United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 24-0361**
	)	**Issued: May 9, 2024**
U.S. POSTAL SERVICE, CENTRAL PARK POST OFFICE, Buffalo, NY, Employer	)	

Appearances:
David J. Barbuzzi, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

On February 21, 2024 appellant, through her representative, filed a timely appeal from a November 15, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 24-0361.

On November 26, 2010 appellant, then a 41-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right hand when she lost her footing and fell, while in the performance of duty. She stopped work that day. By decision dated May 2, 2011, OWCP accepted the claim for right wrist bone contusion and right ulnocarpal abutment syndrome. On August 5, 2011 appellant underwent right wrist arthroscopy with debridement of triangular fibrocartilage complex (TFCC) tear. OWCP paid appellant wage-loss compensation on its supplemental rolls as of January 11, 2011, and on the periodic rolls as of July 3, 2011.

[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.

In an April 5, 2016 report, Dr. John O'Donnell, an orthopedic surgeon serving as a second opinion physician, opined that appellant had right wrist contusion, right ulnocarpal abutment, and triangular fibrocartilage complex tear (TFCC) secondary to her November 26, 2010 work-related fall with residual pain and soreness on the ulnar aspect of the right wrist. He noted that appellant had declined surgery proposed by her hand surgery specialist. Based on the pain expected with increased work activity and physical demands, Dr. O'Donnell opined that appellant was not able to return to her date of injury position but, was capable of working eight hours a day with light work restrictions, noting that her exact level of function may not be known until she returned to work in a restricted capacity. He further noted that appellant should be encouraged to wear a brace cockup splint to further protect the right wrist.

In an April 16, 2016 work capacity evaluation (Form OWCP-5c), Dr. O'Donnell opined that appellant could work 8 hours a day in a sedentary, light and/or medium capacity with restrictions on the right wrist of pushing, pulling, and lifting with the right wrist of no more than 15 pounds for 2.5 (estimated) hours per day.

In an updated June 23, 2016 work capacity evaluation (Form OWCP-5c), Dr. O'Donnell opined that appellant had reached maximum medical improvement. He further opined that she could work sedentary or light duty with permanent restrictions of 8 hours in splint (right hand) and no more than 1/3 of the day pushing, pulling, and lifting no more than 20 pounds.

Following a referral to rehabilitation services, OWCP, by letter dated November 3, 2016, determined that the weight of the medical evidence rested with Dr. O'Donnell's April 5, 2016 report including his permanent work restrictions. It requested that the employing establishment offer appellant a job within those restrictions. A copy of Dr. O'Donnell's April 5, 2016 report and April 16, 2016 Form OWCP-5c were attached.

On October 19, 2016 the employing establishment offered appellant a city carrier position with hours from 8:00 a.m. through 2:30 p.m. with Sunday/Rotating days off. The physical requirements of the position involved operating a motor vehicle at work for 8 hours, repetitive movement with wrists and elbows for 8 hours in a splint and pushing/pulling/lifting 1/3 of the day up to 20 pounds. The position was available October 19, 2016 with a response due from appellant no later than November 2, 2016.

On November 4, 2016 appellant refused the job offer advising that she was medically unable to perform the job duties outlined in the job offer.

On November 16, 2016 the employing establishment confirmed that the offered position remained available to appellant.

On November 16, 2016 OWCP advised appellant that it found that the October 19, 2016 job offer was suitable work within the work limitations provided by Dr. O'Donnell in his June 23, 2016 form OWCP-5c and that it remained available to her. It informed her that an employee who refuses an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation and that she was expected to accept the offered position and return to work if medically capable. OWCP afforded her 30 days to accept the position or provide reasons for the refusal.

In response, appellant submitted a November 3, 2016 Form OWCP-5c. On the November 3, 2016 Form OWCP-5c, Dr. Sameer Mamroon, an internal medicine specialist, opined that appellant had not reached maximum medical improvement and she could not work her usual job due to limited use of the right wrist. He further opined that appellant could work sedentary and light-duty work performing repetitive movements of the wrists no more than 1/4 or 15 minutes per hour; pushing, pulling, lifting no more than five pounds and no squatting, kneeling or climbing. Dr. Mamroon opined that it was unknown how long the restrictions would apply.

The employing establishment continued to advise that the offer job remained available.

By decision dated January 13, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, under 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. O'Donnell on June 23, 2016.

Appellant requested reconsideration on April 28 and October 23, 2017, March 15, 2018, April 22, 2019, May 22, 2020, August 17, 2021, December 20, 2022, and May 22, 2023. She continued to submit medical evidence.[2] In respective decisions dated July 26, 2017, June 13, 2018, May 22, 2019, August 14, 2020, December 23, 2021[3], March 6, 2023, and November 15, 2023, OWCP denied reconsideration or modification of its prior decision.

The Board finds that this case is not in posture for decision.

OWCP improperly issued its January 13, 2017 termination decision for refusal of suitable work as appellant had timely responded to the November 16, 2016 letter with 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 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 November 16, 2016 letter with additional evidence, but she was not provided with an additional 15 days to accept the offered position without penalty prior to OWCP

[2] Appellant did not submit evidence with her October 23, 2017 request for reconsideration. Therefore, by decision dated January 19, 2018, OWCP denied appellant's respective requests for reconsideration without conducting a merit review.

[3] In its December 23, 2021 decision, OWCP set aside its prior decision dated September 2, 2021 which had denied merit review.

[4] 20 C.F.R. § 10.516; *S.B., id.; C.C.*, Docket No. 15-1778 (issued August 16, 2016).

[5] *Id.*

[6] *Id.* at § 10.517.

issuing its January 13, 2017 termination decision for refusal of suitable work. 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 November 15, 2023 decision of the Office of Workers' Compensation Program is reversed.

Issued: May 9, 2024
Washington, DC

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

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

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

[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).

[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).