cervical disc disorder with radiculopathy. He advised that appellant should restrict activities to lifting no more than 10 pounds.

OWCP requested that Dr. Hussamy clarify his opinion on appellant's ability to work. In a January 30, 2023 note, Dr. Hussamy advised that appellant could work in a sedentary capacity for up to six hours per day "with avoidance of lifting weights over 10 pounds."

OWCP periodically requested that appellant submit financial disclosure statements (EN-1032 forms), which solicited information about her employment, volunteer work, dependent(s) status, receipt of other federal benefits and/or payments, and third-party settlements. On May 15, 2023 it provided her with an EN-1032 form and informed her in a letter of even date that federal regulations required her to report any earnings received or employment performed during the previous 15 months. OWCP advised appellant that she was required to fully answer all questions on the EN-1032 form and return it within 30 days or her benefits would be suspended pursuant to 20 C.F.R. § 10.528. It mailed the letter and EN-1032 form to her last known address of record. Appellant did not respond to OWCP's request.

In a May 17, 2023 letter, the employing establishment offered appellant a temporary position as a field representative. It advised appellant that it had "identified a suitable position with the [employing establishment] that is entirely congenial with your physical limitations" of no lifting more than 10 pounds and no driving. The employing establishment indicated that the position was a "[t]emporary [a]ppointment for at least 90 days, with potential for extension" and that appellant's duty station would be her home address in Tampa, Florida. The hourly pay rate would be \$16.14 per hour and appellant would work a variable schedule of up to 20 to 25 hours per week, but no more than 6 hours per day. The employing establishment advised that the position was a sedentary position that was performed entirely at home only and indicated that a field representative interviewed respondents to collect data required for current or one-time surveys via telephone. It advised appellant that she had five days to indicate whether she would accept or decline the offered position and that she was scheduled to begin "tentative training" for the position in July 2023 pending the clearance of her background check. The employing establishment further noted, "Please find the Position Description attached to this offer letter, and the Physical Demands Matrix which outlines the physical requirements of the job that will be adhered to and supersedes any other listing of physical requirements of the job which may be contained in the Position Description." No such documents were attached. Appellant did not accept the position offered by the employing establishment.

In a May 23, 2023 letter, OWCP advised appellant that the field representative position offered by the employing establishment was in accordance with the medical restrictions of Dr. Hussamy and Dr. Silva, and that it had determined that it was suitable. Pursuant to 5 U.S.C § 8106(c)(2), it afforded her 30 days to either accept the position or to provide adequate reasons for refusal. OWCP informed appellant that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

By decision dated June 27, 2023, OWCP suspended appellant's wage-loss compensation benefits, effective June 18, 2023, due to her failure to submit the EN-1032 form as requested. It noted that she had not responded to its May 15, 2023 letter. OWCP advised that, if appellant

completed and returned an enclosed copy of the EN-1032 form, it would reinstate her wage-loss compensation benefits retroactive to the date of suspension.

On June 27, 2023 the employing establishment advised OWCP that the field representative position was still available. In a June 27, 2023 letter, OWCP informed appellant that she had not provided any valid reason for not accepting the field representative position offered by the employing establishment. It further informed her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. Appellant did not accept the position.

By decision dated July 17, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective July 17, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA authorizes the Secretary of Labor to require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.⁴

Under section 10.528 of OWCP's implementing federal regulations, an employee in receipt of compensation benefits must complete an affidavit as to any work or activity indicating an ability to work which the employee has performed for the prior 15 months.⁵ If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly suspended appellant's wage-loss compensation benefits, effective June 18, 2023, for failure to complete an EN-1032 form as requested.

On May 15, 2023 OWCP provided appellant with an EN-1032 form *via* a letter of even date and notified her that federal regulations required her to complete the form and answer all questions concerning her employment or earnings. It properly notified her that, if she did not completely answer all questions and return the form within 30 days, her benefits would be suspended. The record reflects that OWCP's letter was sent to appellant's last known address of record and there is no indication that it was returned as undeliverable.⁷ Under the mailbox rule, a

⁴ 5 U.S.C. § 8106(b).

⁵ 20 C.F.R. § 10.528. *See also R.B.*, Docket No. 20-0176 (issued June 25, 2020); *A.H.*, Docket No. 15-0241 (issued April 3, 2015).

⁶ *Id.* *See also P.M.*, Docket No. 16-0382 (issued May 19, 2016).

⁷ *See J.H.*, Docket No. 20-0785 (issued October 23, 2020); *Kenneth E. Harris*, 54 ECAB 502 (2003).

document mailed in the ordinary course of the sender's business practices to the addressee's last known address is presumed to be received by the addressee.⁸

The record indicates that appellant failed to timely submit the EN-1032 form within 30 days of OWCP's request. At the time she was receiving wage-loss compensation and was, therefore, required to complete the EN-1032 form.⁹ Appellant's failure to file an EN-1032 form within 30 days properly resulted in the suspension of her wage-loss compensation. Thus, the Board finds that OWCP properly suspended her wage-loss compensation benefits, effective June 18, 2023, pursuant to 20 C.F.R. § 10.528.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.¹¹ 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.¹² 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.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

⁸ *Id.*

⁹ *See R.S.*, Docket No. 20-0580 (issued September 14, 2020); *A.S.*, Docket No. 17-1530 (issued November 7, 2017).

¹⁰ *See R.B.*, *supra* note 5; *P.M.*, *supra* note 6; *M.W.*, Docket No. 15-0507 (issued June 18, 2015).

¹¹ *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

¹² 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).

¹³ *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁴ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

¹⁵ 20 C.F.R. § 10.517(a).

¹⁶ *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.¹⁷ 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.¹⁸ In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹⁹

According to OWCP's procedures, a job offer must be in writing and contain a description of the duties to be performed, the specific physical requirements of the position, the organizational and geographical location of the job, the date on which the job will first be available, the work schedule (including telework), pay rate (salary) information, and the date by which a response to the job offer is required.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective July 17, 2023, pursuant to 5 U.S.C. § 8106(c)(2).

In a May 17, 2023 letter, the employing establishment offered appellant a temporary position as a field representative. It advised her that it had "identified a suitable position with the [employing establishment] that is entirely congenial with your physical limitations" of no lifting more than 10 pounds and no driving. The employing establishment indicated that appellant would work a variable schedule of up to 20 to 25 hours per week, but no more than 6 hours per day. It advised that the position was a sedentary position that was performed entirely at home only and indicated that a field representative interviewed respondents to collect data required for current or one-time surveys *via* telephone. The employing establishment did not provide a starting date for the position, but noted that appellant was scheduled to begin "tentative training" for the position in July 2023 pending the clearance of her background check.

As noted above, a job offer must be in writing and contain a description of the duties to be performed, the specific physical requirements of the position, the organizational and geographical location of the job, the date on which the job will first be available, the work schedule (including telework), pay rate (salary) information, and the date by which a response to the job offer is required.²¹

The Board finds that the employing establishment did not provide a detailed description of the field representative position offered to appellant. In its May 17, 2023 letter, it only provided a vague description of the nature of the offered position and its physical requirements. Further, the

¹⁷ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁸ 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).

¹⁹ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

²⁰ See *supra* note 18 at Chapter 2.814.4a (June 2013).

²¹ See *id.*

employing establishment did not clearly indicate the position's starting date. In the same letter, it noted, "Please find the Position Description attached to this offer letter, and the Physical Demands Matrix which outlines the physical requirements of the job that will be adhered to and supersedes any other listing of physical requirements of the job which may be contained in the Position Description." However, no such documents were attached or otherwise made available to appellant.

The Board has held that, as a penalty provision, section 8106(c)(2) must be narrowly construed.²² Given the above-described deficiencies, the evidence of record does not demonstrate the suitability of the field representative position offered to appellant by the employing establishment in May 2023.²³ Consequently, OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective July 17, 2023, pursuant to 5 U.S.C. § 8106(c)(2).²⁴

CONCLUSION

The Board finds that OWCP properly suspended appellant's wage-loss compensation benefits, effective June 18, 2023, for failure to complete an EN-1032 form as requested. The Board further finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective July 17, 2023, pursuant to 5 U.S.C. § 8106(c)(2).

²² *B.H.*, Docket No. 22-0993 (issued November 28, 2022); *S.S.*, Docket No. 20-0123 (issued July 28, 2022).

²³ *See J.O.*, Docket No. 24-0278 (issued May 17, 2024); *Laurie Murrell*, Docket No. 04-0153 (issued June 14, 2004).

²⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2023 decision of the Office of Workers' Compensation Programs is affirmed and the July 17, 2023 decision is reversed.

Issued: August 27, 2024
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