United States Department of Labor
Employees' Compensation Appeals Board

P.P., Appellant	)	
and	)	**Docket No. 18-1232**
	)	**Issued: April 8, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 1, 2018 appellant, through counsel, filed a timely appeal from a February 7, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP has met its burden of proof to properly terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 10, 2016, due to his refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On May 30, 2014 appellant, then a 56-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left arm and shoulder when pulling on a relay bag that had caught on the wall of his truck while in the performance of duty. He explained that as he pulled the bag, he lost his balance and fell, but his arm was caught in the steering wheel. Appellant stopped work on May 30, 2014. OWCP accepted the claim for left shoulder and rotator cuff sprain, left elbow sprain, and left lateral epicondylitis. It paid wage-loss compensation and medical benefits on the periodic rolls benefits commencing July 15, 2014.

Appellant underwent authorized arthroscopic surgery on November 11, 2014, including a rotator cuff repair, subacromial decompression, anterior labral repair, and distal claviculectomy of the left shoulder.

In a report dated April 16, 2015, Dr. William Lackey, appellant's treating physician and a Board-certified orthopedic surgeon, related that he was totally disabled from work.

On May 18, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Hormozan Aprin, a Board-certified orthopedic surgeon. It requested that he assess appellant's current condition and work capacity.

In a June 5, 2015 report, Dr. Aprin noted appellant's history of injury and provided findings based upon a review of the medical evidence, the statement of accepted facts (SOAF), and appellant's physical examination. He determined that appellant had mildly decreased range of motion of the left shoulder, and he noted complaints of left shoulder pain and tenderness of the left shoulder and elbow. Dr. Aprin opined that he was moderately and partially disabled related to his left shoulder and left elbow and confirmed that appellant's disability was related to his May 30, 2014 employment injury. He indicated that appellant did not have a concurrent nonwork-related disability. Dr. Aprin determined that appellant was not capable of performing his regular duties, however, he indicated that appellant could work eight hours per day with restrictions due to his work-related conditions. He advised that the appellant's restrictions included an inability to elevate his left arm above shoulder level and could not push, pull, lift, or carry over 20 pounds. Dr. Aprin also indicated that he could not lift and carry heavy objects with his right hand.

In a July 8, 2015 report, Dr. Lackey indicated that appellant remained totally disabled from work. He advised that it was undetermined when appellant could return to work.

In a letter dated July 13, 2015, the employing establishment offered appellant a modified carrier position. The duties included parcel post delivery up to eight hours per day. The physical requirements included lifting items up to 20 pounds to the shoulders for eight hours per day;

bending, twisting, pulling, pushing, kneeling, and stooping up to eight hours per day, with no weight limit specified; and driving up to eight hours per day.

Appellant declined the offered position on July 21, 2015. He indicated that his physician related that he was totally disabled from work.

On July 22, 2015 the employing establishment confirmed that the offered position remained available and that appellant had not returned to work.

By preliminary notice dated August 18, 2015, OWCP advised appellant that it found the employing establishment's job offer was suitable as it was in accordance with the job limitations prescribed by Dr. Aprin. It notified him of the provisions of 5 U.S.C. § 8106(c)(2) and that his wage-loss compensation and schedule award benefits could be terminated if he refused suitable work. OWCP indicated that the case record would be held open for 30 days for submission of additional evidence.

On August 19, 2015 Dr. Lackey again advised that appellant was totally disabled. In a September 3, 2015 work capacity evaluation, he related that appellant was severely limited secondary to his need for narcotic medication and pain control. Dr. Lackey prescribed restrictions of no reaching above the shoulder. He indicated that appellant could not drive to and from work or operate a vehicle at work due to his pain medications. Dr. Lackey also indicated that appellant could not perform repetitive movement with the elbow or engage in climbing. He related that appellant could push or pull up to 10 pounds for one hour and lift 5 pounds for half an hour.

By notice dated September 29, 2015, OWCP advised appellant that his refusal of the offered position was not justified. It afforded him 15 additional days to accept the offered position.

Dr. Lackey submitted reports dated September 30, November 11, and December 23, 2015, as well as January 4 and 27, 2016. He indicated that appellant's objective and subjective findings remained unchanged from his previous examinations.

By decision dated February 10, 2016, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 10, 2016, as he refused an offer of suitable work. It found that Dr. Aprin's report constituted the weight of the medical evidence regarding appellant's work tolerances and limitations. OWCP also noted that Dr. Lackey provided work excuses indicating that appellant was totally disabled, yet also provided a September 3, 2015 report indicating that he could perform limited-duty work.

On February, 16, 2016 OWCP received confirmation from the employing establishment that the offered position remained available.

On February 10, 2017 appellant requested reconsideration.

Dr. Lackey continued to treat appellant and submitted monthly reports during 2017 summarizing appellant's physical examination findings.

By decision dated March 16, 2017, OWCP denied modification of the February 10, 2016 decision.

On January 16, 2018 appellant requested reconsideration.

OWCP received copies of previously submitted reports from Dr. Lackey from 2016. Dr. Lackey also submitted additional reports dated February 22, March 29, August 16, September 21, October 2 and 19, and November 22, 2017. He noted appellant's findings and diagnosed left shoulder recurrent full-thickness tear with three centimeters of retraction and superior migration humeral head, status post left shoulder arthroscopy with a three anchor rotator cuff repair, and left elbow post-traumatic lateral epicondylitis.

In an October 2, 2017 report, Dr. Lackey opined that appellant was unable to perform any work due to bilateral shoulder internal derangement and he could not accept any job offers. He explained that he was awaiting authorization for bilateral shoulder arthroscopies.

In an October 19, 2017 report, Dr. Lackey examined appellant and provided findings. He noted that appellant was unable to perform overhead reaching. He explained that appellant had undergone surgical intervention which failed to improve his symptoms, and that "repetitive, overhead, and weight-bearing activities placed him at significant risk for further progression of these symptoms." Dr. Lackey noted that appellant was limited with regard to lifting, pushing, pulling, or carrying objects greater than five pounds for transient periods of time not to exceed a minute in duration, and not to exceed cumulative 20 minutes during an 8-hour shift. He explained that he had reviewed the responsibilities and limitation of the position offered to appellant and that he could not meet them due to his medical restrictions and his physical limitations.

On November 27, 2017 appellant, through counsel, requested reconsideration of the March 16, 2017 decision. Counsel argued that the reports of Dr. Lackey, in particular the October 19, 2017 report, established that appellant was totally disabled and the offered position was unsuitable.

By decision dated January 16, 2018, OWCP denied modification of the March 16, 2017 decision. The claims examiner noted that Dr. Lackey provided only a generalized and conclusory opinion, instead of a well-reasoned medical explanation of appellant's limitations and/or total disability from work. The claims examiner noted that Dr. Aprin recognized that appellant's work-related conditions had not ceased, but he opined that appellant was no longer totally disabled from work as a result of the accepted injury.

By letter received on January 19, 2018, counsel requested reconsideration.

By decision dated February 7, 2018, OWCP denied modification of the January 16, 2018 decision. It explained that the evidence of record was insufficient to provide a sufficiently rationalized medical opinion which explained why appellant remained totally disabled and unable to perform any work despite receiving aggressive, conservative care and undergoing surgical intervention.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's compensation benefits.[3] Section 8106(c) of FECA 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."[4] It is OWCP's burden of proof to justify termination of compensation under section 8106(c) due to refusal of suitable work or neglecting to perform suitable work.[5] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[6]

To support termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his/her refusal to accept such employment.[7] In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[8] OWCP's 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] 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.[10] It is well established under this section of FECA, OWCP must consider both preexisting and subsequently-acquired conditions in the evaluation of the suitability of an offered position.[11]

[3] *T.M.*, Docket No. 18-1368 (issued February 21, 2019).

[4] 5 U.S.C. § 8106(c).

[5] *Joyce M. Doll*, 53 ECAB 790 (2002).

[6] 20 C.F.R. § 10.517(a).

[7] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[9] Federal (FECA) Procedure Manual, Part -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[10] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[11] *Richard P. Cortes*, 56 ECAB 200 (2004).

ANALYSIS

The Board finds that OWCP has not met its burden of proof to properly terminate appellant's entitlement to wage-loss compensation and schedule award benefits, effective February 10, 2016, pursuant to 5 U.S.C. § 8106(c)(2), for refusing an offer of suitable work.

OWCP found that the modified carrier position was suitable work based on the work restrictions provided by Dr. Aprin, the second opinion physician. However, the Board finds that the physical requirements of the modified carrier position, as set forth by the employing establishment, did not comply with Dr. Aprin's recommended work restrictions. Dr. Aprin advised that appellant could not elevate his left arm above shoulder level and could not push, pull, lift, or carry over 20 pounds. He also indicated that he could not lift and carry heavy objects with his right hand. The modified carrier position offered to appellant on July 13, 2015 required parcel post delivery up to eight hours per day with physical requirements of lifting items up to 20 pounds to the shoulders for eight hours per day; bending, twisting, pulling, pushing, kneeling, and stooping up to eight hours per day, with no weight limit specified; and driving up to eight hours per day. The Board finds that some of the key physical requirements of the offered position did not limit the weight for which appellant would be required to push and pull, while Dr. Aprin specifically assigned restrictions of pushing and pulling no more than 20 pounds. Therefore, the Board finds that the modified carrier requirements did not comply with Dr. Aprin's restrictions which specified a weight limit of 10 to 20 pounds regarding pushing and pulling. As the requirements of the position potentially exceeded appellant's restrictions it cannot be considered suitable work.[12]

The Board further finds that Dr. Aprin indicated that appellant could not lift and carry heavy objects with his right hand. In addition, Dr. Aprin was not asked to review the modified-job offer to address its suitability for appellant considering all of his preexisting, work related, and subsequently acquired medical conditions.[13] The medical evidence of record, therefore, fails to establish that the offered position was suitable.

The Board has held that, for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.[14] As a penalty provision, section 8106(c) must be narrowly construed.[15] The Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations.

Consequently, OWCP has not met its burden of proof to justify the termination of his wage-loss compensation and entitlement to a schedule award.

[12] *See supra* note 8.

[13] *See P.S.*, Docket No. 18-0396 (issued August 17, 2018).

[14] *D.M.*, Docket No. 17-1668 (issued April 9, 2018).

[15] *Id.*

CONCLUSION

The Board finds that OWCP has not met its burden of proof to properly terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 10, 2016, due to a refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2018 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 8, 2019
Washington, DC

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

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

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