

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective June 20, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On October 5, 2011 appellant, then a 45-year-old clean room clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 30, 2011 she sustained injuries to her left knee when trying to move a postal container filled with mail, which tilted, came towards her, and knocked her backwards while in the performance of duty. OWCP accepted her claim for other internal derangement of left knee, injury to peroneal nerve at lower left leg level, enthesopathy of left knee, and tear of medial meniscus of left knee. Appellant underwent OWCP-authorized surgeries to her left knee on June 18, 2012, February 23, 2017, April 18, 2019, February 26, 2021, and March 31, 2022. OWCP paid her intermittent wage-loss compensation on the supplemental rolls as of November 22, 2011, and on the periodic rolls commencing September 12, 2021. Appellant stopped work on February 26, 2021 and has not returned.

On March 9, 2023 OWCP referred appellant and the case record, along with a statement of accepted facts (SOAF) and a series of questions, for a second opinion examination and evaluation with Dr. Leon Sultan, a Board-certified orthopedic surgeon. It requested that Dr. Sultan provide an evaluation of appellant's injury-related condition and her ability to work.

Prior to, and after Dr. Sultan's second opinion examination, OWCP received physical therapy reports which noted objective evidence of severe left quadriceps atrophy.

In a report dated April 4, 2023, Dr. Sultan recounted appellant's history of injury and medical course of treatment, noting that he reviewed diagnostic testing through 2022, and reports from Dr. Fred Cushner, a Board-certified orthopedic and reconstructive surgical specialist, through October 31, 2022. He noted her complaints regarding her left knee including chronic pain, stiffness, weakness, and occasional buckling, as well as occasional spasm or tremor involving the quadriceps. Dr. Sultan also noted that appellant demonstrated noticeable favoring of the left lower extremity without her cane and that the left knee examination was essentially normal with left knee flexion at 95 degrees (normal 140 degrees) and left distal thigh measured 14½ inches in circumference compared 15½ inches in circumference measured on the right side. He indicated that her examination confirmed partial left knee post-traumatic and postoperative arthrofibrosis, as well as a chronic left knee painful condition. Dr. Sultan opined that appellant's work-related condition involving her left knee had not clinically resolved, but her left knee condition was permanent as she had reached maximum medical improvement (MMI). He opined that while she was incapable of returning to her date-of-injury position as a clean room clerk, she could engage in strict sedentary work activity including desk work, answering telephones, or opening light mail. Dr. Sultan concluded that appellant's work restrictions were medically warranted and that her "present level of disability is a direct result of the accepted work-related condition." In an accompanying April 4, 2023 work capacity evaluation (Form OWCP-5c), he opined that appellant could work an eight-hour day at the sedentary level with permanent restrictions of no bending/stooping, kneeling, climbing, or operating motor vehicle at work and less than 10 pounds of pushing, pulling and lifting.

In an April 10, 2023 letter, OWCP informed the employing establishment that the weight of the medical evidence rested with Dr. Sultan, and inquired whether a job within his restrictions could be provided.

OWCP subsequently received a March 13, 2023 x-ray of left knee, which indicated postoperative changes without acute osseous abnormality or change in alignment, and a chronic irregularity of the patella with apparent incomplete integration of the patella resurfacing interface, inferiorly.

Reports from Dr. Cushner were also received. In a March 13, 2023 report, Dr. Cushner reported on appellant's medical progress status post-total left knee replacement. He noted that she ambulated with an antalgic gait and continued in physical therapy. Appellant's left knee examination was normal with mild effusion in the knee and trace of lower extremity edema absent varicosities. Dr. Cushner reviewed x-rays of the left knee and indicated that the patella bone grafting side was consolidating and that he believed the generalized anterior medial knee pain was related to her severe left quadriceps atrophy. He opined that appellant remained totally disabled. In a March 28, 2023 attending physician's report (Form CA-20), Dr. Cushner opined that appellant was totally disabled as of November 2, 2020 as a result of the left knee patella revision. In an April 3, 2023 report, he indicated that appellant had a new onset of decreased temperature of the foot, which he did not believe was related to her previous knee surgery, and referred her to a vascular surgeon for evaluation.

On April 14, 2023 the employing establishment offered appellant a job as a modified general expeditor. The full-time position involved Express, registry and manual mail work for up to eight hours a day, linear sorter (keying) for up to eight hours a day, Small Parcel and Bundle Sorter (SPBS) (keying) for up to eight hours a day, if qualified, and intermittent flat sorter duties for up to ½ hour. The physical requirements of the position required intermittent walking/standing for up to ½ hour; pushing, pulling and lifting to 10 pounds for up to 4 hours; fine manipulation and simple grasping; and sitting up to 8 hours with no bending/stopping/squatting/kneeling or climbing.

In an April 17, 2023 letter, OWCP advised appellant that the modified general expeditor position offered by the employing establishment was in accordance with the medical restrictions of Dr. Sultan, OWCP's second opinion physician, and that it had determined that the position was suitable. It also noted that the employing establishment confirmed that the position remained available to her. 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 appellant that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss compensation or a schedule award.

Appellant continued to undergo physical therapy, which noted objective evidence of severe left quadriceps atrophy.

On May 8, 2023 OWCP received appellant's statement, dated May 9, 2023, challenging the findings of the second opinion evaluation.

In a May 17, 2023 letter, OWCP notified appellant that her reasons for not accepting the position offered by the employing establishment were unjustified. It advised 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. No response was received.

Appellant continued to submit physical therapy reports.

A May 15, 2023 x-ray of appellant's left knee and bilateral views of the patellae noted postoperative changes without acute osseous abnormality or change in alignment. A chronic irregularity of the patella with apparent incomplete integration of the patella resurfacing interface, inferiorly was noted.

In a May 15, 2023 report, Dr. Cushner reported that since appellant's last visit, she underwent a second opinion evaluation and was told to return to work. He provided examination findings and reviewed appellant's left knee x-rays, noting that appellant had left knee limitations with buckling, she walked with a cane, and her range of motion had plateaued at 90 to 95 degrees. Dr. Cushner provided an impression of status post revision knee replacement and status post patella bone grating. He disagreed that appellant could return to work, noting that she walked with a cane, had daily pain (which had plateaued), her knee buckled at times and her range of motion was limited. Dr. Cushner opined that appellant had significant limitations and was unable to return to work. He also advised that he would like to rule out the various sources of her anterior pain, such as an inferior branch of the saphenous nerve injury, and that he would refer her for a second opinion. Dr. Cushner opined that appellant remained totally disabled from work.

In a May 30, 2023 letter, Dr. Cushner summarized appellant's factual and medical treatment history from the September 30, 2011 work-related injury. He indicated that her left knee replacement had not been successful, and that he had assumed care of appellant after her knee replacement failed. Dr. Cushner indicated that appellant's atrophy persisted despite extended physical therapy, her knee pain was chronic, and limited her ability for prolonged walking, climbing or sitting. He indicated that according to appellant, her pain was daily, limiting her everyday activities. Dr. Cushner opined that appellant was totally disabled with regard to even a modified assignment. He indicated that her disability was permanent, and that he expected her pain symptoms to limit her ability to return to work. Dr. Cushner explained that even if significant strengthening occurred, appellant would be unable to work full time. He thus disagreed with Dr. Sultan that appellant could return to a desk job with permanent limitations, noting that working in a full-time capacity involved both a commute to work and sitting with the knee flexed, which increased appellant's anterior pain. Dr. Cushner concluded that appellant was permanently disabled from work in any capacity.

In a June 15, 2023 memorandum of telephone call (Form CA-110), the employing establishment indicated that the modified position was still available to appellant.

By decision dated June 20, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective the same date, pursuant to 5 U.S.C. § 8106(c)(2), because she refused an offer of suitable work. It found that the work restrictions of Dr. Sultan, OWCP's referral physician, constituted the best assessment of appellant's ability to work at the time she was offered the modified general expeditor position.

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.⁴ 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.⁵ 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.⁶ 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.⁷

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.⁸ 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.⁹ In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.¹⁰

Section 10.517(a) of FECA's implementing regulations provides 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

Section 8123(a) of FECA provides, in pertinent part, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical

⁴ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁵ 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).

⁶ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

⁹ 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).

¹⁰ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹¹ 20 C.F.R. § 10.517(a).

¹² *Id.* at § 10.516.

examiner (IME) who shall make an examination.¹³ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁴

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective June 20, 2023, because she refused an offer of suitable work.

OWCP accepted appellant's claim for other internal derangement of left knee, injury to peroneal nerve at lower left leg level, enthesopathy of left knee, and tear of medial meniscus of left knee. Appellant underwent OWCP-authorized surgeries to her left knee on June 18, 2012, February 23, 2017, April 18, 2019, February 26, 2021, and March 31, 2022.

On March 9, 2023 OWCP referred appellant for a second opinion evaluation with Dr. Sultan regarding appellant's injury-related condition and her ability to work. In a report dated April 4, 2023, Dr. Sultan indicated that appellant's examination confirmed partial left knee post-traumatic and postoperative arthrofibrosis, as well as a chronic left knee painful condition. Thus, he opined that appellant's work-related condition involving her left knee had not clinically resolved, but she reached MMI, and her left knee condition was permanent. Dr. Sultan opined that appellant's work restrictions were medically warranted and, in an accompanying Form OWCP-5c, opined that she could work an eight-hour day at the sedentary level with permanent restrictions of no bending/stooping, kneeling, climbing or operating a motor vehicle at work and less than 10 pounds of pushing, pulling and lifting.

In reports dated March 13 and 28, and May 15 and 30, 2023, Dr. Cushner, appellant's treating physician, opined that appellant was totally disabled, noting that she walked with a cane, had daily pain (which plateaued), her knee buckled at times, and she had limited range of motion. In his May 15 and 30, 2023 reports, he explained that appellant's atrophy persisted despite extended physical therapy, and she had chronic knee pain which limited her ability for prolonged walking, climbing, or sitting. Dr. Cushner opined that appellant's pain symptoms limited her ability to return to work and, even if significant strengthening occurred, she was unable to work full time as working in a full-time capacity involved both a commute to work and sitting with the knees flexed, which increased appellant's anterior pain.

The Board, therefore, finds that a conflict in medical opinion exists between Dr. Sultan and Dr. Cushner with regard to appellant's ability to return to work.¹⁵ Due to the unresolved conflict in the medical opinion evidence regarding appellant's ability to perform the offered position, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective June 20, 2023.

¹³ 5 U.S.C. § 8123(a); *G.S.*, Docket No. 20-0562 (issued June 23, 2022); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *M.S.*, 58 ECAB 238 (2007).

¹⁴ *Id.*; see also *R.C.*, 58 ECAB 238 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁵ *A.E.*, Docket No. 23-0756 (issued December 14, 2023); *S.N.*, Docket No. 19-1050 (issued July 31, 2020); *D.S.*, Docket No. 20-0146 (issued June 11, 2020); *W.B.*, Docket No. 17-1994 (issued June 8, 2018).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective June 20, 2023, because she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 10, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board