

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

S.P., Appellant)	
)	
and)	Docket No. 24-0409
)	Issued: June 27, 2024
U.S. POSTAL SERVICE, WHITE PLAINS)	
PROCESSING & DISTRIBUTION CENTER,)	
White Plains, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Erik B. Blowers, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 11, 2024 appellant, through counsel, filed a timely appeal from a March 1, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Appellant, through counsel, submitted a timely request for oral argument before the Board. Counsel asserted that oral argument should be granted because OWCP's termination of appellant's wage-loss compensation and schedule award benefits was improper. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). The Board, in exercising its discretion, denies appellant's request for oral argument because this matter pertains to an evaluation of the weight of the medical evidence presented. As such, the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. The oral argument request is, therefore, denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include a back condition as causally related to her accepted November 6, 2017 employment injury; and (2) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 10, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On November 6, 2017 appellant, then a 51-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on even date she sprained her left knee when she tripped over a mail container while in the performance of duty. She stopped work the same day.⁵ On February 11, 2019 OWCP accepted the claim for complex tear of medial meniscus, left knee. Appellant underwent a left knee arthroscopy and a right knee arthroscopy on April 16, 2019 and June 21, 2022, respectively. OWCP subsequently accepted additional conditions of sprain of unspecified site of right knee, unspecified internal derangement of left knee, permanent aggravation, and other tear of lateral meniscus, right knee, permanent aggravation. It paid appellant wage-loss compensation on the supplemental rolls, effective December 22, 2017, and on the periodic rolls, effective March 31, 2019.

On October 7, 2022 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Jonathan Paul, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of her accepted conditions and work capacity.

In an October 24, 2022 report, Dr. Jeffrey Cohen, an orthopedic surgeon, noted that appellant had waited a year for authorization of her right knee arthroscopy, which had impacted the left knee, and that appellant now had back pain consequential to her impaired ambulation. He provided findings on right knee examination and noted that appellant had antalgic gait. Dr. Cohen diagnosed right knee peripheral tear of medial meniscus, which he opined was causally related to her work injury and he opined that appellant was totally disabled from work.

In an October 26, 2022 report, Dr. Craig Feuerman, a Board-certified physiatrist, recounted appellant's history of left knee surgery, traumatic left knee meniscal tear status post-surgery and

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the March 1, 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 additional evidence for the first time on appeal. *Id.*

⁵ Under OWCP File No. xxxxxx448, OWCP accepted appellant's February 15, 2008 traumatic injury claim for lumbar strain. Appellant returned to full duty on May 28, 2008.

compensatory right knee pain with meniscal tear status post meniscectomy. He opined that appellant was temporarily totally disabled.

In a November 9, 2022 report, Dr. Paul reviewed appellant's history of injury on November 6, 2017. He noted that she ambulated with a cane and had an antalgic gait. On physical examination of the bilateral knees, Dr. Paul observed no effusion with a valgus deformity, positive lateral patellar tracking on the left and normal alignment on the right. He reported reduced flexion for both knees; negative two degrees extension of the right knee; tenderness along the medial joint line bilaterally with good ligament stability, medial and lateral, anterior and posterior. Dr. Paul opined that appellant had objective findings of arthroscopy portals bilateral knees. He indicated that her right knee had underlying osteoarthritis, which he opined was unrelated to the November 6, 2017 employment injury. Dr. Paul opined that appellant had not reached maximum medical improvement (MMI) and opined that he could not determine a timeframe for her return to her date-of-injury position. He recommended cortisone injections for pain relief but indicated that no further surgical intervention was necessary. In a November 9, 2022 work capacity evaluation (Form OWCP-5c) form, Dr. Paul opined that appellant was able to work full time in a sedentary capacity with restrictions of pushing, pulling, and lifting no more than 10 pounds. He did not address the status of her lumbar condition, which was noted in the SOAF.

In a November 23, 2022 report, Dr. Feuerman noted appellant's complaints of continued right knee buckling. He diagnosed compensatory right knee pain with meniscal tear status post meniscectomy. Dr. Feuerman continued to opine that appellant was temporarily totally disabled.

In a November 28, 2022 report, Dr. Cohen diagnosed complex tear of medial meniscus to both left and right knees. He noted physical examination findings of the bilateral knees and related that appellant was totally disabled. Dr. Cohen also opined that she had low back pain consequential to her impaired ambulation.

In a December 8, 2022 letter to Dr. Paul, OWCP noted that he had indicated that appellant sustained a left knee injury, but it noted that the accepted conditions included right knee conditions. It requested that Dr. Paul determine the status of her accepted conditions and work capacity.

In a December 16, 2022 addendum report, Dr. Paul listed all of appellant's accepted bilateral knee conditions. He reaffirmed his findings that she continued to suffer from residuals of the accepted conditions as she had loss of knee motion and arthroscopy portals, as well as ongoing pain. Dr. Paul noted that appellant required further medical care, such as cortisone and hyaluronic acid injections to bilateral knees. He reiterated that she was not at MMI and indicated that the work restrictions on the November 9, 2022 OWCP-5c form remained the same and were indefinite until further notice.

In a letter dated January 13, 2023, OWCP advised the employing establishment that the weight of the medical evidence rested with Dr. Paul's November 9 and 16, 2022 reports, which provided appellant's work restrictions, and it requested that the employing establishment offer her a position based on those restrictions.

Dr. Feuerman and Dr. Cohen continued to opine that appellant was totally disabled from work due to her accepted conditions. Dr. Cohen also continued to opine that appellant had low back pain consequential to her impaired ambulation.

In a letter dated June 6, 2023, the employing establishment offered appellant a permanent, modified-duty mail handler position, effective June 7, 2023, purportedly based on Dr. Paul's second opinion reports from November 9 and December 16, 2022. The position required eight hours of intermittent work including address verification for scanning sampled bundles and prepping mail for automated flats sorting machine. The physical requirements of the position involved eight hours of intermittent walking, standing; simple grasping; and pulling, pushing and lifting up to 10 pounds.

On June 12, 2023 appellant refused the job offer. She provided a May 25, 2023 narrative letter from Dr. Cohen. Dr. Cohen noted appellant's April 2019 and June 2022 knee surgeries, to the left knee and right knee, respectively and opined that appellant had developed low back pain consequential to her longstanding impaired ambulation. He recommended further evaluation to establish the connection to the work injury. Dr. Cohen indicated that appellant's lumbar spine had restricted range of motion with radicular complaints to the right leg and concluded that she was totally disabled causally related to her accepted work injury. He further opined that she required medical treatment of her lumbar spine condition, which was a consequence of her long-term gait impairment following knee surgeries.

On June 28, 2023 the employing establishment confirmed that the job offer remained available to appellant.

By letter dated June 28, 2023, OWCP advised appellant of its determination that the modified mail handler position offered by the employing establishment on June 7, 2023 was suitable in accordance with the medical limitations provided by Dr. Paul in his November 9 and December 16, 2022 reports and remained available to her. It informed her that her compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2), if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

On July 10, 2023 OWCP received Dr. Cohen's June 22, 2023 treatment note. Dr. Cohen continued to relate appellant's bilateral knee examination findings, which included moderate medial joint line tenderness and reduced range of motion findings. He indicated that her low back pain was a consequence of her longstanding impaired ambulation. Dr. Cohen provided an impression of "medial meniscal tear both knees [causally] related [disability] total [consequence] low back pain to be [established]." He also opined that appellant was not fit for duty as a mail handler due to bilateral knee surgeries and consequential low back pain, which required x-rays, magnetic resonance imaging (MRI) scans, physical therapy and pain management.

In a July 17, 2023 letter, counsel presented legal arguments, including that the claim be developed or expanded to include a consequential low back condition.

In an August 21, 2023 progress notes and narrative report, Dr. Cohen continued to opine that appellant was totally disabled due to her right knee medial meniscal tear. He indicated that formal physical therapy was ordered for ongoing low back pain consequential to her longstanding impaired ambulation, status post bilateral knee surgeries.

By letter dated August 29, 2023, OWCP notified appellant that her reasons for refusing the position offered by the employing establishment were unjustified. It provided her 15-days to accept the position or have her entitlement to wage-loss compensation and schedule award compensation, pursuant to 5 U.S.C. § 8106(c)(2).

The employing establishment again confirmed that the job offer remained available.

In a September 11, 2023 progress note, Dr. Cohen reported that appellant was mandated by her employer to return to limited duty, but he had advised her it was not safe. In a September 13, 2023 medical narrative report template, he continued to opine that she was totally disabled from work.

The employing establishment continued to confirm the job offer was available.

By letter dated September 20, 2023, OWCP notified appellant that her reasons for refusing the position offered by the employing establishment were unjustified. It provided her an additional 15 days to accept the position or have her entitlement to wage-loss compensation and schedule award compensation, pursuant to 5 U.S.C. § 8106(c)(2).

On September 25, 2023 OWCP received Dr. Cohen's September 18, 2023 report and medical narrative report template. Dr. Cohen recounted appellant's physical examination findings of the bilateral knees and diagnosed bilateral knee post-traumatic osteoarthritis. He opined that appellant's bilateral knee conditions were causally related to her accepted work injury and rendered her totally disabled. Dr. Cohen also opined that appellant had consequential low back pain with sciatica on right side due to longstanding impaired ambulation from both knee surgeries.

The employing establishment again confirmed that the job offer remained available.

By decision dated October 10, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, pursuant to 5 U.S.C. § 8106(c)(2), as she refused an offer of suitable work. It found that the job offer was suitable based upon her current work restrictions as provided by Dr. Paul in his November 9, 2022 report. OWCP also found that appellant's reasons for job refusal were not justified as Dr. Cohen failed to provide any opinion or discussion on why appellant was totally disabled from any type of work.

In an October 12, 2023 medical narrative report template, Dr. Cohen opined that appellant was temporarily totally disabled from work.

On October 16, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 8, 2024.

In reports dated October 9, November 6, and December 4, 2023 and January 22, 2024, Dr. Cohen opined that appellant had post-traumatic arthritis in both knees causally related to her work injury which rendered her totally disabled. He also opined that she had low back pain right-sided sciatica as a consequence of her long-standing impaired ambulation. Dr. Cohen provided right knee cortisone injections on October 9 and December 4, 2023 and ordered a new MRI scan and x-rays of the right knee on January 22, 2024. He continued to opine that appellant was totally disabled from work due to her knee conditions and consequential low back pain with right sciatica.

In a November 9, 2023 state workers' compensation form, Dr. Cohen requested that appellant's lumbar spine condition be accepted. He opined, with a checkmark "no" that appellant could not return to work.

By decision dated March 1, 2024, an OWCP hearing representative affirmed OWCP's October 10, 2023 decision. The hearing representative noted that although appellant maintained her low back pain was consequential to her work injury, she provided no reasoned medical evidence establishing a causal relationship between a lumbar spine condition and the work injury or knee surgeries. The hearing representative concluded that Dr. Cohen's reports which suggested impaired gait as a contributing factor were of diminished probative value.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁶ When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional misconduct.⁷ Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁸

To establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, an employee must submit rationalized medical evidence.⁹ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include a back condition as causally related to her accepted employment injury of November 6, 2017.

Dr. Cohen first diagnosed low back pain as consequential to appellant's impaired ambulation in his October 24, 2022 report. The Board has held that pain is a description of a symptom, not a clear diagnosis of a medical condition.¹¹ As such, Dr. Cohen's October 24, 2022 report and subsequent reports, prior to September 18, 2023, which also related a diagnosis of low back pain, are insufficient to establish expansion of claim.

⁶ *B.C.*, Docket No. 24-0036 (issued March 19, 2024); *M.M.*, Docket No. 19-0951 (issued October 24, 2019); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ *See J.M.*, Docket No. 19-1926 (issued March 19, 2021); *I.S.*, Docket No. 19-1461 (issued April 30, 2020); *see also Charles W. Downey*, 54 ECAB 421 (2003).

⁸ *J.M., id.*; *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

⁹ *See V.A.*, Docket No. 21-1023 (issued March 6, 2023); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

¹⁰ *E.P.*, Docket No. 20-0272 (issued December 19, 2022); *I.J.*, 59 ECAB 408 (2008).

¹¹ *D.R.*, Docket No. 18-1408 (issued March 1, 2019); *D.A.*, Docket No. 18-0783 (issued November 8, 2018).

In his September 18, 2023 report and subsequent reports dated October 9, November 6, and December 4, 2023 and January 22, 2024, Dr. Cohen diagnosed appellant with consequential low back pain with right-sided sciatica which he opined was due to long-standing impaired ambulation. While he opined that her impaired gait from the work-related bilateral knee conditions resulted in a consequential right-sided sciatica, he did not explain, with medical rationale and objective medical findings, how the right-sided sciatica physiologically developed as a consequence of the November 6, 2017 work injury. The Board has held that a mere conclusion without the necessary rationale is insufficient to meet a claimant's burden of proof.¹² The Board, therefore, finds this evidence insufficient to establish expansion of the claim.

As the medical evidence of record is insufficient to establish expansion of the acceptance of the claim to include an additional back condition as causally related or consequential to the accepted employment injury, the Board finds that appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ Pursuant to section

¹² *A.T.*, Docket No. 19-0410 (issued August 13, 2019); *E.L.*, Docket No. 17-1632 (issued January 3, 2018).

¹³ *See B.P.*, Docket No. 21-0614 (issued December 30, 2021); *K.S.*, Docket No. 19-1650 (issued April 28, 2020); *J.R.*, Docket No. 19-0206 (issued August 14, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

¹⁴ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

¹⁵ *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁶ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

¹⁷ 20 C.F.R. § 10.517(a).

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.¹⁸

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.¹⁹ 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.²⁰ In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.²¹ The Federal (FECA) Procedure Manual provides that, if medical reports document a condition, which has arisen since the compensable injury and disables an employee from the offered job, the job will be considered unsuitable, even if the subsequently-acquired condition is not employment related.²²

ANALYSIS -- ISSUE 2

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 10, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

The issue of whether a claimant is able to perform the duties of the offered employment position is a medical question that must be resolved by probative medical evidence. In finding that appellant could perform the duties of the offered employment position, OWCP found that Dr. Paul's November 9, 2022 restrictions as set forth in his November 9, 2022 OWCP-5c form and his reports dated November 9 and December 16, 2022 supported appellant's ability to perform the duties of the position. However, Dr. Paul failed to consider all of appellant's conditions in the assignment of the work restrictions, specifically right knee osteoarthritis which he found on examination but opined was not causally related.²³ He also did not address whether her preexisting lumbar condition, or her current alleged lumbar condition required work restrictions. As previously noted, all conditions must be considered in determining whether an offered position is suitable work, whether or not they are employment related.²⁴

The Board further notes that the work restrictions Dr. Paul provided limited appellant to sedentary work. In a November 9, 2022 Form OWCP-5c, Dr. Paul opined that appellant was able

¹⁸ *Id.* at § 10.516.

¹⁹ See *K.W.*, Docket No. 19-0860 (issued September 18, 2019); *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

²⁰ 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).

²¹ *D.P.*, Docket No. 21-0596 (issued August 31, 2021); see *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

²² Federal (FECA) Procedure Manual, *supra* note 20 at Chapter 2.814.4(c)(7) (June 2013); *R.M.*, Docket No. 19-1236 (issued January 24, 2020).

²³ *Id.*

²⁴ See *B.P.*, *supra* note 13; *supra* note 21.

to work full time in a sedentary capacity with restrictions of pushing, pulling, and lifting no more than 10 pounds. The modified mail handler job offer, effective June 7, 2023, however, required eight hours of walking, standing and simple grasping and pulling, pushing and lifting up to 10 pounds. The modified job offer did not indicate that the position was sedentary. The Board finds that Dr. Paul's opinion, therefore, did not establish that appellant was capable of performing the modified mail handler position offered by the employing establishment. Thus, Dr. Paul's opinion did not establish that the position was suitable.²⁵

As a penalty provision, the termination of compensation benefits is narrowly construed.²⁶ Consequently, the Board finds that OWCP failed to meet its burden of proof to justify the termination of appellant's compensation benefits pursuant to section 8106(c)(2).

CONCLUSION

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include a back condition as causally related to her accepted employment injuries of November 6, 2017. The Board further finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 10, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

²⁵ See *V.J.*, Docket No. 22-0941 (issued September 8, 2023).

²⁶ *R.M.*, *supra* note 22; *see also supra* note 21.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2024 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: June 27, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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