United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 25-0084**
	)	**Issued: December 9, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On November 1, 2024 appellant, through counsel, filed a timely appeal from a June 25, 2024 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.

[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.*

ISSUE

The issue is whether appellant has established that her refusal of suitable work was justified.

FACTUAL HISTORY

This case has previously been before the Board.[3] 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 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 commencing March 29, 2015, and on the periodic rolls commencing 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 the status of her injury-related medical condition and work capacity.

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 upon request. 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

[3] Docket No. 20-0341 (issued April 3, 2024).

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. 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 opined that appellant could sit for eight hours per day and perform each of the following activities for up to 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 even 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).

In a February 22, 2018 letter, OWCP advised appellant that the customer care agent position offered by the employing 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 retirement 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*).[4]

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 and ill-suited for appellant. In an April 4, 2018 statement, appellant discussed the circumstances of her early retirement.

On April 23, 2018 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, due to her abandonment of 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. A hearing was held on October 19, 2018, during which appellant asserted that she was no longer able to work in the customer care agent position that she had 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 termination decision.

Appellant, through counsel, appealed to the Board. By decision dated April 3, 2024,[5] the Board affirmed OWCP's January 2, 2019 decision. The Board found that OWCP properly relied

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

[5] *Supra* note 3.

on the opinion of appellant's vocational rehabilitation counselor regarding appellant's vocational ability to work, and on the opinion of Dr. Goldman, OWCP's referral physician, regarding appellant's work capacity.

On May 28, 2024 appellant, through counsel, requested reconsideration of OWCP's termination of her wage-loss compensation and entitlement to a schedule award, effective April 28, 2018, for abandoning suitable work. Counsel argued that the customer care agent position was not vocationally or physically suitable for appellant. He indicated that appellant found her work as a customer care agent to be "horrible and stressful" and noted that, shortly before she stopped working in the position, she had been approved for early retirement. Appellant resubmitted several reports of Dr. Goldman, prior OWCP decisions, and correspondence, which were all previously of record.

By decision dated June 25, 2024, OWCP denied modification.

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.[6] 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.[7] 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.[8] 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.[9]

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.[10] 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.[11]

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

[7] 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).

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

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

[10] 20 C.F.R. § 10.517(a).

[11] *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.[12] 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.[13] In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[14]

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.[15] 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.[16] In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.[17] Its procedures provide that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[18]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that her refusal of suitable work was justified.

The Board preliminarily notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's January 2, 2019 decision. On prior appeal, the Board found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits, effective April 28, 2018. Findings made in prior Board decisions are *res judicata* and cannot be considered absent further merit review by OWCP under section 8128 of FECA.[19]

Following the Board's April 3, 2024 decision, appellant requested reconsideration. Counsel argued that the customer care agent position was not vocationally or physically suitable for appellant. He indicated that appellant found her work as a customer care agent to be "horrible

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

[13] *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).

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

[15] 20 C.F.R. § 10.517(a); *see L.A.*, Docket No. 20-0946 (issued June 25, 2021).

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

[17] *P.S.*, Docket No. 18-1789 (issued April 11, 2019).

[18] Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.814.5(a)(4) (June 2013).

[19] *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

and stressful" and noted that, shortly before she stopped working in the position, she had been approved for early retirement. However, no additional medical evidence was received.

As appellant has not submitted sufficient evidence to support her refusal of the modified city carrier position is insufficient to justify her refusal of the position, the Board finds that she has not met her burden of proof.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her refusal of suitable work was justified.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board