

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSWALDO SOLORZANO and U.S. POSTAL SERVICE,
POST OFFICE, San Mateo, CA

*Docket No. 03-1139; Submitted on the Record;
Issued September 4, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

On September 9, 1997 appellant, then a 36-year-old letter carrier, filed an occupational disease claim, alleging that he developed a right shoulder condition due to repeated overhead reaching, lifting heavy packages, carrying heavy mailbags and pushing and pulling more than 50 pounds. The Office accepted that he sustained a right shoulder impingement and a right shoulder tear in the performance of duty. Appellant stopped work on November 21, 2001, underwent right shoulder surgery on December 11, 2001 and began receiving appropriate compensation benefits.

Appellant submitted various progress reports from his Board-certified orthopedic surgeon and attending physician, Dr. Eugene M. Wolf, indicating that he was recovering but was unable to return to work. In a duty status report dated May 1, 2002, Dr. Wolf indicated that appellant could work 4 hours per day with the restrictions of no reaching above the shoulder, reaching limited to 2 hours a day, no pushing, pulling, no overhead lifting and arm lifting limited to 15 pounds on the left. He stated that beginning June 5, 2002 appellant could work eight hours per day. The employing establishment offered appellant a temporary position based on Dr. Wolf's restrictions on May 10, 2002. Dr. Wolf approved the position and appellant accepted the job offer on May 17, 2002 and returned to work on that date for four hours per day.

In a report dated May 24, 2002, Dr. Wolf indicated that appellant's right shoulder condition was now permanent and stationary and that he was not in need of any further medical care. On physical examination, he found that appellant's right shoulder had well-healed incisions with a small scar, which was normal for anterior portals and that the portals were well healed. Dr. Wolf stated that there was no apparent atrophy of any of the muscles of the shoulder girdle and no tenderness of palpation, in addition to no soft tissue swelling and no pain or weakness on resisted elevation. He discussed the results of tests noting that the apprehension test on external rotation and abduction was negative and that the ligamentous examination performed

with appellant supine and bilaterally did not demonstrate any instability with the scapulae and glenoids stabilized and compression force placed on the glen humeral joint. The jerk test was also negative. Regarding work restrictions, Dr. Wolf indicated that appellant was precluded from repeated overhead lifting and repetitive overhead work.

The employing establishment issued a full-time permanent job offer to appellant on June 6, 2002, based on Dr. Wolf's May 24, 2002 medical report. The modified carrier position included working eight hours per day with no repeated overhead lifting and no repeated overhead work. The job duties remained the same as the previous job offer but the hours were increased from four to eight hours per day based on Dr. Wolf's recommendation that, beginning June 5, 2002, appellant could work full time.

By letter dated June 7, 2002, the Office notified appellant that he was offered a position that was found to be suitable to his work capabilities and that the employing establishment confirmed that the position was available. The Office indicated that appellant had 30 days to accept the position or provide an explanation of the reasons for refusing it. On June 11, 2002 appellant replied that he would accept the job "with protest" for the following reasons: he felt that the duties of the job would cause him further injury, he was being asked to report to a different work site that was further away from his home and required additional driving and he felt that Dr. Wolf's report contained contradictory language. He also requested permission to seek treatment from another physician because he felt that the employing establishment was putting pressure on Dr. Wolf to return him to work.

On June 21, 2002 appellant rejected the June 6, 2002 job offer stating that he had lost full use of his shoulder, was experiencing pain in his shoulder and was concerned that there were complications after the surgery. He stated that the job offer had "unrealistic accommodations" for the restriction of reaching above the shoulder and repetitive motion.

On June 24, 2002 the Office referred appellant to a second opinion physician based on his complaints of Dr. Wolf. Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, stated, in a July 17, 2002 report, that appellant had a full range of motion in the right shoulder with some pain. He opined that appellant was permanent and stationary regarding his right shoulder and required no further treatment. Dr. Sherman noted that appellant should not be required to use the right shoulder for overhead work on a repetitive basis, but was otherwise unrestricted regarding pushing, pulling, reaching and lifting. He stated that he concurred with Dr. Wolf's work restrictions that appellant was able to use the right shoulder for overhead lifting and repetitive overhead work on a limited basis and could do these activities for 50 percent of the normal workday activity. In a work capacity evaluation, he indicated that appellant could do reaching above the shoulder for up to four hours per day.

Appellant sought treatment from Dr. Leslie M. Israel, Board-certified in preventive medicine and submitted a June 24, 2002 work status note indicating work restrictions of "no casing, no repetitive reaching with arms, no pull-down, limit lifting/pushing/pulling to 15 pounds occasionally and limit delivery to 1 hour per day."

By letter dated July 18, 2002, the Office advised appellant that his reasons for refusing the position were insufficient and afforded appellant an additional 15 days to accept the offered position without penalty or his benefits would be terminated.

By decision dated August 30, 2002, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. The Office determined that the weight of the medical evidence rested with the well-reasoned opinions of Drs. Wolf and Sherman, who found that appellant could perform the duties of the offered position.¹

By letter dated November 23, 2002, appellant requested reconsideration and submitted reports from Dr. Dave M. Atkin, a Board-certified orthopedic surgeon. In an October 18, 2002 narrative report, Dr. Atkin indicated that appellant had approximately an 80 percent cervical spine range of motion and limited range of motion of his shoulders. He diagnosed cervical radiculopathy, left shoulder impingement with acromion joint arthritis and persistent right shoulder pain status post surgery times two. In a duty status report, dated September 11, 2002, he stated that appellant could work four hours per day with no climbing and no reaching above the shoulder with a maximum lifting of five to ten pounds.

By decision dated January 7, 2003, the Office denied appellant's request for modification of its previous decision finding that the medical evidence submitted was insufficient to cause a conflict in medical opinion or overcome the weight of the medical opinion evidence represented by Drs. Wolf and Sherman.²

The Board finds that the Office properly terminated appellant's compensation benefits in this case.

Section 8106(c) provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.³ To justify such a termination, the Office must show that the work offered was suitable.⁴ An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.⁵

The determination of whether appellant is capable of performing the offered position of a modified letter carrier is a medical question that must be resolved by medical evidence.⁶ The

¹ Appellant filed a second notice of occupational disease on October 23, 2002 alleging the same injury but the Office dismissed this claim.

² Evidence was submitted after the January 7, 2003 decision but the Board may not review this evidence according to 20 C.F.R. § 501.2(c).

³ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁴ *John E. Lemker*, 45 ECAB 258 (1993).

⁵ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁶ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

Board finds that the probative medical evidence establishes that the position offered was within appellant's medical restrictions.

Appellant began treatment with his attending Board-certified orthopedic surgeon, Dr. Wolf, in November 2001. Dr. Wolf performed arthroscopic surgery on appellant's right shoulder in December 2001 and continued follow-up care until 2002. In a May 1, 2002 duty status report, he indicated that appellant could work 4 hours per day with restrictions of no reaching above the shoulder, reaching limited to 2 hours a day, no pushing, pulling, no overhead lifting and arm lifting limited to 15 pounds. Dr. Wolf stated that beginning June 5, 2002 appellant could increase his work to eight hours per day. The employing establishment offered appellant a temporary position according to Dr. Wolf's work restrictions on May 10, 2002 and Dr. Wolf approved of the offered position. Appellant accepted the position and returned to work for four hours per day. In Dr. Wolf's final report on May 24, 2002, he stated that appellant's right shoulder condition was now permanent and stationary and that he was not in need of any further medical care. On physical examination, he found that the right shoulder incisions were well healed with only a small area of scar tissue, that there was no apparent atrophy of any of the muscles or tenderness or soft tissue swelling and that all the tests performed were negative and that there was full range of motion. Dr. Wolf stated that appellant was precluded from repetitive overhead lifting and repetitive overhead work. Dr. Sherman, a Board-certified orthopedic surgeon who served as a second opinion physician, also found on examination that appellant had a full range of motion in the right shoulder and that he was permanent and stationary and required no further medical treatment. He stated that he agreed with Dr. Wolf's work restrictions that appellant should not use the right shoulder for overhead work on a repetitive basis but was otherwise unrestricted regarding pushing, pulling, reaching and lifting.

The Board finds that the opinions of Dr. Wolf and Dr. Sherman represent the weight of the medical evidence in this case with respect to appellant's work restrictions. Dr. Wolf provided several complete reports based on an accurate medical history beginning with appellant's work-related injury and arthroscopic surgery in December 2001. He followed appellant's progress after the surgery and returned him to work for four hours per day on May 1, 2002 and found that, as of June 6, 2002, appellant would be able to work eight hours per day. Dr. Wolf agreed to the first, temporary job offer on May 10, 2002. The second permanent job offer on June 6, 2002 had the same duties as the earlier job offer but the working hours increased from four to eight. In his final report, Dr. Wolf stated that appellant's restrictions were no repetitive overhead lifting and no repetitive overhead work. Dr. Sherman found very limited findings of examination and indicated that he agreed with the work restrictions recommended by Dr. Wolf.

The job offered by the employing establishment was a modified carrier position and the physical requirements were specifically tailored to the restrictions recommended by Dr. Wolf on May 24, 2002. The activities, which would require appellant to occasionally perform overhead reaching, not repetitive reaching, would be sorting mail that had been improperly routed, casing mail and pulling mail. However, casing mail, as outlined in the job offer, could not exceed more than 2 hours per day, pulling mail could not exceed more than 1 hour per day and sorting mail could not exceed more than 12 minutes per day. In summary, appellant would not be performing overhead work for at least approximately five hours out of an eight-hour workday. Dr. Wolf's restrictions were no repetitive overhead lifting and no repetitive overhead work and the offered

position was specifically tailored to the restrictions. The job offer also indicated that a step would be provided if appellant found it necessary to use this ergonomic accommodation when performing the occasional overhead work.

Appellant submitted medical reports from Dr. Israel, an attending physician Board-certified in preventive medicine, and Dr. Atkin, an attending Board-certified orthopedic surgeon, in support of his contention that he could not perform the offered position. Dr. Israel's report is of little probative value because she only listed appellant's work restrictions and did not outline appellant's medical history or the history of injury. She also did not give any objective medical findings and medical rationale to substantiate her recommended work restrictions. Although Dr. Atkins provided some findings on examination, he did not adequately explain why these findings justified the work restrictions he provided. Therefore, Dr. Atkin's reports are of little probative value in establishing whether the offered position was suitable. For these reasons, the opinions of Dr. Israel and Dr. Atkin are insufficient to overcome the weight of the medical evidence of Dr. Wolf and Dr. Sherman.

The Board also finds that the reasons appellant cited in declining the job offer of the modified carrier position are inadequate. He alleged that the new position would require him to drive a longer distance to work, however, there is no work restriction pertaining to driving. The permanent job offer was also amended to change the job location to San Mateo, which is closer to appellant's home. Appellant claimed that the arthroscopic surgery was unsuccessful, however, reports from Dr. Wolf, who performed the surgery and follow-up treatment found that appellant's right shoulder had healed well. Appellant asserted that Dr. Wolf's report was contradictory and incoherent but did not specify what was contradictory in the report or provide any new medical evidence to support his contention. Last, appellant noted that the job offer had unrealistic accommodations for the restriction of reaching above the shoulder and repetitive motion. As noted earlier, the employing establishment stated that an ergonomic stool could be provided to aid appellant with the occasional overhead work and such work would be within his physical restrictions.

The Office properly advised appellant that the position of a modified letter carrier was suitable and the reasons offered for refusing it were insufficient. The weight of the medical evidence establishes that the position offered to appellant was consistent with his physical limitations. Therefore, the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation based on his refusal of suitable work under 5 U.S.C. § 8106(c).

The January 7, 2003 and August 30, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 4, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member