

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

_____)	
E.W., Appellant)	
)	
and)	Docket No. 19-1711
)	Issued: July 29, 2020
U.S. POSTAL SERVICE, INDIAN TRAIL POST)	
OFFICE, Indian Trail, NC, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 12, 2019 appellant filed a timely appeal from April 9 and July 15, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ The Board notes that, following the issuance of the July 15, 2019 merit 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 additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

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 April 10, 2019, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On October 6, 2011 appellant, then a 47-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that same date he sustained a left shoulder injury when he was leaning in his chair and fell backward while in the performance of duty. He stopped work on the date of injury and sought treatment with Dr. Nady Hamid, a Board-certified orthopedic surgeon. OWCP accepted the claim for complete left rotator cuff rupture and sprain of the left shoulder and upper arm. It placed appellant on the supplemental rolls commencing December 31, 2011 and on the periodic rolls commencing April 8, 2012.

On March 8, 2012 appellant underwent an OWCP approved arthroscopic repair of his rotator cuff, subacromial decompression of the left shoulder, and a biceps tenotomy. He continued to receive wage-loss compensation and returned to modified-duty work on July 24, 2014. On June 11, 2015 appellant underwent an OWCP approved left shoulder arthroscopic revision rotator cuff repair and left shoulder arthroscopic revision subacromial decompression. He stopped work following his surgery and received wage-loss compensation.

In a February 20, 2018 medical report, Dr. Hamid discussed appellant's evaluation status post left arthroscopic rotator cuff repair in 2012 and revision arthroscopic rotator cuff repair in 2015. He reported that appellant had been able to return to some level of function with regard to his left shoulder, but complained of continued pain and dysfunction. Dr. Hamid reported that a postoperative magnetic resonance imaging (MRI) scan of appellant's left shoulder performed in December 2016 demonstrated recurrent rotator cuff tearing involving the supraspinatus and infraspinatus. He diagnosed status post left shoulder revision rotator cuff repair with a large, recurrent rotator cuff tear. Dr. Hamid found that appellant had reached maximum medical improvement. He noted that appellant had a large recurrent rotator cuff tear that could eventually lead to worsening function, development of arthritis, and further surgery with the possibility of a left reverse total shoulder arthroplasty. With regards to his return to work status, Dr. Hamid assigned permanent restrictions for the left shoulder of no lifting above his head greater than 5 pounds, no lifting from waist to shoulder greater than 10 pounds, and no lifting from floor to waist greater than 20 pounds.

On August 28, 2018 appellant was referred for vocational rehabilitation services based on Dr. Hamid's opinion that he was capable of performing modified duties with restrictions.

On January 24, 2019 the employing establishment offered appellant a limited-duty position as a modified rural carrier associate. Duties of the assignment included casing mail for one to two hours per day, pulling mail down in trays no greater than 10 pounds with the right shoulder only for up to 30 minutes per day, loading vehicle for up to 30 minutes per day, and driving to deliver mail for two to six hours per day. Physical requirements included standing for up to four hours per day, no lifting from floor to waist greater than 20 pounds for up to four hours per day,

pushing/pulling up to one hour per day, reaching up to two hours per day, grasping up to eight hours per day, twisting up to six hours per day, walking up to four hours per day, sitting up to four hours per day, driving up to six hours per day, squatting up to two hours per day, and no lifting from waist to shoulder greater than 10 pounds using the left shoulder.

On January 24, 2019 the employing establishment requested that OWCP review appellant's modified job offer which was created based on Dr. Hamid's February 20, 2018 permanent restrictions. It indicated that appellant requested that OWCP review the job offer to determine if the employment duties aligned with the medical evidence, and noted that he had not submitted new medical documentation.

On January 29, 2019 appellant refused the limited-duty position of a rural carrier associate. He explained that he was seeking reasonable accommodation and the offer failed to meet those requirements. Appellant also indicated that management had refused to engage in dialogue with him.

In a letter dated January 29, 2019, appellant reported that his supervisor repeatedly refused to discuss his concerns related to his most recent job offer.

On February 4, 2019 the employing establishment informed OWCP that appellant had requested reasonable accommodation and additional time to have his physician review the modified duties provided. It requested that OWCP review appellant's modified job offer which it asserted that it had created in strict adherence to Dr. Hamid's February 20, 2018 medical report.

In a letter dated February 14, 2019, OWCP advised appellant that it had confirmed with the employing establishment that the offered position remained available. It explained that the modified rural carrier associate position was suitable and in accordance with the medical restrictions set forth in Dr. Hamid's February 20, 2018 report. OWCP noted that there was no medical evidence of record to support appellant's contention that his condition had changed. It indicated that the case would be held open for 30 days for evaluation of the evidence. OWCP further advised appellant that, if he failed to accept the position or provide adequate reasons for refusing the job offer, his right to compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2).

In a March 20, 2019 letter, OWCP advised appellant that he failed to provide a reason for refusing to accept the offered position. It noted that the employing establishment confirmed that the job remained available to him. OWCP provided appellant an additional 15 days to accept and report to the position, and advised that, if he did not report to the job within 15 days of the date of the letter, his wage-loss compensation benefits and entitlement to a schedule award would be terminated.

On March 27, 2019 appellant informed OWCP, in writing, that he was rejecting the job offer because it failed to accommodate his prior, relevant work restrictions. He further asserted that the job offer did not conform to his updated permanent restrictions provided by his attending physician. In support of his claim, appellant submitted a March 19, 2019 narrative report, treatment note, and work restrictions from Dr. Hamid. In the narrative report Dr. Hamid summarized appellant's history of injury and subsequent surgeries for both shoulders. He noted

that appellant previously had undergone a functional capacity evaluation which outlined specific work restrictions, including a permanent lifting restriction which he had noted in prior reports. Dr. Hamid further reported that appellant could not perform any prolonged reaching or lifting with the left arm out of the window or above his head as this exacerbated his chronic left shoulder condition related to his previous work-related injury. He indicated that appellant was capable of using the right arm for full activities at the workplace. Dr. Hamid referenced an accompanying work note which outlined these restrictions and reported that no further surgery or treatment was recommended at this time.

In a separate March 19, 2019 medical report, Dr. Hamid evaluated appellant's shoulder condition and provided new work restrictions, noting that appellant could not do any prolonged reaching or lifting with the left arm.

In a March 19, 2019 work status note, Dr. Hamid provided work restrictions of no prolonged or overhead reaching with the left arm. He also referred to all prior lifting restrictions which were permanent.

By decision dated April 9, 2019, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement, effective April 10, 2019, pursuant to 5 U.S.C. § 8106(c)(2), as he had refused an offer of suitable work. It found that the offered position was within the restrictions set forth by Dr. Hamid's February 20, 2018 report. OWCP further found that, even with the additional reaching restrictions mentioned in his March 19, 2019 letter, the job offer was still suitable as it only required reaching up to two hours daily.

On April 16, 2019 appellant requested reconsideration. In an accompanying letter, he asserted that OWCP improperly terminated his wage-loss compensation benefits effective April 10, 2019. Appellant argued that OWCP had not met its burden of proof to terminate his benefits because it failed to establish that the job offer provided was suitable based on his permanent medical restrictions.

In support of his claim, appellant submitted a May 7, 2019 medical report from Dr. Hamid who referred appellant for a new functional capacity evaluation of the left shoulder to determine more specific work restrictions pertaining to his claim.

On June 11, 2019 appellant underwent a functional capacity evaluation. A copy of the report outlining his abilities and restrictions was submitted.

By decision dated July 15, 2019, OWCP denied modification of the April 9, 2019 decision.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ It has authority under 5 U.S.C. § 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was

³ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

suitable, that appellant was informed of the consequences of his refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁴ In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.⁵ 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.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 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.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 After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.¹⁰

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 10, 2019, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).¹¹

In its April 9, 2019 termination decision, OWCP determined that the January 19, 2019 job offer extended to appellant was suitable based on the work restrictions provided by Dr. Hamid in his February 20, 2018 report. The Board finds that OWCP improperly relied on Dr. Hamid's

⁴ 5 U.S.C. § 8106(c)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (the claims examiner (CE) must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2), and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the CE must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid); *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also* *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

⁵ 20 C.F.R. § 10.500(b).

⁶ *Supra* note 4 at Chapter 2.814.5a (June 2013).

⁷ *Joan F. Burke*, 54 ECAB 406 (2003); *see* *Robert Dickerson*, 46 ECAB 1002 (1995).

⁸ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, *supra* note 4.

⁹ *Id.* at § 10.516.

¹⁰ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also* *George Servetas*, 43 ECAB 424 (1992).

¹¹ *C.E.*, Docket No. 19-0614 (issued November 1, 2019).

February 20, 2018 report in determining that the modified position offered by the employing establishment constituted suitable employment.¹²

On February 14, 2019 OWCP notified appellant that the modified rural carrier associate position was suitable work and advised him that he had 30 days to accept the position or provide a written explanation for his refusal. In response, it received Dr. Hamid's March 19, 2019 narrative report, medical evaluation, and work restrictions pertaining to appellant's left shoulder condition. Dr. Hamid referred to appellant's prior lifting restrictions which were permanent and remained in place. He further provided additional restrictions indicating that appellant could not do any prolonged reaching or lifting with the left arm out of the window or above his head as this exacerbates his work-related chronic left shoulder condition. The Board notes that the position offered by the employing establishment included up to two hours of reaching, among the other employment duties with potentially similar movements, and makes it unclear if the duties provided are outside of appellant's medical restrictions.¹³ The Board has held that, when additional medical evidence is submitted after the job offer is made, OWCP must consider the evidence in determining medical suitability.¹⁴ The Board has also 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.¹⁵ The evidence of record indicates that the employing establishment failed to clarify whether the modified job offer complied with the additional restrictions noted in Dr. Hamid's March 19, 2019 report.¹⁶ The issue of whether a claimant is able to perform the duties of the offered employment position is a medical one and must be resolved by probative medical evidence.¹⁷ OWCP did not secure a medical report from Dr. Hamid that reviewed the job offer and provided a reasoned opinion as to its suitability for appellant, considering all existing and relevant conditions.¹⁸ The medical evidence of record, therefore, fails to establish that the offered position was suitable.¹⁹

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

¹² *R.A.*, *supra* note 4.

¹³ *M.E.*, Docket No. 18-0808 (issued December 7, 2018).

¹⁴ *See E.G.*, Docket No. 18-0710 (issued February 12, 2019).

¹⁵ *P.P.*, Docket No. 18-1232 (issued April 8, 2019).

¹⁶ *C.M.*, Docket No. 19-0614 (issued November 1, 2019).

¹⁷ *F.B.*, Docket No. 17-0216 (issued February 13, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁸ OWCP's procedure manual provides that, "If the reemployment effort was based upon the attending physician's work restrictions and the physician has now changed his/her opinion, the CE can develop the issue further with the attending physician by providing a copy of the job offer and seeking an opinion regarding the claimant's ability to perform the job." *See supra* note 4 at Chapter 2.814.5(a)(4) (June 2013). *See also S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

¹⁹ *See P.S.*, Docket No. 18-0396 (issued August 17, 2018).

the offered position.²⁰ As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.²¹ Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his established limitations and capabilities. Consequently, OWCP has not met its burden of proof to justify the termination of his entitlement to wage-loss compensation and entitlement to a schedule award.²²

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 10, 2019, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 15 and April 9, 2019 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 29, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

²⁰ *K.Y.*, Docket No. 19-1079 (issued November 14, 2019).

²¹ *Id.*

²² For a full and fair adjudication, on return of the claim file OWCP shall administratively combine File No. xxxxxx398 with the current claim file. *See supra* 4 at Chapter 2.400.8(c)(1) (February 2000); *see also D.W.*, Docket No. 19-1584 (issued July 9, 2020).