

radiculopathy, left neck sprain, left shoulder sprain, right lateral epicondylitis, and right rotator cuff impingement and paid compensation benefits. Appellant stopped work on August 5, 2013 and has not returned. He received compensation benefits on the periodic rolls as of June 29, 2014.

In an August 19, 2014 letter, Dr. Carolyn Casino, a physiatrist and appellant's treating physician, indicated that the diagnosed conditions related to the work injury were left rotator cuff tears, right rotator cuff calcific tendinitis, right lateral epicondylitis, sprain of neck and shoulder, and possible early right carpal tunnel syndrome. She advised that appellant could not return to his previous position and could only tolerate sitting, desk, or computer positions.

In an August 25, 2014 report, Dr. Jimmy Lim, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed the history of injury as noted on the statement of accepted facts (SOAF), reviewed the medical records, and presented his physical examination findings. He diagnosed status post right elbow lateral epicondyle, status post right and left shoulder rotator cuff tear, and status post cervical spine sprain as the accepted work conditions. Dr. Lim opined that maximum medical improvement had been achieved and that appellant was able to return to work eight hours a day with restrictions of no lifting over 30 pounds and no repetitive use of arms longer than two hours without rest of at least five minutes. In an August 27, 2014 form report (Form 5c), he set forth appellant's restrictions as walking, standing, reaching, and reaching above shoulder eight hours a day, repetitive movements of elbow eight hours a day, pushing and pulling no more than 10 pounds eight hours a day; and lifting no more than 30 pounds eight hours a day.

In a November 13, 2014 report, Dr. Casino disagreed with Dr. Lim's conclusions with regard to appellant's work hours and work ability. She noted that he would not be able to work eight hours a day with two hours of repetitive use of his arms and rest of at least five minutes. Dr. Casino explained that it was the repetitive use of his arms as well as repetitive overhead activities which caused his injuries. She opined that appellant would not be able to return to his date-of-injury position again based on his current diagnoses as outlined in her previous notes and the swelling in his left hand, which she attributed to epicondylitis. Dr. Casino opined that he would be eligible for desk work which would not involve overhead activities, lifting or repetitive motions involving his shoulder, elbow, and elbow joints.

OWCP determined a conflict in medical opinion existed between Dr. Casino and Dr. Lim regarding appellant's diagnoses and his functional ability to work. Appellant was referred, along with a copy of his medical record, a SOAF, and a list of questions, to Dr. Avi Weiner, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in medical opinion. Dr. Weiner was asked to provide an objective medical opinion, using the SOAF, to diagnose all conditions medically connected to the July 19, 2010 work injury; to address the date of maximum medical improvement; to provide an opinion, with medical rationale supported by objective findings, as to appellant's current work capacity; and to complete the enclosed work capacity evaluation (Form OWCP-5c), making sure to note the number of hours appellant could work and his work restrictions.

In an April 2, 2015 report, Dr. Weiner noted the history of injury and medical treatment, appellant's complaints, and his findings on physical examination. He opined that appellant had

achieved a fully expected recovery with conservative treatment. Dr. Weiner noted that some of the symptoms were due to appellant's fear of attempted motion. He indicated that appellant strongly rejected returning to his employment which involved sorting mail in slots, but he was willing to perform other activities that did not require the same repetitive motion of the right shoulder. Dr. Weiner felt strongly that appellant had some subjective issues, perhaps work stress, which prevented him from reaching further improvement. He opined that appellant could not return to his previous regular duties as this would cause further symptoms and, given appellant's history of diabetes, may eventually lead to sympathetic dystrophy that would render him completely disabled. Dr. Weiner opined that, if appellant was provided a different employment position, he would be able to continue his work and with time the symptoms would dissipate. In the April 2, 2015 Form OWCP-5c, he noted that appellant had right shoulder pain and could not perform repetitive overhead activity. Dr. Weiner advised that appellant had reached maximum medical improvement and could work eight hours a day with restrictions on reaching and reaching above shoulder² and no more than four hours of repetitive movements of the wrist and elbow, pushing, pulling, squatting, kneeling, and climbing and no more than four hours of lifting no more than 20 pounds with no overhead activities or heavy lifting.

On April 22, 2015 OWCP requested that Dr. Weiner clarify and describe any of appellant's physical limitations resulting from the work-related disability that would impact his ability to perform reaching and reaching above shoulder. It further requested that Dr. Weiner describe the activities, include the number of hours for each restriction, and to provide a supplemental report containing all of the requested information. No response was received.

In an April 29, 2015 letter, appellant took issue with Dr. Weiner's examination and report. He noted that Dr. Weiner never mentioned his left shoulder condition and got several dates and his medical history wrong.

OWCP received several medical reports from Dr. Casino regarding appellant's status. In a May 21, 2015 report, Dr. Casino reported bilateral shoulder pain with restrictions in range of motion, right greater than left side, right elbow pain, some hand paresthesias left greater than right, bilateral upper back pain and discomfort in the intrascapular region. In addition, appellant exhibited ongoing bilateral knee pain left greater than right with a recent period of active right knee swelling. Dr. Casino reported minimal crepitus with left knee range of motion and tenderness along the medial joint line. Significant tenderness was noted in the right knee along the prepatella bursa and with flexion some pain at the medial joint line. Dr. Casino continued to recommend restrictions in the work environment to include no lifting, no repetitive activities including overhead pitching, and no prolonged standing. In a May 20, 2015 OWCP-5c report, she opined that appellant was restricted to work six to seven hours a day with restrictions of six to seven hours sitting, one to two hours of walking and standing, no reaching, no reaching above shoulder, no repetitive movements and no pushing, pulling, lifting, squatting, kneeling, or climbing.

By notice dated May 27, 2015, the employing establishment offered appellant a position as modified mail processing clerk. The duties of the position required casing/sorting manual

² No time limitation was provided.

letters and flats, working delivery bar code sorter (DBCS), running and sweeping machines which required lifting trays from container and loading machine ledge; pulling mail from the bin and placing it in the trays; placing full trays on top of DBCS racks. The physical requirements of the position were listed as no overhead lifting, no reaching above shoulder; lifting up to 20 pounds up to eight hours per day intermittently, standing up to eight hours a day intermittently, walking up to eight hours per day intermittently; bending and stooping up to four hours per day intermittently; twisting up to four hours per day intermittently; pushing/pulling up to four hours per day intermittently; simple grasping up to eight hours per day intermittently; and fine manipulation up to eight hours per day intermittently.

In a June 9, 2015 letter, appellant's counsel argued that the medical report and opinion of Dr. Weiner were insufficient to resolve the conflict in medical opinion and could not be used to determine the suitability of the position or appellant's work capabilities. Consequently, counsel argued appellant was unable to accept the May 27, 2015 job offer.

On June 10, 2015 OWCP advised appellant that the duties and physical requirements of the modified mail processing clerk position were within the medical limitations provided by Dr. Weiner in his April 2, 2015 report and that the employing establishment had confirmed that the position remained open and available to him. It allowed him 30 days to accept the position or provide his reasons for refusal. Appellant was advised that an employee who refuses an offer of suitable work without reasonable cause is not eligible for further wage loss or schedule award compensation.

OWCP did not receive a response to the 30-day notice. The employing establishment confirmed that appellant did not accept the job and did not return to work during the 30-day period.

By notice dated July 13, 2015, appellant was advised that his refusal of the offered position was not justified and he was afforded an additional 15 days to accept the job. He did not accept the job.

In response to the 15-day notice, OWCP received: a June 11, 2015 magnetic resonance imaging (MRI) scan of the left knee and right knee, a July 17, 2015 Office of Personnel Management election letter, and May 21 and June 16, 2015 treatment notes from Dr. Casino, which indicated that appellant had degenerative changes in both of his knees, left greater than right, with a history of a previous partial lateral meniscectomy with chronic degenerative changes. Dr. Casino also indicated that both knees showed evidence of tendon inflammation and chondromalacia patella. She recommended work restrictions of no lifting, no repetitive activities, including overhead pitching and no prolonged standing.

In a July 23, 2015 letter, appellant's counsel reiterated arguments previously made regarding Dr. Weiner's report.

By decision dated July 29, 2015, OWCP terminated appellant's entitlement to compensation benefits effective August 23, 2015 because he refused to accept suitable employment pursuant to 5 U.S.C. § 8106(c)(2). The claims examiner noted that "any submitted

evidence regarding any lower extremity conditions are irrelevant as they are not one or any of the included accepted conditions.”

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ Section 8106(c)(2) of FECA⁴ 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.⁵ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁶ 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.⁷

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 by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.⁸ 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.⁹

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee’s ability to work, establishing that a position has been offered within the employee’s work restrictions and setting forth the specific job requirements of the position.¹⁰ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.¹¹

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹² The determination of whether an employee is physically capable of performing a

³ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁴ *Supra* note 1.

⁵ *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁶ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.517(a).

⁹ *Id.* at § 10.516.

¹⁰ *See Linda Hilton*, 52 ECAB 476 (2001).

¹¹ *Id.*

¹² *See supra* note 6.

modified assignment is a medical question that must be resolved by medical evidence.¹³ OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹⁴

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation based on the finding that he refused an offer of suitable work.

In developing the medical evidence, OWCP determined that a conflict in medical opinion arose between Dr. Casino and Dr. Lim regarding appellant's diagnoses and capacity for work. It referred him to Dr. Weiner for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a). The Board finds, however, that Dr. Weiner's report is insufficient to resolve the conflict. Therefore, OWCP improperly relied on his opinion when determining that the position offered by the employing establishment constituted suitable employment.

OWCP's procedures provide that the referee physician should provide a report sufficient to resolve the conflict which contains a clinical history, results of the examination, results of any testing performed and a reasoned opinion in response to the questions posed. The procedures further require the referee physician to use the SOAF as the framework for his or her opinion.¹⁵ Dr. Weiner's April 2, 2015 report and OWCP-5c form did not include a detailed clinical history or detailed findings on examination.¹⁶ It is unclear to which shoulder Dr. Weiner was referring and there is no evidence that Dr. Weiner performed any specific tests to support his conclusions. The report did not reflect review of or use of the SOAF as a basis for his opinion, as required. Dr. Weiner did not present a list of appellant's diagnoses or offer an opinion as to which diagnoses were work related. While he opined that appellant had reached MMI, despite being requested to do so by OWCP, he failed to provide a date at which it had been reached or whether he agreed with Dr. Lim's assessment of MMI. While Dr. Weiner also opined that appellant was capable of working eight hours a day with restrictions, his report focuses solely on appellant's right shoulder pain, but did not reference the other accepted conditions referenced in the SOAF. Medical conclusions unsupported by rationale are of diminished probative value.¹⁷

The Board notes that Dr. Weiner also failed to respond to OWCP's request for clarification and did not have an opportunity to review the position description for the job offered by the employing establishment in order to render an opinion as to whether appellant could perform the required duties. As Dr. Weiner's report was insufficiently rationalized to

¹³ *Gayle Harris*, 52 ECAB 319 (2001).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (July 2013).

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Referee Examinations*, Chapter 3.500.4(g) (July 2011).

¹⁶ Dr. Weiner reported that appellant showed some sensitivity of the pectoralis major, he had good abduction power of his shoulder against resistance, and there was some loss of motion secondary to pain.

¹⁷ *Willa M. Frazier*, 55 ECAB 379 (2004).

support OWCP's suitability determination, there remains an unresolved conflict in medical opinion.¹⁸ Consequently, OWCP failed to meet its burden of showing that the work offered to and refused by appellant was suitable.¹⁹

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 14, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁸ See *E.G.*, Docket No. 12-1011 (issued November 28, 2012).

¹⁹ *M.L.*, 57 ECAB 746 (2006).