

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

E.O., Appellant)	
)	
and)	Docket No. 24-0365
)	Issued: May 21, 2024
U.S. POSTAL SERVICE, MERRICK POST)	
OFFICE, Merrick, NY, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 9, 2024 appellant filed a timely appeal from a December 19, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 December 19, 2023, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On January 27, 2011 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2011 he injured his back when he slipped and fell

¹ 5 U.S.C. § 8101 *et seq.*

while descending stairs in the performance of duty. He stopped work on January 26, 2011. OWCP accepted the claim for sprain of lumbar region of back, aggravation of preexisting spinal stenosis of lumbar spine and lumbar radiculopathy. It paid appellant wage-loss compensation on the supplemental rolls, effective February 28, 2011, and on the periodic rolls effective March 11, 2012. On January 29, 2016 appellant underwent a lumbar laminectomy at L3-4.

In a March 15, 2023 report, Dr. Michael Nicolosi, a Board-certified physiatrist, continued to provide diagnoses of lumbar radiculopathy, intervertebral disc disorders with radiculopathy, lumbar region, spondylosis without myelopathy or radiculopathy, lumbar region. He opined that appellant remained totally disabled from his January 26, 2011 work-related employment injury.

On July 7, 2023 OWCP referred appellant, along with a June 30, 2023 statement of accepted facts (SOAF) and series of questions, for a second opinion examination and evaluation with Dr. Leon Sultan, a Board-certified orthopedic surgeon. It requested that Dr. Sultan evaluate whether appellant continued to have residuals of the January 26, 2011 employment injury and his ability to return to work.

In a July 25, 2023 report, Dr. Sultan noted his review of the SOAF and the medical records, and discussed appellant's factual and medical history. He indicated that on January 26, 2011 appellant sustained trauma to the lumbar spine which resulted in L3-4 spondylolisthesis and traumatically-induced spinal stenosis with radiculopathy. Dr. Sultan opined that while the January 2016 surgery improved appellant's work-related condition, it had not resolved as there was clinical evidence to support that the work-related conditions were partially active and causing objective examination findings. He indicated that additional medical recovery could not be expected, and appellant's lower back condition was at maximum medical improvement (MMI). Dr. Sultan opined that appellant could not return to his date-of-injury job as a letter carrier, but he could perform sedentary or light-work activity with restrictions on repeated bending, squatting, stooping and crawling, and lifting and carrying no more than 20 pounds, using both hands. In a July 25, 2023 work capacity evaluation (Form OWCP-5c), he opined that appellant could work on a full-time basis performing either sedentary or light-duty work with restrictions of no bending/stooping and no more than 20 pounds of pushing, pulling, and lifting.

On August 10, 2023 OWCP determined that the weight of the medical evidence rested with Dr. Sultan's July 25, 2023 report and requested that the employing establishment offer appellant a job within those restrictions.

Also, on August 10, 2023, OWCP referred appellant to vocational rehabilitation services.

On August 11, 2023 the employing establishment offered appellant a permanent modified carrier technician position with a report date of August 26, 2023. The position was for the hours of 7:00 a.m. to 11:00 a.m. The position required casing mail four hours a day. The physical requirements of the position required up to four hours a day standing/walking/sitting, reaching above the shoulder, pushing, pulling, and lifting up to 20 pounds, and no bending/stooping. The employing establishment noted that the job offer was up to eight hours a day if work was available within appellant's restrictions. Appellant did not respond to the job offer.

On August 22, 2023 OWCP received a June 7, 2023 report from Dr. Daniel Kapner, an osteopathic Board-certified physiatrist. Dr. Kapner related appellant's physical examination findings and diagnosed lumbar radiculopathy, intervertebral disc disorders with radiculopathy, lumbar region, lower back pain, spondylosis without myelopathy or radiculopathy, lumbar region. He opined that appellant remained totally disabled from his January 26, 2011 work-related employment injury.

In a September 5, 2023 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor noted that appellant had reported that he planned to retire. In an August 25, 2023 vocational rehabilitation initial evaluation, the vocational rehabilitation counselor indicated that appellant refused the job offer and reported that he would retire.

On September 14, 2023 the employing establishment confirmed that the position remained available to appellant. It noted that he had not responded to the job offer and failed to report to the position.

On September 20, 2023 OWCP received an illegible attending physician's report.

In a letter dated September 27, 2023, OWCP advised appellant that it had determined that he had refused or failed to report to the offered permanent position as a modified carrier technician. It informed him that it had reviewed the offered position and found it suitable and in accordance with the medical restrictions provided by Dr. Sultan in his July 25, 2023 report. OWCP informed appellant of the provisions of 5 U.S.C. § 8106(c)(2) that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation. It afforded him 30 days to either accept the position or to provide adequate reasons for refusal.

In response, OWCP received a legible copy of a September 12, 2023 attending physician's report, wherein Dr. Nicolosi opined that appellant remained totally disabled from his January 26, 2011 work-related lumbar radiculopathy post laminectomy.

In a letter dated November 14, 2023, OWCP advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It advised that the position remained available and that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter. Appellant did not accept the position.

By decision dated December 19, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective December 19, 2023, as he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

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.² Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable

² See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

work is offered to, procured by or secured for the employee is not entitled to compensation.³ 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.⁴ Section 8106(c) 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.⁵

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.⁶ 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.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

³ 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).

⁴ *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁵ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁶ 20 C.F.R. § 10.517(a).

⁷ *Id.* at § 10.516.

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).

ANALYSIS

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

In determining that appellant was physically capable of performing the modified carrier technician position, OWCP properly relied on the opinion of Dr. Sultan, the second opinion physician.

In a July 25, 2023 report, Dr. Sultan discussed appellant's factual and medical history and reported findings of his physical examination. He indicated that while the January 2016 surgery improved appellant's work-related condition, there remained clinical evidence to support that the work-related conditions were partially active and was causing objective examination findings. Dr. Sultan further indicated that, as additional medical recovery could not be expected, appellant's lower back condition was at MMI. He opined that appellant could perform sedentary or light-work activity with restrictions. In a July 25, 2023 work capacity evaluation (Form OWCP-5c), Dr. Sultan opined that appellant could work on a full-time basis performing sedentary- or light-duty work with restrictions of no bending/stooping and no more than 20 pounds of pushing, pulling, and lifting. The Board notes that these restrictions would allow appellant to work in the modified carrier technician position.

The Board finds that OWCP properly accorded the weight of the medical opinion evidence to Dr. Sultan, who based his opinion on a proper factual and medical history and physical examination findings and provided medical rationale for his opinion. Dr. Sultan provided a well-rationalized opinion regarding appellant's ability to work, and that his evaluation of appellant's ability to work was the most comprehensive evaluation conducted around the time that the modified carrier technician position was offered to appellant. Accordingly, OWCP properly relied on his July 25, 2023 report relative to work tolerances and limitations in terminating appellant's wage-loss compensation and entitlement to schedule award compensation effective the date he refused an offer of suitable work.¹¹

Appellant submitted a June 7, 2023 report from Dr. Kapner and a September 12, 2023 attending physician report from Dr. Nicolosi regarding his ability to work which were contemporaneous with Dr. Sultan's report. Both Dr. Kapner and Dr. Nicolosi opined that appellant was totally disabled from the January 26, 2011 work injury. However, neither physician provided medical rationale in support of their opinion that appellant was totally disabled. The Board has held that a report is of limited probative value if it does not contain medical rationale explaining its conclusions regarding a given medical condition/level of disability.¹² Thus, these

¹¹ See *Y.J.*, Docket No. 20-1562 (issued December 14, 2021); *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

¹² See *Y.J.*, *id.*; *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

reports are insufficient to outweigh the well-rationalized opinion of Dr. Sultan who addressed the accepted conditions, and opined that appellant was able to work with restrictions.

The Board finds that, therefore, OWCP has established that the modified carrier technician position offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified. The Board has reviewed the evidence and argument submitted by appellant in support of his refusal of the offered permanent modified carrier technician position, and notes that it is insufficient to justify his refusal of the position. Moreover, OWCP properly noted that retirement¹³ and the fact that appellant was in an OWCP sponsored vocational rehabilitation program¹⁴ are not valid reasons for refusing a suitable offer of employment.

The Board further finds that OWCP complied with its procedural requirements prior to terminating his compensation, including providing him with an opportunity to accept the position offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid.¹⁵

CONCLUSION

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

¹³ See *Robert P. Mitchell*, 52 ECAB 116 (2000); *L.D.*, Docket No. 16-1169 (issued September 20, 2017); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(4) (June 2013).

¹⁴ See *J.J.*, Docket No. 14-951 (issued September 2, 2014).

¹⁵ See generally *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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