

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

S.S., Appellant)	
)	
and)	Docket No. 20-0123
)	Issued: July 28, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Warrendale, PA, Employer)	
)	

Appearances:

Neal A. Sanders, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 21, 2019 appellant, through counsel, filed a timely appeal from a September 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, appellant asserted that oral argument should be granted so that she can illustrate error that she claimed existed in OWCP's September 12, 2019 hearing decision. The Board, in exercising its discretion, denies her request for oral argument because the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective January 29, 2019, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On October 10, 2006 appellant, then a 37-year-old mailhandler, filed a traumatic injury claim (Form CA-1) alleging that on that date she was helping a coworker push a wire cage onto a truck when the dock plate raised into a "v" shape and she fell landing on her left leg while in the performance of duty. She filed a second Form CA-1 on November 3, 2006 and alleged that on October 10, 2006 she also injured her left arm when she fell. On February 28, 2007 appellant underwent arthroscopic left shoulder surgery due to left shoulder rotator cuff tendinitis, resulting in subacromial decompression, debridement of the labrum, arthroscopic distal clavicle excision, and suprascapular nerve block. She returned to part-time limited-duty work on April 27, 2007. On August 7, 2007 OWCP accepted appellant's claim for sprain of the left shoulder and upper arm, supraspinatus; and aggravation of localized osteoarthritis, left shoulder region. It paid appellant wage-loss compensation. She returned to full-duty work on November 18, 2007.

On June 27, 2018 OWCP found a conflict of medical opinion evidence between Dr. Irina Vinarski, a Board-certified internist, and Dr. Michael Seel, a Board-certified orthopedic surgeon, regarding the extent of appellant's disability from work and medical residuals. It referred appellant, a statement of accepted facts, and a list of questions to Dr. Jon Levy, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 16, 2018 report, Dr. Vinarski noted appellant's history of injury and medical history. She again found that appellant's left arm condition had not improved and determined that appellant had developed bone spurs as a consequence of overuse of her right arm. Dr. Vinarski noted that appellant had difficulty sleeping and awoke due to pain. She found that appellant was totally disabled from work.

On August 19, 2018 Dr. Levy noted appellant's history of injury and medical history. He performed a physical examination and noted that she had restricted range of motion of her left shoulder with tenderness over the left anterolateral acromion as well as the left acromioclavicular (AC) joint. Dr. Levy noted that appellant had positive Neer's and Hawkins signs on the left. He diagnosed chronic left shoulder pain and left shoulder strain. Dr. Levy found that she could return

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the September 12, 2019 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.*

to modified-duty work within the restrictions he provided and attributed her work restrictions to her accepted employment injury. He opined that appellant had ongoing residual difficulties referable to her October 10, 2006 employment injury as she had remained clinically symptomatic from the time of injury and failed to demonstrate full functional abilities. Dr. Levy completed a work capacity evaluation (Form OWCP-5c) and found that appellant could work eight hours a day in a light strength capacity with restrictions of reach with the left arm from one to two hours and no reaching above the shoulder with the left arm. He also found that she could use her left arm to push, pull, and lift between 5 to 10 pounds.

In reports dated August 28 through November 13, 2018, Dr. Vinarski found that appellant was totally disabled due to her accepted left shoulder injury. In a November 16, 2018 narrative report, she noted that she had not experienced any improvement of her left arm. Dr. Vinarski opined that appellant's right arm was her only functioning limb and was overused because of her need for a cane. She disagreed that she could use her right arm continually for an eight-hour shift. Dr. Vinarski also found that the medications prescribed to treat appellant's anxiety, depression, and pain affected her ability to concentrate and stay focused. She found that appellant was totally disabled from work.

On November 13, 2018 appellant refused a November 6, 2018 offer by the employing establishment of a modified-duty position as a mailhandler working eight hours a day reaching with the left arm between one and two hours and pushing, pulling, and lifting with the left arms no more than 10 pounds. The offered job duties required scanning, facing flats, and placard verification.

On December 3, 2018 OWCP informed appellant that the offered position was suitable work. It found that the weight of the medical evidence rested with Dr. Levy. OWCP noted that the offered position was still available and afforded her 30 days to accept the position or offer her written reasons for refusal. It also informed appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2).

In a December 14, 2018 report, Dr. Vinarski opined that appellant was totally disabled from work. She found that she could not perform the offered modified duties with her right arm as normal daily use of her right arm caused it to become numb. Dr. Vinarski also noted that appellant was not cleared to drive a vehicle, had limited mobility, instability and was walking with a cane for balance assistance. She reviewed Dr. Levy's report and noted that appellant had positive Neer's and Hawkins tests. Dr. Vinarski suggested that these positive tests could reveal part of the underlying issue of damage to the tendon and supraspinatus muscle.

In a letter dated January 7, 2019, OWCP reviewed Dr. Vinarski's December 14, 2018 report and found that she did not provide valid reasoning for appellant to refuse the offered position. It noted that the offered position was still available and afforded her an additional 15 days to accept and report to the position. OWCP informed appellant that, if she did not accept and report to the position within the allotted period, her entitlement to wage-loss compensation and schedule award benefits would be terminated.

On January 15, 2019 Dr. Vinarski again opined that appellant was totally disabled from work and noted that she had not been released to return to the offered position.

In a letter dated January 23, 2019, the employing establishment informed OWCP that appellant had not reported for duty.

By decision dated January 29, 2019, OWCP terminated appellant's entitlement to wage-loss compensation and a schedule award, effective that date, as she had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that Dr. Levy's report was entitled to the special weight of the medical evidence as it was based on a thorough examination, review of the medical documentation, and well rationalized.

On February 6, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 28, 2019.

By decision dated September 12, 2019, OWCP's hearing representative affirmed the January 29, 2019 termination decision, finding that Dr. Levy's report as the impartial medical examiner (IME), was entitled to the special weight of the medical evidence.

LEGAL PRECEDENT

Section 8106(c)(2) 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."⁵ It is OWCP's burden to terminate compensation under section 8106(c)(2) for refusing to accept suitable work or neglecting to perform suitable work.⁶ To justify such a termination, OWCP must show that the work offered was suitable.⁷

With respect to the procedural requirements of termination under section 8106(c)(2), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow him or her an opportunity to provide reasons for refusing the offered position.⁸ If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford him or her a final opportunity to accept the position.⁹

Section 10.516 of FECA's implementing regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability.¹⁰ If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding

⁵ 5 U.S.C. § 8106(c)(2); *S.B.*, Docket No. 17-1797 (issued April 11, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

⁶ *S.B., id.*; *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁷ *S.B., id.*; *John E. Lemker*, 45 ECAB 258 (1993).

⁸ *S.B., id.*; *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.516; *S.B., id.*; *C.C.*, Docket No. 15-1778 (issued August 16, 2016).

that the employee's reasons are not acceptable.¹¹ After providing the 30- and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.¹²

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.¹³ All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁴

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits.

In an August 19, 2018 IME report, Dr. Levy noted appellant's history of injury and medical history. He performed a physical examination and noted that she had restricted range of motion of her left shoulder with tenderness over the left anterolateral acromion as well as the left AC joint. Dr. Levy noted that appellant had positive Neer's and Hawkins signs on the left. He diagnosed chronic left shoulder pain and left shoulder strain. Dr. Levy found that she could return to modified-duty work within the restrictions he provided and attributed her work restrictions to her accepted employment injury. He opined that appellant had ongoing residual difficulties referable to her October 10, 2006 employment injury as she had remained clinically symptomatic from the time of injury and failed to demonstrate full functional abilities. In an accompanying Form OWCP-5c, Dr. Levy found that appellant could work eight hours a day in a light strength capacity with restrictions of reach with the left arm from one to two hours and no reaching above the shoulder with the left arm. He also found that she could use her left arm to push, pull, and lift between 5 to 10 pounds. The employing establishment offered appellant a modified mailhandler position consistent with Dr. Levy's August 19, 2018 IME report. However, the Board notes that Dr. Levy provided restrictions only with regard to appellant's left arm/shoulder. He failed to consider whether restrictions were necessary for her additional diagnosed conditions of right shoulder bone spurs, chronic pain syndrome, anxiety, depression and difficulties with balance, memory, and concentration due to her prescribed medications.

As previously noted, the Board has held that all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁵ The Board finds that

¹¹ *Id.*

¹² *Id.* at § 10.517.

¹³ *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

¹⁴ *M.E.*, Docket No. 18-0808 (issued December 7, 2018); *Mary E. Woodward*, 57 ECAB 211 (2005).

¹⁵ *Id.*; *S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

OWCP failed to consider whether appellant's additional diagnosed conditions affected her ability to perform the duties of the modified mailhandler position.

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.¹⁶ As a penalty provision, section 8106(c)(2) must be narrowly construed.¹⁷ OWCP did not secure a medical report that reviewed the job offer and provided a reasoned opinion as to its suitability, considering all existing and relevant conditions. The Board thus finds that it has not met its burden of proof and erroneously terminated her compensation entitlement under 5 U.S.C. § 8106(c)(2).¹⁸

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective January 29, 2019, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

¹⁶ *S.Y., id.*; *Annette Quimby*, 49 ECAB 304 (1998).

¹⁷ *S.Y., id.*; *Stephen A. Pasquale*, 57 ECAB 396 (2006).

¹⁸ *See D.C.*, Docket No. 12-0459 (issued August 10, 2012).

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 28, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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