

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

_____)	
T.H., Appellant)	
)	
and)	Docket No. 22-0524
)	Issued: December 27, 2022
U.S. POSTAL SERVICE, POST OFFICE, Greensboro, NC, Employer)	
_____)	

Appearances:
*Erik Blowers, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 24, 2022 appellant, through counsel, filed a timely appeal from a February 22, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.³

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.*

³ The Board notes that, following the issuance of the February 22, 2022 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective August 27, 2021, pursuant to 20 C.F.R. § 10.500(a).

FACTUAL HISTORY

On June 26, 2020 appellant, then a 60-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 22, 2020 "something tore" in her left shoulder when she placed parcels on a porch while in the performance of duty. She stopped work on June 23, 2020.

By decision dated August 3, 2020, OWCP denied appellant's claim, finding that the June 22, 2020 incident did not occur, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 19, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 5, 2020.

By decision dated January 7, 2021, OWCP's hearing representative vacated the August 3, 2020 decision. She found that the June 22, 2020 employment incident occurred as alleged, but remanded the case for further development of the claim as to whether a diagnosed condition was causally related to the accepted employment incident.

On January 4, 2021 appellant underwent left shoulder revision arthroscopic subacromial decompression, distal clavicle excision, and biceps tenodesis. The procedure was performed by Dr. Dax Varkey, a Board-certified orthopedic surgeon.

On February 2, 2021 Dr. Varkey completed a duty status report (Form CA-17) wherein he opined appellant could return to light duty with continuous and intermittent lifting limited to five pounds, no pushing or pulling, and no reaching above the shoulder.

On February 10, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Chason S. Hayes, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine if appellant had any diagnosed conditions causally related to the June 22, 2020 employment incident, whether her work-related conditions had resolved, and whether appellant had any work restrictions. The February 2, 2021 SOAF listed appellant's employment duties, her history of injury, preexisting concurrent conditions of left shoulder surgery in March 2019, and that a left shoulder condition had been denied under OWCP File No. xxxxxx959.

In a report dated March 12, 2021, Dr. Hayes noted appellant's medical history. On examination he observed tenderness with left shoulder range of motion (ROM), no crepitus, negative Hawkins' test, negative drop arm test, negative impingement test, intact sensation to light touch, and normal muscle strength. Dr. Hayes noted that appellant's work-related condition had not resolved and work restrictions were necessary until she recovered from her surgery. He opined that that she could perform light-duty work with restrictions of no overhead reaching. Dr. Hayes explained that he based his opinion on a clinical assessment, examination findings, and review of documents. However, he advised that his opinion did not "constitute *per se* (sic) a recommendation

for specific claims or administration functions/decisions to be made or enforced.” In an attached work capacity evaluation form (Form OWCP-5c) dated March 12, 2021, Dr. Hayes recommended no reaching above her shoulder for six weeks. He checked a box indicating that she was capable of performing sedentary, light and medium strength work.⁴

By decision dated April 6, 2021, OWCP accepted the claim for left shoulder rotator tear and bicipital tendinitis. It paid appellant on the supplemental rolls commencing June 23, 2020 and on the periodic rolls commencing March 28, 2021.

On May 7, 2021 OWCP offered appellant a modified assignment as a rural carrier working 40 hours per week and yearly salary of \$69,554.00. The duties of the job position required up to 2.10 hours per day casing mail (sorting mail in route order) and up to 5.90 hours per day mail delivery (curbside delivery only) with delivery of only the mounted route portion to prevent overhead lifting. The physical requirements of the position required up to 8.00 hours of intermittent lifting, standing, and walking, up to 5.90 hours of driving a postal vehicle, up to 8.00 hours of intermittent reaching, and up to 8.00 hours of fine manipulation/simple grasping. The employing establishment advised that the position was medium strength level and that mail for the top row of the case would be set aside so appellant would not violate her work restriction of no overhead reaching. It indicated that assistance would be provided until a platform had been built and installed. Appellant refused the offered position on May 13, 2021, noting that she was restricted to light duty and weight limit of 10 pounds.

A Form CA-17 dated June 1, 2021 indicated that appellant was capable of working light duty with restrictions.⁵ Restrictions included intermittent lifting up to 10 pounds, rarely lifting parcels up to 70 pounds, no kneeling, no fine manipulation, up to .75 hours of reaching above the shoulder.

In a progress note dated June 1, 2021, Dr. Varkey reported that appellant was status post left shoulder revision arthroscopic surgery. He noted that she was progressing but that her left shoulder was still painful most of the time. On examination Dr. Varkey reported intact distal motor and sensory function, no pain with cuff strength testing 5/5 cuff strength, 150 degrees active forward flexion, and 45 degrees external rotation. He advised that appellant would continue with light-duty work and would likely be released to full duty at the end of a work-conditioning program in two months.

On June 14, 2021 OWCP issued a notice of proposed termination. It informed appellant that it found the May 7, 2021 job offer suitable and in accordance with the work restrictions provided by Dr. Hayes. OWCP noted that the employing establishment confirmed that the position remained open and available to her. It advised appellant that an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for total wage loss. OWCP noted that the offered pay rate of \$1,337.58 per week for working 40 hours week was greater than her date-of-injury pay rate and, therefore, she would not be entitled to ongoing wage-loss

⁴ Pursuant to the Department of Labor’s *Dictionary of Occupational Titles*, the physical demands of the medium strength category include strength levels of less than 50 pounds, and no squatting, climbing or kneeling. See *J.W.*, Docket No. 06-1874 (issued March 22, 2007).

⁵ The signature on the form is illegible, but it appears to be signed by a certified physician assistant.

compensation. It afforded her 30 days to accept the assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

In a Form OWCP-5c dated July 12, 2021, Dr. Varkey noted that appellant was still recovering from her surgery. He advised that she was capable of working with restrictions of up to two hours of reaching, no reaching above the shoulder, lifting less than five pounds using the left arm, and up to 10 pounds of pushing, pulling, and lifting using the right arm.

On August 3, 2021 Dr. Varkey noted that appellant has been under his care for a work-related left shoulder injury and she continued to have left shoulder pain. He reported that he disagreed with Dr. Hayes that appellant was able to work, but not raise her arm overhead safely. Dr. Varkey recommended a functional capacity evaluation (FCE) to determine her work capacity.

An August 11, 2021 FCE found appellant was capable of performing light physical demand work requiring floor to waist lifting up to 19 pounds, waist to shoulder lifting up to 17 pounds, shoulder to overhead lifting up to 12 pounds, and two hand carrying up to 15 pounds. It noted that she could perform certain activities on a frequent, but not constant basis, including reaching to the front from either side, and reaching overhead from the right.

Dr. Varkey, in an August 20, 2021 progress note, reviewed the August 11, 2021 FCE and recommended following the work restrictions noted in the FCE.

By decision dated August 27, 2021, OWCP terminated appellant's wage-loss compensation, effective that date, pursuant to 20 C.F.R. § 10.500(a).

On August 31, 2021 appellant requested reconsideration.

OWCP received progress notes from Dr. Varkey reporting continued left shoulder pain due to her work injury. Dr. Varkey opined that appellant was not capable of lifting overhead safely and without risk of damaging her shoulder. Also submitted were a series of physical therapy reports.

By decision dated November 29, 2021, OWCP denied modification.

In a November 30, 2021 request for reconsideration, counsel asserted that OWCP wrongly terminated appellant's compensation as the SOAF provided Dr. Hayes was incomplete. In addition, he argued that the report by Dr. Hayes was equivocal and that OWCP failed to consider all the evidence of record. Specifically, counsel noted that Dr. Hayes advised that his opinion did not "constitute *per se* a recommendation for specific claims or administration functions or decisions to be made or enforced."

By decision dated February 22, 2022, OWCP denied modification.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁶

OWCP regulations at 20 C.F.R. § 10.500(a) provides in relevant part:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee’s work restrictions.”⁷

When it is determined that an employee is no longer totally disabled from work and is on the periodic rolls, OWCP’s procedures provide that the claims examiner should evaluate whether the evidence of record establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.⁸ When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.⁹

OWCP’s procedures further advise: “If there still would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based upon the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment).”¹⁰

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall

⁶ *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ 20 C.F.R. § 10.500(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1) (June 2013).

⁹ *Id.*

¹⁰ *Id.* at Chapter 2.814.9(c)(8).

make an examination.¹¹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist 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.¹³

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 27, 2021, pursuant to 20 C.F.R. § 10.500(a).

OWCP accepted that appellant sustained left shoulder rotator tear and bicipital tendinitis as a result of the June 22, 2020 employment injury based on the opinion of Dr. Hayes, the second opinion physician.

In his March 16, 2021 report, Dr. Hayes noted appellant's history of injury and medical treatment. He opined that she was not capable of performing her regular work duties until she had recovered from her shoulder surgery. However, Dr. Hayes opined that appellant was capable of working with restrictions of no reaching above the shoulder for six weeks in a sedentary/light/medium level job.

Based upon Dr. Hayes restrictions, the employing establishment's May 7, 2021 job offer noted that the rural carrier position involved job duties such as sorting mail, curbside mail delivery with only delivery of mounted route portion to prevent overhead lifting. The physical requirements of the position involved up to 8.00 hours of intermittent lifting, standing, and walking, up to 5.90 hours of driving a postal vehicle, up to 8.00 hours of intermittent reaching, and up to 8.00 hours of fine manipulation/simple grasping. The position was noted to be at the medium strength level (up to 50 pounds). It advised that mail for the top row would be set aside until a platform was built and installed so that appellant did not violate her overhead lifting restriction.

OWCP had, however, also received reports from appellant's treating surgeon, Dr. Varkey, who noted her progress following her January 4, 2021 left shoulder surgery. On February 2, 2021 Dr. Varkey completed a Form CA-17 wherein he noted that appellant could return to light duty with continuous and intermittent lifting limited to five pounds, no pushing or pulling, and no reaching above the shoulder. In a Form OWCP-5c dated July 12, 2021, he noted that appellant was still recovering from her surgery. Dr. Varkey advised that appellant was capable of working with restrictions of up to two hours of reaching, no reaching above the shoulder, lifting less than five pounds using the left arm, and up to 10 pounds of pushing, pulling, and lifting using the right arm.

¹¹ 5 U.S.C. § 8123(a); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹² 20 C.F.R. § 10.321.

¹³ *M.W.*, *supra* note 11; *C.T.*, *supra* note 11; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

On August 3, 2021 Dr. Varkey noted that he disagreed with Dr. Hayes assessments regarding appellant's work restrictions. He recommended an FCE to determine her work capacity.

An August 11, 2021 FCE found appellant was capable of performing light physical demand work requiring floor to waist lifting up to 19 pounds, waist to shoulder lifting up to 17 pounds, shoulder to overhead lifting up to 12 pounds, and two hand carrying up to 15 pounds. It noted that she could perform certain activities on a frequent, but not constant basis, including reaching to the front from either side, and reaching overhead from the right. Dr. Varkey, in an August 20, 2021 progress note, reviewed the August 11, 2021 FCE and recommended following the work restrictions noted in the FCE.

As of August 27, 2021, the date OWCP terminated appellant's compensation benefits for refusal to accept the temporary light-duty position, a conflict existed in the medical opinion between Dr. Hayes, OWCP's second opinion physician, and Dr. Varkey, appellant's treating physician, regarding appellant's ability to perform the duties of the offered position. Pursuant to 5 U.S.C. § 8123(a) and 20 C.F.R. § 10.321, OWCP should have referred appellant for an impartial medical evaluation prior to terminating his compensation benefits.¹⁴ The Board therefore finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 27, 2021, pursuant to 20 C.F.R. § 10.500(a).

¹⁴ *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 27, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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