

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

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H.N., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
CUSTOMS & BORDER PROTECTION, JFK )  
INTERNATIONAL AIRPORT, Jamaica, NY, )  
Employer )

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**Docket No. 18-0501  
Issued: February 20, 2020**

*Appearances:*

*Paul Kalker, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On January 10, 2018 appellant, through counsel, filed a timely appeal from a December 19, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the December 19, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective December 20, 2017, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

## **FACTUAL HISTORY**

On May 4, 2015 appellant, then a 50-year-old administrative aid, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his right shoulder when he fell on a wet floor while in the performance of duty. He stopped work that same date.

On June 25, 2015 OWCP accepted appellant's claim for right shoulder sprain and later expanded acceptance of the claim to include the additional condition of partial tear of the right rotator cuff. A right shoulder arthroscopy was authorized on October 22, 2015.

Appellant continued to submit frequent progress notes from his treating physician, Dr. Tony N. Quach, a Board-certified orthopedic surgeon, dated August 14, 2015 to June 9, 2016. Dr. Quach reported that appellant was disabled due to his employment injury. He also noted appellant's history of polio and reported that he wore braces on his legs and required crutches to ambulate.

On July 15, 2016 Dr. Quach diagnosed partial thickness rotator cuff tear and full thickness rotator cuff tear. He advised that appellant was disabled from work. In an undated attending physician's report (Form CA-20), Dr. Quach advised that appellant underwent surgery and was totally disabled from work commencing October 22, 2015. In a duty status report (Form CA-17) dated July 29, 2016, he diagnosed right shoulder rotator cuff tear status post rotator cuff repair and noted that appellant could not resume work.

Appellant was referred by OWCP for a second opinion examination along with the record and a statement of accepted facts (SOAF) to determine his disability status. In a July 25, 2016 report, Dr. Arnold Goldman, a Board-certified orthopedic surgeon serving as a second opinion physician, noted his review of the SOAF, medical records, and that he conducted a physical examination. He opined that appellant had disabling residuals due to his accepted employment injury. Dr. Goldman noted that appellant had a complicated medical history of polio since the age of four and a half and he wore braces on both lower extremities. Findings on examination revealed well-healed arthroscopic portals of the right shoulder, forearm atrophy, range of motion (ROM) of the right shoulder was limited, and strength of 4/5 on the right and 5/5 on the left. Dr. Goldman advised that the conditions had not resolved due to atrophy and decreased ROM caused by the fall and injury. He noted no aggravated preexisting conditions. Dr. Goldman advised that appellant had not reached maximum medical improvement (MMI). He indicated that appellant was not capable of returning to his date-of-injury job, but could work four hours a day through September 2016 and then increase to an eight-hour day with restrictions secondary to the surgery. Dr. Goldman noted that appellant's prognosis was guarded for return to his preinjury level of work, but the prognosis was good for a return to work in a light-duty capacity for eight hours per day. In a work capacity evaluation (Form OWCP-5c), he noted that appellant was not capable of returning to his usual job due to pain and atrophy of the right arm, but could return to work four hours per day with a gradual increase to eight hours per day with restrictions necessary due to his shoulder surgery.

Appellant continued to submit reports from Dr. Quach dated September 16, 2016 to January 30, 2017 in which he noted appellant's continued complaints of right shoulder pain. On December 27, 2016 Dr. Quach indicated that appellant reported using his wheelchair the majority of the time as he lacked endurance to use crutches for long periods of time. He diagnosed right shoulder rotator cuff tendon tear after a mechanical fall at work in May 2015. Dr. Quach noted that the tear required operative intervention and appellant subsequently developed left shoulder symptoms and a partial thickness rotator cuff tear secondary to overuse of the left shoulder after his right shoulder surgery. He noted the history of polio. Dr. Quach opined that appellant was unable to return to work.

On March 30, 2017 OWCP determined that there was a conflict of opinion between Dr. Quach, appellant's treating physician who opined that appellant was totally disabled from work, and Dr. Goldman, the second opinion physician, who opined that appellant was capable of working in a part-time, limited-duty capacity with a gradual increase to eight hours.

On April 3, 2017 Dr. Quach noted appellant's continued complaints of significant pain and weakness of the right shoulder. He reported appellant's inability to walk given the history of polio and requirement of crutches to walk despite appellant's shoulder conditions. Dr. Quach opined that appellant was totally disabled.

In a June 15, 2017 letter, OWCP referred appellant for an impartial medical examination with Dr. Eial Faierman, a Board-certified orthopedic surgeon.

In a report dated June 27, 2017, Dr. Faierman noted reviewing the SOAF, medical history, and the medical record. He noted that appellant presented using a motorized wheelchair and carried his crutches. A physical examination of both shoulders revealed nonanatomic tenderness in all bony, tendon, and ligamentous surfaces; no swelling or effusion; full ROM of the shoulders; apprehension testing was within normal limits; Yergason testing for biceps subluxation was normal; and drop arm testing was negative. Dr. Faierman diagnosed right shoulder rotator cuff repair/distal clavicle resection and left shoulder complaints. He noted that appellant had full ROM in both shoulders and unrelated polio residuals of severe atrophy in the bilateral lower extremities. Dr. Faierman advised that appellant had nonwork-related disability due to the polio. He noted that appellant reached MMI and no longer required medical treatment as the rotator cuff repair was successful and he had full ROM of both shoulders. Dr. Faierman noted that appellant's weakness made it difficult for him to walk prolonged distances or stand for prolonged periods of time due to the preexisting polio and shoulder surgery. He opined that appellant was able to return to his preinjury job, but the job must allow for a wheelchair and not require more than 10 pounds of lifting. In a work capacity evaluation (OWCP-5c) dated June 27, 2017, Dr. Faierman provided work restrictions for appellant, which were permanent. He noted that appellant was unable to perform his regular job without restrictions as he was wheelchair bound except he could walk 10 feet on crutches. Dr. Faierman advised that appellant could work eight hours per day in a sedentary position with restrictions of sitting for eight hours a day; repetitive movements of the wrists and elbow for eight hours a day; pushing, pulling, and lifting limited to eight hours per day up to 10 pounds; no walking, standing, reaching, reaching above the shoulder, twisting, bending/stooping, squatting, kneeling, climbing, operating a motor vehicle at work, or operating a motor vehicle to and from work.

On August 22, 2017 OWCP inquired whether the employing establishment could offer appellant a permanent position within the restrictions set forth in Dr. Faierman's report. On

August 29, 2017 the employing establishment offered appellant the modified position of inspectional aide at JFK International airport. The salary for the position was the same as appellant's current GS-7 Step 9 salary of \$58,775.00. The job description listed that duties would be performed up to eight hours a day and included answering the telephone and data input which had minimal physical requirements and could be performed while sitting. The days off and the available shift were from 7:00 a.m. to 3:00 p.m., Monday through Friday, with breaks taken when required and around operational requirements or as directed by appellant's attending physician.

On September 1, 2017 appellant, through counsel, indicated that he was medically unable to accept the offered position as a result of continuing work-related disability. He further indicated that he applied to the Office of Personnel Management (OPM) for disability retirement benefits.

In a September 1, 2017 report, Dr. Quach noted that appellant needed crutches for walking and also had problems with prolonged walking.

In an e-mail dated October 11, 2017, the employing establishment confirmed that the light-duty job was wheelchair accessible.

In a letter dated October 26, 2017, OWCP advised appellant of its determination that the inspectional aide position, offered by the employing establishment on August 29, 2017 was suitable. It indicated that the position was based upon the opinion of Dr. Faierman, the impartial medical examiner (IME), who opined that he was capable of working eight hours per day, sedentary work, with restrictions. The employing establishment confirmed that the position remained available to appellant. OWCP instructed him that he must, within 30 days, either accept the position or provide a written explanation of the reasons he refused to accept the position. Appellant was informed that he could lose his right to compensation pursuant to 5 U.S.C. § 8106(c) of FECA.

On November 3, 2017 appellant, through counsel, responded to the October 26, 2017 letter and indicated that he was medically unable to accept the offered position as the duties of the assignment were inconsistent with his medical restrictions and disabilities. Counsel noted that the report of Dr. Faierman was internally inconsistent, contradictory, and could not constitute the special weight of the medical evidence. Appellant asserted that the report of Dr. Faierman should be discounted and the medical evidence from appellant's treating physicians should constitute the weight of the medical evidence.

In a November 28, 2017 letter, OWCP found that the reasons appellant provided for refusing the offered position were invalid. It gave him 15 additional days to accept the position or to make arrangements to report to this position. OWCP noted that if appellant did not accept the position within 15 days of the date of the letter, his right to wage-loss compensation and a schedule award would be terminated pursuant to section 8106 of FECA. It would not consider any further reasons for refusal of the offered position.

In a December 1, 2017 report, Dr. Quach indicated that appellant still required crutches to walk more than 10 to 15 feet and was mostly wheelchair bound due to his lower extremity issues. He noted that appellant was status post right shoulder surgery and was applying for long-term disability given his other comorbidities. Dr. Quach noted that appellant was applying for OPM long-term disability benefits given his other comorbidities.

In a letter dated December 4, 2017, appellant, through counsel, indicated that he was medically unable to accept the offered position as the duties of the assignment were inconsistent with his medical restrictions and disabilities. Counsel noted that the report of Dr. Faierman was internally inconsistent, contradictory, and could not constitute the special weight of the medical evidence. He also alleged that the assignment was inconsistent with his medical restrictions and disabilities.

By decision dated December 19, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective December 20, 2017, finding that he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> Section 8106(c)(2) of FECA 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.<sup>8</sup> The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>9</sup>

Section 8123(a) of FECA provides in pertinent part that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>10</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and

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<sup>4</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>6</sup> *S.D.*, *supra* note 4; *Ronald M. Jones*, 52 ECAB 406 (2003).

<sup>7</sup> *S.D.*, *id.*; *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

<sup>9</sup> *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>10</sup> 5 U.S.C. § 8123(a).

who has no prior connection with the case.<sup>11</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>12</sup>

### 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 20, 2017, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

OWCP accepted that, as a result of the May 4, 2015 employment injury, appellant sustained a right shoulder sprain and a partial tear of the right rotator cuff and he underwent arthroscopic surgery. Dr. Quach opined that appellant was unable to return to work noting that his history was significant for polio and he wore braces on his legs and relied on crutches to ambulate. Appellant was referred for a second opinion evaluation with Dr. Goldman who opined that appellant was unable to returning to his date-of-injury job, but could work four hours a day through September 2016 and then increase to an eight-hour day with restrictions secondary to the surgery. OWCP properly found a conflict in the medical opinion evidence and referred appellant to Dr. Faierman for an impartial medical examination.<sup>13</sup>

In a June 27, 2017 impartial medical examination report, Dr. Faierman noted that appellant had full ROM in both shoulders and unrelated polio with severe atrophy in the bilateral lower extremities. He opined that appellant was able to return to his preinjury job, however, the job must allow for a wheelchair and not require more than 10 pounds of lifting. Dr. Faierman provided detailed permanent work restrictions and also noted that appellant was wheelchair bound except he could walk 10 feet on crutches. The Board finds that Dr. Faierman's opinion is entitled to the special weight of the medical evidence accorded an IME because he based his opinion as to appellant's ability to return to employment on a proper factual background, after a review of the medical record, and following physical examination and provided a well-rationalized opinion that appellant was capable of a sedentary level of light-duty work.

On August 29, 2017 the employing establishment offered appellant a limited-duty position as inspectional aide. The employing establishment listed the duties of the position to be performed up to eight hours a day included answering the telephone and data input which could be performed while sitting. The physical requirements of the position were minimal and breaks were permitted as medically necessary. The Board finds that the physical requirements of the offered position of inspectional aide fell within appellant's work restrictions as provided by Dr. Faierman. The weight of the evidence of record establishes that appellant was no longer totally disabled from work and had the physical capacity to perform the duties listed in the August 29, 2017 job offer. Thus, OWCP properly relied on Dr. Faierman's opinion in finding the inspectional aide position suitable.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), OWCP advised appellant on October 26, 2017 that it found that the job offer of inspectional aide to be suitable and

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<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> *K.S.*, Docket No. 19-0082 (issued July 29, 2019).

<sup>13</sup> *Id.*

afforded him an opportunity to provide reasons for refusing the position within 30 days. Following appellant's reply it advised him, in a November 28, 2017 letter, that his reasons for refusing were deficient and properly allowed 15 additional days to accept the offered position. The Board finds that OWCP followed the established procedures prior to the termination of his wage-loss compensation pursuant to section 8106(c).

Subsequent to the November 28, 2017 letter from OWCP, appellant submitted a December 1, 2017 report from Dr. Quach, who indicated that appellant required crutches to walk more than 10 to 15 feet and was mostly wheelchair bound due to his lower extremity issues. Dr. Quach noted that appellant was applying for OPM long-term disability benefits given his other comorbidities. Dr. Quach, however, was on one side of the conflict in the medical opinion that Dr. Faierman resolved, and his report and progress notes are thus insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.<sup>14</sup>

The Board finds that the position offered to appellant was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) and therefore OWCP has met its burden of proof to terminate his wage-loss compensation benefits and entitlement to a schedule award based on his refusal to accept the offered position.

On appeal counsel asserts that appellant was medically unable to accept the offered position as duties of the assignment were inconsistent with his medical restrictions and disabilities. He further asserted that the report of Dr. Faierman was internally inconsistent, contradictory, and could not constitute the special weight of the medical evidence. As discussed above, the Board finds that OWCP properly referred appellant to Dr. Faierman to resolve the conflict in the medical opinion evidence and that his opinion was well rationalized and sufficient to establish that the offered position was suitable.

### **CONCLUSION**

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 20, 2017, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

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<sup>14</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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