

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

R.B., Appellant)	
)	
and)	Docket No. 24-0358
)	Issued: May 20, 2024
U.S. POSTAL SERVICE, EAST ISLIP POST)	
OFFICE, East Islip, NY, Employer)	
)	

Appearances:
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 22, 2024 appellant, through counsel, filed a timely appeal from a January 19, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 24-0358.

On August 17, 2005 appellant, then a 42-year-old limited-duty carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained injuries to both knees when he stepped/tripped on a bundle of mail and fell while in the performance of duty. He stopped work that day. OWCP assigned File No. xxxxxx626 and accepted the claim for bilateral sprain/strain of knees and lumbosacral sprain/strain. It paid appellant wage-loss compensation on the periodic rolls as of November 27, 2005.

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 a 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.

In an order dated September 15, 2011, the Board remanded the case for consolidation of the current case with OWCP File No. xxxxxx366 to be followed by a *de novo* decision as to whether appellant's January 20, 2009 request for authorization of total knee replacement surgery should be authorized.² On November 10, 2014 appellant underwent a total right knee replacement.³ By decision dated January 14, 2015, OWCP expanded the acceptance of the claim to include old disruption of bilateral medial collateral ligament, localized lower leg primary osteoarthritis, aggravation of lumbar disc displacement, aggravation derangement posterior horn right medial meniscus, and aggravation derangement right anterior horn lateral meniscus.

In a November 25, 2020 report, Dr. Frank DiMaio, a Board-certified orthopedist, opined that appellant was unable to work for the employing establishment in any capacity.

In a February 16, 2021 report, Dr. Leon Sultan, a Board-certified orthopedic surgeon serving as a second opinion physician, opined that appellant could not work his date-of-injury position, but could return to work in a limited-duty capacity. In an attached February 16, 2021 work capacity evaluation (Form OWCP-5c), he identified appellant's work restrictions.

On February 25, 2021 OWCP requested an addendum report from Dr. Sultan, as he did not explain with sufficient rationale why he believed appellant was totally disabled from all work. In a March 15, 2021 supplemental report, Dr. Sultan indicated that appellant was incapable of returning to full-duty work and provided restrictions.

In an April 28, 2021 report, Dr. DiMaio opined that appellant was unable to return to work in his date-of-injury position. In the attached April 28, 2021 Form OWCP-5c, he opined that appellant was totally disabled.

On May 4, 2021 OWCP declared a conflict in medical opinion between Dr. DiMaio and Dr. Sultan regarding appellant's ability to work in positions other than his date-of-injury position.

On March 15, 2022 OWCP referred appellant to Dr. Alexander Finger, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 17, 2022 report, Dr. Finger, the impartial medical examiner (IME), concurred with Dr. Sultan that appellant was unable to return to his position as a letter carrier, noting that he had some disability from his right knee and arthritis in his back. He noted appellant's complaints of a vague loss of sensation throughout both lower extremities, but opined it made no sense as it did not follow any dermatomal pattern and did not correlate with his magnetic resonance imaging (MRI) findings. Dr. Finger noted that appellant's main complaints and source of disability were from his left ankle, not a work-related injury. In the accompanying May 21, 2022 Form OWCP-5c, he opined that appellant could work a sedentary or light-duty position for 6 hours per day, with permanent restrictions of no pushing, pulling, or lifting more than 10 pounds; no twisting, bending,

² *Order Remanding Case*, Docket No. 11-163 (issued September 15, 2011).

³ Appellant previously underwent a right knee arthroscopy on March 14, 1997 under OWCP File No. xxxxxx366. OWCP has administratively combined File Nos. xxxxxx366 and xxxxxx626, with the latter serving as the master file.

and stooping more than 1 hour per day; and no squatting, kneeling, climbing, or operating a motor vehicle at work.

On June 24, 2022 OWCP determined that Dr. Finger's May 17, 2022 opinion constituted the weight of the medical evidence. It requested that the employing establishment offer appellant a job within those restrictions.

On July 6, 2022 the employing establishment offered appellant a permanent assignment as a modified carrier technician for four hours a day, to go into effect July 16, 2022. The physical requirements of the position were as outlined in Dr. Finger's report.

In a July 12, 2022 statement, appellant indicated that he was not refusing the July 6, 2022 job offer, as he could not in good conscience accept Dr. Finger's May 17, 2022 opinion as factual due to the untrue statements in his narrative. Appellant submitted a July 13, 2022 progress report in which Dr. DiMaio continued to opine that appellant was totally disabled from work.

On July 28, 2022 OWCP found that the July 6, 2022 job offer contained an error in pay rate as the annual salary appeared to be the pay rate for full-time work when appellant was only capable of working half days. It requested that the employing establishment provide a new job offer "showing the annual salary for half-time work or confirm that the pay rate shown on the job offer is correct."

In an August 2, 2022 offer of permanent modified assignment, the employing establishment offered appellant a modified carrier technician position for four hours a day, to go into effect August 13, 2022. The permanent physical requirements of the position were again based on the restrictions provided by Dr. Finger.

In an August 3, 2022 report, Dr. Douglas A. Schechter, a Board-certified anesthesiologist and pain medicine specialist, noted the history of appellant's August 17, 2005 work injury. He provided assessments of lumbar radicular pain, lumbar herniated disc, neuropathic pain, muscle spasm, inflammatory pain, and degenerative disc disease, lumbar spine, which he opined were due to the work-related injury.

On August 26, 2022 the employing establishment confirmed that the offered position remained available to appellant. On August 29, 2022 OWCP advised appellant that it found that the August 2, 2022 permanent modified offered position was suitable, within the work limitations provided by Dr. Finger and that it remained available to him. It informed him that an employee who refuses an offer of suitable work without cause was not entitled to wage loss or schedule award compensation, pursuant to 5 U.S.C. § 8106(c)(2), and that he was expected to accept the offered position and return to work if medically capable. OWCP afforded appellant 30 days to accept the position or provide reasons for the refusal.

In an August 31, 2022 report, Dr. Schechter noted appellant's complaints of worsening back pain. He continued to opine that appellant's diagnosed lumbar conditions were causally related to the August 17, 2005 work injury. Dr. Schechter also indicated that appellant would be referred for surgical scheduling.

In a September 13, 2022 letter, appellant reiterated that he has not refused the modified position, but that he was seeing a new physician due to foot instability, which he was fearful would cause a safety issue. He noted that the doctor had ordered a new lower spine MRI scan and was awaiting authorization for epidural spine shots. Appellant also noted his concerns regarding Dr. Finger.

OWCP received an August 15, 2022 MRI scan of the lumbar spine, which revealed bulging L2-3 through L5-S1 discs contributing to stenosis with facet arthrosis, straightening of the normal lumbar lordosis likely due to muscle spasm after injury, and lumbar spondylosis, and requests for lumbar epidural steroid injections.

In an October 7, 2022 letter, OWCP responded to appellant's September 13, 2022 letter. It noted that there was no MRI scan report included with his letter and that it had previously addressed his concerns.

By decision dated November 9, 2022, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective that date, under 5 U.S.C. § 8106(c)(2) as he refused an offer of suitable work. It noted that it had received the August 3 and 31, 2022 treatment notes from Dr. Schechter and the August 15, 2022 lumbar MRI report, but advised that the May 17, 2022 opinion of Dr. Finger constituted the special weight of the evidence and established that appellant could perform the duties of the offered position. OWCP noted that he had not accepted the offered modified carrier technician position, and had not reported to duty or provided a written explanation of his reasons for not accepting the position within the allotted period.

On October 23, 2023 appellant requested reconsideration and submitted additional medical evidence.

By decision dated January 19, 2024, OWCP denied modification of its November 9, 2022 decision.

The Board, having duly considered this matter finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits and entitlement to schedule award compensation.

OWCP improperly issued its November 9, 2022 termination decision for refusal of suitable work as appellant had timely responded to the August 29, 2022 30-day letter with a response and additional evidence. Section 10.516 of FECA's implementing regulations provides that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability.⁴ If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons

⁴ 20 C.F.R. § 10.516; *C.C.*, Docket No. 15-1778 (issued August 16, 2016); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

for finding that the employee's reasons are not acceptable.⁵ After providing the 30- and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.⁶

The Board finds that OWCP failed to follow established procedures as appellant had timely responded to the August 29, 2022 30-day letter with a response and additional evidence, but OWCP did not provide him with an additional 15 days by OWCP to accept the offered position without penalty. The Board has recognized that section 8106(c)(2) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁷ It is OWCP's burden of proof to terminate compensation and, due to the above-noted procedural error, the Board finds that OWCP failed to meet its burden of proof.⁸ Accordingly,

IT IS HEREBY ORDERED THAT the January 19, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 20, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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

⁵ *Id.*

⁶ *Id.* at § 10.517.

⁷ *L.A.*, Docket No. 20-0946 (issued June 25, 2021); *see R.G.*, Docket No. 15-0492 (issued November 16, 2015); *H. Adrian Osborne*, 48 ECAB 556 (1997); *Maggie L. Moore*, *supra* note 4.

⁸ *L.A.*, *id.*; *see S.B.*, Docket No. 17-1797 (issued April 11, 2018); *S.M.*, Docket No. 16-1913 (issued April 11, 2017).