

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

E.W., Appellant

and

U.S. POSTAL SERVICE, INDIAN TRAIL POST
OFFICE, Indian Trail, NC, Employer

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 21-0333
Issued: July 18, 2022**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 7, 2021 appellant filed a timely appeal from a December 1, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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 1, 2020, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

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 while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for complete left rotator cuff rupture and sprain of the left shoulder and upper arm. It paid appellant wage-loss compensation on the supplemental rolls commencing December 31, 2011. On March 8, 2012 Dr. Nady Hamid, a Board-certified orthopedic surgeon, performed an OWCP-approved arthroscopic repair of appellant's rotator cuff, subacromial decompression of the left shoulder, and a bicep tenotomy. OWCP paid appellant wage-loss compensation on the periodic rolls commencing April 8, 2012.

Appellant returned to modified-duty work on July 24, 2014. On June 11, 2015 Dr. Hamid performed an OWCP-approved left shoulder arthroscopic revision rotator cuff repair and left shoulder arthroscopic revision subacromial decompression. Appellant stopped work again following the surgery and OWCP again paid him wage-loss compensation on the periodic rolls.

In a February 20, 2018 medical report, 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 and could return to work subject to 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 OWCP referred appellant for vocational rehabilitation services.

On January 24, 2019 the employing establishment offered appellant a limited-duty position as a modified rural carrier associate.³

² Docket No. 19-1711 (issued July 29, 2020).

³ 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 29, 2019 appellant refused the limited-duty position of a rural carrier associate. He asserted that he was seeking a reasonable accommodation and the job offer failed to meet his medical requirements.

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 indicated that the case would be held open for 30 days for evaluation of the evidence. It 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). No response was received.

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 and entitlement to a schedule award would be terminated.

On March 27, 2019 appellant responded that he was rejecting the job offer because it failed to accommodate his prior, relevant work restrictions and did not conform to his updated permanent restrictions provided by his attending physician. In support thereof, he submitted several reports from Dr. Hamid dated March 19, 2019 who noted that appellant could not perform any prolonged reaching or lifting with the left arm out of the window or above his head, but he was capable of using the right arm for full activities at the workplace.

By decision dated April 9, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, 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 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.

On June 11, 2019 appellant underwent a functional capacity evaluation.

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

On August 12, 2019 appellant appealed to the Board. By decision dated July 29, 2020, the Board reversed OWCP's April 9 and July 15, 2019 decisions, finding that OWCP failed to meet

its burden of proof to terminate his 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).⁴

On September 1, 2020 OWCP reinstated appellant's compensation on the periodic rolls, pursuant to the Board's decision dated July 29, 2020.

In a work status note dated September 9, 2020, Dr. Hamid noted that appellant could return to work with the following restrictions: no lifting, pushing, or pulling greater than 50 pounds. Similarly, in an undated work capacity evaluation (Form OWCP-5c), he noted that appellant could return to work eight hours a day with permanent physical restrictions of no pushing, pulling, or lifting over 50 pounds. Dr. Hamid further noted that appellant could perform sedentary, light, and medium-duty work.

On September 18, 2020 the employing establishment offered appellant a limited-duty position as a modified rural carrier associate. Duties of the assignment included casing mail for up to two and one half hours a day, delivering express mail up to three hours a day, and Sunday Amazon and priority delivery up to five and one half hours a day. The employing establishment would also assign a hand truck for assistance. Physical requirements included lifting/pushing/pulling greater than 50 pounds intermittently up to five and one half hours a day, sitting/standing/walking intermittently up to five and one half hours a day, simple grasping/fine manipulation up to five and one half hours a day, and driving up to five and one half hours a day.

On September 28, 2020 appellant refused the job offer. He explained that he was seeking reasonable accommodation and the offer failed to meet those requirements or medical restrictions.

In a letter dated October 5, 2020, OWCP advised appellant that the offered position of modified rural carrier associate was found to be suitable to his capability and was currently 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 September 9, 2020 narrative report. Appellant was provided 30 days to accept the position or provide written reasons for his refusal. OWCP informed him that if he failed to accept the offered position and failed to demonstrate that the refusal of the offer of suitable work was justified, his right to compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2).

OWCP subsequently received additional evidence. In a report dated September 9, 2020, Dr. Hamid treated appellant for left shoulder pain status-post two arthroscopic surgeries. He noted x-rays performed demonstrated evidence of previous surgery in the left shoulder and early signs of cuff tear arthropathy. Dr. Hamid diagnosed left shoulder chronic rotator cuff disease status-post two previous repairs. He advised that appellant's previous restrictions remained unchanged.

Appellant submitted an October 3, 2020 letter to A.B., injury compensation specialist, and rejected the job offer of October 5, 2020 because it did not offer reasonable accommodations.

In a November 10, 2020 letter, OWCP advised appellant that the offered position remained suitable and available to him, and that his reasons for refusing to accept the position were not valid.

⁴ *Supra* note 2.

It afforded him 15 additional days to accept and report to the position or his wage-loss compensation and entitlement to a schedule award would be terminated.

OWCP received a work status report from Dr. Hamid and an undated Form OWCP-5c, previously of record.

By decision dated December 1, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective December 1, 2020, pursuant to 5 U.S.C. § 8106(c)(2). It found that the offered position was within the restrictions set forth by Dr. Hamid's September 9, 2020 report.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ 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 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ Pursuant to section

⁵ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁶ 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).

⁷ 20 C.F.R. § 10.500(b).

⁸ *Supra* note 6 at Chapter 2.814.5a (June 2013).

⁹ *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

¹⁰ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, *supra* note 6.

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.¹¹ After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.¹²

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 December 1, 2020, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).¹³

OWCP did not establish that appellant was capable of performing the modified rural carrier associate position offered by the employing establishment on September 18, 2020. The offered position required casing mail for up to two and one half hours a day, delivering express mail up to three hours a day and Sunday Amazon and priority delivery up to five and one half hours a day. The physical requirements of this modified assignment included lifting/pushing/pulling greater than 50 pounds intermittently up to five and one half hours a day, sitting/standing/walking intermittently up to five and one half hours a day, simple grasping/fine manipulation up to five and one half hours a day, and driving up to five and one half hours a day. The offer also indicated that the employing establishment would assign a hand truck for assistance. Since Dr. Hamid's September 9, 2020 restrictions reported no lifting greater than 50 pounds and no pushing or pulling greater than 50 pounds, OWCP has not established that appellant could perform the duties of the position, which on their face, appear to require lifting/pushing/pulling greater than 50 pounds intermittently up to five and one half hours a day. The Board finds that the physical requirements violate the restrictions provided by Dr. Hamid.

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)(2) of FECA must be narrowly construed.¹⁵ 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 failed to meet its burden of proof to terminate his wage-loss compensation and entitlement to a schedule award, effective December 1, 2020, for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

¹¹ *Id.* at § 10.516.

¹² *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

¹³ *C.E.*, Docket No. 19-0614 (issued November 1, 2019).

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

¹⁵ *Id.*

CONCLUSION

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 December 1, 2020, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 18, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board