United States Department of Labor
Employees' Compensation Appeals Board

G.K., Appellant	)	
and	)	
DEPARTMENT OF THE NAVY, MARINE CORPS AIR GROUND TASK FORCE TRAINING COMMAND, Twentynine Palms, CA, Employer	)	**Docket No. 24-0594** **Issued: July 26, 2024**

Appearances:
Stephanie Leet, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 9, 2024 appellant, through counsel, filed a timely appeal from a January 11, 2024 merit decision of the Office Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal

[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] The Board notes that following the January 11, 2024 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 evidence for the first time on appeal. *Id*.

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.

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 October 19, 2023, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On June 9, 2021 appellant, then a 45-year-old automotive mechanic, filed a traumatic injury claim (Form CA-1) alleging that on June 7, 2021 he injured his lower back when removing trash from a vehicle while in the performance of duty. He stopped work on June 7, 2021, returning on July 26, 2021 performing light duty. Appellant stopped work again on November 3, 2021. OWCP accepted the claim for strain of the muscle, fascia, and tendons of the lower back and radiculitis of the right lower extremity. It paid appellant wage-loss compensation on the supplemental rolls commencing November 21, 2021.

A magnetic resonance imaging (MRI) scan of appellant's lumbar spine obtained on June 23, 2021 demonstrated L3-L4 very small posterior disc bulge, bilateral ligamentum flavum facet joint hypertrophy, mild narrowing of the bilateral neural foramina, and no central canal stenosis. At L4-L5 the MRI reflected moderate broad-based posterior disc bulge, bilateral ligamentum flavum and facet joint hypertrophy, moderate-to-severe narrowing of the lateral recess, mild-to-moderate narrowing of the left and mild narrowing of the right neural foramina, moderate central canal stenosis.

An electromyogram/nerve conduction velocity (EMG/NCV) study obtained on April 28, 2022 demonstrated normal EMG findings for the lower extremities and lumbar paraspinous muscles, as well as normal NCV findings for the peroneal nerves across the knee, the posterior tibial nerves and medial and lateral plantar branches, and the sural nerves.

On August 2, 2022 the employing establishment offered appellant a permanent job offer as a materials expediter within the restrictions provided by Dr. Michael J. Einbund, a Board-certified orthopedic surgeon who served as an OWCP second opinion physician. Appellant refused the offered position on August 11, 2022, noting his belief that operation of a forklift would further aggravate his condition, and that he had previously worked as a materials expediter, which was a fast-paced position in violation of his work restrictions.

In a notice dated August 23, 2022, OWCP advised appellant that it had determined that he refused or failed to report to the offered position as a materials expediter. It informed him that it had reviewed the offered position and found it was suitable and in accordance with the medical restrictions provided by Dr. Einbund. Pursuant to 5 U.S.C § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position, or to provide adequate reasons for refusal. It informed him that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

[3] 5 U.S.C. § 8101 *et seq*.

In a letter dated September 20, 2022, counsel contended that the offered position of a materials expediter was not suitable, as the physical requirements of the position were unclear and may violate his work restrictions.

On October 19, 2022 OWCP terminated appellant's compensation and entitlement to a schedule award, effective that date, as he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On November 11, 2022 appellant, through counsel, requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

In a letter dated November 18, 2022, Dr. Howard Levy, a Board-certified osteopathic family physician, opined that the August 2, 2022 job offer as a materials expediter was outside appellant's work restrictions. Dr. Levy noted work restrictions due to appellant's accepted condition of no pushing, pulling, lifting, or carrying more than 10 pounds; no standing for more than 90 minutes in a four-hour period; and no repetitive reaching, climbing, bending, stooping, twisting, or operating forklifts. He stated that the June 7, 2021 injury at work caused increased inflammation, muscle spasms, loss of range of motion, weakness, and numbness that became debilitating, as well as reduced range of motion, reduced stability, and difficulty walking and standing. Dr. Levy noted that the accepted injury had led to an altered gait and postural changes, which aggravated preexisting spinal osteoarthritis, substantiated by severe muscle spasms with significant tenderness and swelling of the lower back, in addition to the findings of an MRI scan. He stated that due to appellant's use of prescribed pain medication to assist with controlling his incapacitating pain, appellant could not drive a forklift. Dr. Levy opined that due to his accepted condition and aggravation of preexisting medical conditions of the lumbar region, appellant could not perform the duties of a materials expediter job contained in the August 2, 2022 offer. He further noted that the accepted injury of June 7, 2021 caused lumbar radicular and sciatica-type pain due to aggravation of his preexisting lumbar pathology, as evidenced by radiographic and clinical findings of lumbar spinal stenosis and lumbar degenerative disc disease with associated disc bulges. Dr. Levy stated that these conditions had caused excessive pressure on appellant's lower spine, leading to the annulus fibers of the lumbar vertebrae to weaken, which was the pathophysiology for appellant's continued disabling symptoms of back pain. He explained that this pathophysiology resulted from appellant's abrupt body movement in exiting his work truck on June 7, 2022 resulting in a substantial torque on appellant's back, thus producing the space between his spinal discs to narrow, causing pressure to be placed on the nerves and spinal cord, which exacerbated a more intense preexisting lumbar spinal stenosis.

Following a preliminary review, by decision dated March 2, 2023, OWCP's hearing representative set aside the October 19, 2022 decision, and remanded the case for further development. The hearing representative directed that OWCP accept appellant's claim for radiculitis of the right lower extremity, update the statement of accepted facts (SOAF), and refer the record, including Dr. Levy's November 18, 2022 report, to Dr. Einbund for further review.

In a report dated April 21, 2023, Dr. Einbund reviewed the medical evidence of record and related that appellant was capable of returning to work with restrictions of lifting no more than 25 pounds for no more than 2.66 hours per day; repeated bending and stooping for no more than 1.5 hours per day; and standing/walking for no more than 5 hours per day. He opined that appellant was capable of performing the duties of the job offer of August 2, 2022. Dr. Einbund reviewed Dr. Levy's November 18, 2022 report, noting that there was no evidence of compression of the

spinal nerve roots demonstrated by MRI or EMG/NCV studies of the lower extremities. He stated that diagnostic studies demonstrated preexisting degenerative changes resulting in stenosis, which were of long-standing nature. Dr. Einbund noted that Dr. Levy had not supported his opinion as to aggravation of preexisting changes with objective findings and that, contrary to Dr. Levy's opinion, there was no objective evidence to support appellant's temporary total disability.

In a report dated June 21, 2023, Dr. John W. Skubic, a Board-certified orthopedic surgeon, diagnosed lumbar strain with right L5 radicular features, secondary to stenosis. On physical examination of the lumbar region, he observed tenderness to palpation to the paraspinals, 70 percent range of motion of the lumbar spine with normal range of motion of the lower extremities, a positive straight leg raising test on the right, and right L5 sensory hypesthesia. Dr. Skubic examined the results of an MRI scan of the lumbar spine obtained on May 27, 2023, noting degenerative changes at L4-L5 and L5-S1 with findings of instability at L4-L5 with retrolisthesis, as well as foraminal and lateral recess stenosis consistent with pain in the back radiating to the right leg. He stated that appellant was temporarily totally disabled and would likely require permanent work restrictions of limited lifting and no repetitive bending, stooping, or twisting.

On June 30, 2023 the employing establishment offered appellant a permanent job offer as a materials expediter within the restrictions provided by Dr. Einbund in his April 21, 2023 report. Appellant refused the offered position on July 10, 2023, noting that he was not capable of operating a forklift.

In a notice dated July 19, 2023, OWCP advised appellant that it had determined that he refused or failed to report to the offered position as a materials expediter. It informed him that it had reviewed the offered position and found it was suitable based on the medical restrictions provided by Dr. Einbund in his April 21, 2023 report. Pursuant to 5 U.S.C § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position or to provide adequate reasons for refusal. It informed him that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

An MRI scan of appellant's lumbar spine obtained on May 27, 2023 demonstrated subtle retrolisthetic micro-instability at L4-L5 with a spondylitic disc bulge partially effacing the lateral recesses and contracting the descending L5 nerve roots, in conjunction with facet arthropathy, resulting in moderate-to-severe bilateral foraminal narrowing. It further demonstrated spondylitic disc disease and medial facet arthropathy at L3-L4 resulting in moderate-to-severe left and moderate right foraminal narrowing; and lumbar levocurvature with multilevel spondylitis disc disease and multilevel facet arthropathy.

In a letter dated August 17, 2023, counsel contended that Dr. Einbund's April 21, 2023 report, upon which the June 30, 2023 job offer was based, was deficient in that it did not indicate that Dr. Einbund had reviewed a new SOAF including appellant's accepted radiculitis of the right lower extremity. He stated that the job offer was outside of appellant's medical restrictions, that the duties of the job offer were vague, and that there remained an unresolved conflict of medical opinion. Counsel noted that the job offer stated that appellant must possess or be able to obtain a forklift license within six months of being appointed to the position, but that appellant's prescribed medications to treat his accepted conditions would render it impossible for appellant to operate a forklift.

On September 18, 2023 the employing establishment offered appellant an amended written job offer, which was the same as the June 30, 2023 job offer with the exception that duties related to operating a forklift had been removed. It noted that appellant should respond to the job offer by September 29, 2023.

On October 3, 2023 OWCP advised appellant that he had an additional 15 days to accept the position. No response was received.

By decision dated October 19, 2023, OWCP terminated appellant's compensation and entitlement to a schedule award effective on that date, as he refused a June 30, 2023 offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It noted that the employing establishment had removed the forklift license requirement from the job description as a courtesy to appellant. OWCP concluded that the weight of the medical evidence rested with the reports of Dr. Einbund, the second opinion physician.

On November 13, 2023 appellant, through counsel, requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. With the request, counsel noted that the June 30, 2023 job offer was not the most recent job offer from the employing establishment rather, the September 18, 2023 job offer was the most recent. Counsel continued to argue that a conflict existed in the medical opinion evidence with regard to appellant's ability to perform the duties of the job offer.

By decision dated January 11, 2024, OWCP's hearing representative affirmed the October 19, 2023 termination decision. The hearing representative found that Dr. Einbund's April 21, 2023 report constituted the weight of the medical evidence.[4]

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.[5] 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.[6] 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.[7] Section 8106(c) will be narrowly construed as it serves

[4] While the decision indicated that the June 30, 2023 job offer was temporary, the offer noted that it was for a permanent position.

[5] *See E.O.*, Docket No. 24-0365 (issued May 21, 2024); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[6] 5 U.S.C. § 8106(c)(2); *see also J.O.*, Docket No. 24-0278 (issued May 17, 2024); *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *Geraldine Foster*, 54 ECAB 435 (2003).

[7] *See J.N.*, Docket No. 24-0136 (issued April 23, 2024); *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

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]

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

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician, known as a referee physician or impartial medical examiner (IME), who shall make an examination.[14] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15] When a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

[8] *See D.K.*, Docket No. 20-0341 (issued April 3, 2024); *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

[9] 20 C.F.R. § 10.517(a); *see also F.S.*, Docket No. 23-0576 (issued October 2, 2023).

[10] *Id*. at § 10.516; *see also H.L.*, Docket No. 22-1114 (issued February 27, 2024).

[11] *See M.F.*, Docket No. 23-1105 (issued February 9, 2024); *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *see C.G.*, Docket No. 23-0842 (issued October 31, 2023); *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

[13] *See J.M.*, Docket No. 23-0342 (issued July 26, 2023); *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

[14] 5 U.S.C. § 8123(a); *see J.N.*, Docket No. 24-0136 (issued April 23, 2024); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[15] 20 C.F.R. § 10.321.

[16] *J.N.*, *supra* note 14; *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective October 19, 2023.

On November 18, 2022 Dr. Levy opined that the August 2, 2022 job offer as a materials expediter was outside appellant's work restrictions. He noted work restrictions due to appellant's accepted condition of no pushing, pulling, lifting, or carrying more than 10 pounds; no standing for more than 90 minutes in a four-hour period; and no repetitive reaching, climbing, bending, stooping, twisting, or operating forklifts. Dr. Levy stated that the June 7, 2021 injury at work caused increased inflammation, muscle spasms, loss of range of motion, weakness, and numbness that became debilitating, as well as reduced range of motion, reduced stability, and difficulty walking and standing. He noted that the accepted injury had led to an altered gait and postural changes, which aggravated preexisting spinal osteoarthritis, substantiated by severe muscle spasms with significant tenderness and swelling of the lower back, in addition to the findings of an MRI scan. Dr. Levy further noted that the accepted injury of June 7, 2021 caused lumbar radicular and sciatica-type pain due to aggravation of his preexisting lumbar pathology, as evidenced by radiographic and clinical findings of lumbar spinal stenosis and lumbar degenerative disc disease with associated disc bulges. He stated that due to appellant's use of prescribed pain medication to assist with controlling his incapacitating pain, appellant could not drive a forklift. Dr. Levy opined that due to his accepted conditions and aggravation of preexisting medical conditions of the lumbar region, appellant could not perform the duties of a materials expediter.

On April 21, 2023 Dr. Einbund, OWCP's referral physician, reviewed the medical evidence of record and related that appellant was capable of returning to work with restrictions of lifting no more than 25 pounds for no more than 2.66 hours per day; repeated bending and stooping for no more than 1.5 hours per day; and standing/walking for no more than 5 hours per day. He opined that appellant was capable of performing the duties of the job offer of August 2, 2022. Referencing Dr. Levy's November 18, 2022 report, Dr. Einbund stated that there was no evidence of compression of the spinal nerve roots demonstrated by MRI scan or EMG/NCV studies of the lower extremities. He stated that diagnostic studies demonstrated preexisting degenerative changes resulting in stenosis. Dr. Einbund noted that Dr. Levy had not supported his opinion as to aggravation of preexisting changes with objective findings and that, contrary to Dr. Levy's opinion, there was no objective evidence to support appellant's temporary total disability.

As previously stated, all conditions must be considered in determining whether an offered position is suitable work, whether or not they are employment related.[17]

The Board therefore finds that there was an unresolved conflict in the medical opinion evidence with regard to appellant's work capacity and recommended work restrictions between appellant's treating physician, Dr. Levy, and OWCP's second opinion physician, Dr. Einbund, OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and schedule award entitlement pursuant to 5 U.S.C. § 8106(c)(2).

[17] *S.P.*, Docket No. 24-0409 (issued June 27, 2024); *see B.P.*, Docket No. 21-0614 (issued December 30, 2021).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective October 19, 2023, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 26, 2024
Washington, DC

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

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

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