

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

M.M., Appellant)	
)	
and)	Docket No. 24-0025
)	Issued: April 24, 2024
U.S. POSTAL SERVICE, MONONGAHELA)	
POST OFFICE, Monongahela, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Michael John Watson, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 11, 2023 appellant, through counsel, filed a timely appeal from an October 2, 2023 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 October 2, 2023 decision, appellant submitted additional evidence to OWCP. 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 June 29, 2023, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

FACTUAL HISTORY

On December 6, 2019 appellant, then a 40-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 5, 2019 she sustained multiple injuries from a motor vehicle accident (MVA) when her postal vehicle was struck by another vehicle while in the performance of duty. She stopped work on the date of injury. OWCP accepted appellant's claim for sprain of cervical spine ligaments, and subsequently expanded the acceptance of her claim to include concussion without loss of consciousness, strain of muscle, fascia and tendon of the right shoulder, and upper arm and rotator cuff tear or rupture of the right shoulder not specified as traumatic. It paid her wage-loss compensation on the supplemental rolls, effective January 20, 2020, and on the periodic rolls, effective April 26, 2020.

Appellant underwent surgery for right shoulder arthroscopy with extensive debridement of the joint on June 2, 2020, right glenohumeral joint arthroscopy and extensive debridement, right open biceps tenodesis, right arthroscopic rotator cuff repair, right arthroscopic subacromial decompression, right open distal clavicle excision and right distal clavicle joint stabilization with semitendinosis allograft on March 31, 2021 right decompression and neuroplasty of the medial cord of brachial plexus on April 21, 2021, and right ulnar nerve neurolysis of the wrist on August 4, 2021. The procedures were authorized by OWCP.

OWCP subsequently expanded the acceptance of appellant's claim to include, dislocation of the right acromioclavicular joint, lesion of the ulnar nerve of the right upper limb, and brachial plexus disorders.

On July 19, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Mitchell Antin, an osteopath and Board-certified orthopedic surgeon, for a second opinion evaluation.

OWCP's July 19, 2022 SOAF noted appellant's preexisting medical conditions of back pain, fibromyalgia, anxiety, migraines, lumbar surgery, and panic attacks. It also described the physical requirements of her date-of-injury job as a rural carrier, which required sorting mail into cases (shelves) while standing or sitting and picking up and delivering mail in motor vehicles. This included loading vehicles with mail, including parcels weighing up to 70 pounds, in sequence for the route, and delivering mail to roadside mailboxes by placing mail inside the mailboxes from the front right-hand window of the vehicle. Physical requirements of the position included regular standing, grasping, and fine manipulation; occasional bending, stooping, kneeling, climbing, pushing, pulling, reaching and stretching with arms and shoulders (sometimes above the head), and pivoting from the waist up; continuous lifting of 10 pounds; and occasional lifting up to 70 pounds.

In a report dated August 10, 2022, Dr. Antin evaluated appellant. He noted her history of injury and medical treatment, and provided physical examination findings. Dr. Antin discussed

appellant's diagnosis of right severe ulnar neuropathy with compression at the elbow, which would require future tendon and nerve reconstruction of the right hand. He also noted complaints of left shoulder and arm symptomology, presumably due to overuse, for which she received a left shoulder injection on July 28, 2022. Dr. Antin diagnosed right shoulder rotator cuff tear and brachial plexus disorder resulting in total disability. He opined that appellant's work-related conditions had not resolved and were permanent, noting clear objective evidence of ongoing progressive findings in the right upper extremity. Dr. Antin further reported that her prognosis remained fair and maximum medical improvement had not been reached as she required ongoing treatment, therapy, and surgery. He opined that appellant was not capable of returning to her date-of-injury position as a rural carrier due to chronic pain, restricted range of motion, weakness, nerve damage, and right upper extremity and hand atrophy. Dr. Antin explained that she was extremely limited in her ability to perform any work-related activities for any duration of time on a regular daily basis. He concluded that as appellant was severely restricted in her tolerances and ability to work in any capacity, work restrictions and limitations would be medically warranted.

In a work capacity evaluation (Form OWCP-5c) dated August 10, 2022, Dr. Antin determined that appellant was not capable of performing sedentary work. His form noted that she could work two to four hours per day and further reported restrictions of no reaching of the right arm, no reaching above the right shoulder, no operating a motor vehicle at work or to and from work, no repetitive movements of the right elbow and wrist, no climbing, and up to two hours per day of pushing, pulling, and lifting less than two pounds.

On September 20, 2022 OWCP referred appellant, along with an SOAF, a copy of the case record, and a series of questions, to Dr. Richard Kasdan, a Board-certified neurologist, for a second opinion evaluation regarding her residuals and ability to perform her date-of-injury job or a modified position.

On October 11, 2022 Dr. Kasdan evaluated appellant for the purpose of the second opinion evaluation. In his report, he documented her physical examination findings, discussed history of injury, and summarized various diagnostic studies. Dr. Kasdan reported that appellant sustained injuries as a result of a work-related MVA on December 5, 2019 resulting in a concussion, cervical strain, and injury to the right shoulder warranting four surgeries. His examination revealed a worsening right ulnar nerve injury resulting in no feeling in the fourth and fifth fingers of the palmar surface of the hand and the entire medial aspect of the forearm and upper right arm. Dr. Kasdan diagnosed compression of the right brachial plexus and compression of the entire ulnar pathway. He determined that mobility of the entire ulnar distribution of the right arm was abnormal with fingers curled and flexed, no feeling in the medial hand, forearm, and right upper extremity, and no biceps reflexes. Dr. Kasdan reported that appellant's right shoulder injury had not resolved, and her prognosis was poor. He opined that she was not capable of returning to her date-of-injury job as a rural carrier as outlined in the SOAF, and noted that her current physical capabilities were described in an attached Form OWCP-5c.

In a Form OWCP-5c dated October 11, 2022, Dr. Kasdan reported that appellant could work four hours per day and was capable of performing sedentary work, restricting her from using the right hand or arm in any capacity.

On February 23, 2023 the employing establishment offered appellant a part-time, temporary offer of a modified assignment titled "modified." It indicated that she would work a

part-time schedule, up to 20 hours per week. The duties of the position were identified as working on “C360 cases” for four hours per day, which required investigating customers complaints related to mail delivery. This required performing an initial contact with the customer, investigating the issue, adding case notes related to the case, resolving the issue if possible, and closing the case. The employment duties described calling or e-mailing the customer and required intermittent computer work, which could be completed with the left hand and a headset for the right hand. The physical requirements of the modified-duty position included sitting for four hours per day, intermittent simple grasping with the left hand only up to two hours per day, intermittent computer work with the left hand up to two hours per day, and use of a headset for up to four hours per day. The employing establishment indicated that it based the position on work restrictions provided by the August 10 and October 11, 2022 medical reports. The position description advised that the offer was temporary and instructed appellant to report for duty on March 9, 2023.

On March 6, 2023 the employing establishment notified OWCP that a temporary offer of modified assignment had been provided to appellant in compliance with her medically defined work restrictions. It reported that she had not responded to the attached job offer.

By notice dated May 23, 2023, OWCP advised appellant of its proposed termination of her wage-loss compensation, in accordance with 20 C.F.R. § 10.500(a), based on her refusal of the modified, temporary light-duty position. It advised that it had reviewed the work restrictions provided by Dr. Kasdan and Dr. Antin, the second opinion physicians, noting that Dr. Kasdan indicated that she could work four hours per day with permanent restrictions and Dr. Antin indicated that she could work two to four hours per day. OWCP further determined that the offered position was within appellant’s restrictions and remained available. It informed her of the provisions of 20 C.F.R. § 10.500(a), and that any claimant who declined a temporary, light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss. OWCP noted that the offered pay rate of \$591.79 for 20 hours per week would have met or exceeded the wages of the job appellant held when injured, and she would not be entitled to ongoing wage-loss compensation. It afforded her 30 days to accept the modified assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

In response to the notice of proposed termination, appellant submitted a May 5, 2023 chest computerized tomography scan, an April 17, 2023 electromyography and nerve conduction velocity study, and March 23, 2023 medical notes.

In an April 17, 2023 report, Dr. Glenn A. Buterbaugh, a Board-certified orthopedic surgeon, discussed findings related to appellant’s right shoulder bursitis and brachial plexitis. He also noted increasing pain in the left shoulder and recommended a left shoulder magnetic resonance imaging (MRI) scan for further evaluation.

In a May 23, 2023 narrative statement, appellant reported that she contacted the employing establishment and informed them of her concerns with the temporary light-duty assignment, which was outside of her work restrictions.

By decision dated June 29, 2023, OWCP terminated appellant’s wage-loss compensation, effective that date, because she failed to accept the temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It explained that, had she accepted the temporary light-duty assignment, she would have worked 20 hours per week, with wages of \$591.79 per week, and her

actual earnings would have met or exceeded the current wages of the job held when injured, thereby resulting in no wage loss. OWCP found that the assignment was appropriate and within the established sedentary work restrictions provided by Dr. Kasdan and Dr. Antin.

On September 4, 2023 appellant requested reconsideration.

In support of her claim, appellant submitted medical reports dated December 9, 2022, and March 23 and July 23, 2023 from a registered nurse practitioner.

On May 5, 2023 appellant underwent an MRI scan of the left shoulder, which revealed findings of a partial tear of the rotator cuff. In a July 31, 2023 report, Dr. Buterbaugh opined that her left shoulder rotator cuff condition was secondary to overuse due to the significant disability of her right arm.

By decision dated October 2, 2023, OWCP denied modification of its June 29, 2023 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁴

OWCP regulations at 20 C.F.R. § 10.500(a) provide, 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 work 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. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph).”⁵

When it is determined that an appellant 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 establishes that light-duty work was available within his or her restrictions. The

⁴ *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *see R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ 20 C.F.R. § 10.500(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1) (June 2013).

claims examiner should provide a pretermination or prereduction notice if the claimant is being removed from the periodic rolls.⁶ 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.⁷ 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 on the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light[-]duty assignment)."⁸

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 29, 2023, pursuant to 20 C.F.R. § 10.500(a).

OWCP terminated appellant's wage-loss compensation benefits, pursuant to 20 C.F.R. § 10.500(a), based on the opinions of Dr. Kasdan and Dr. Antin, the second opinion examiners.

In an August 10, 2022 medical report, Dr. Antin provided examination findings and opined that appellant's work-related right shoulder conditions had not resolved and were permanent. He further noted left shoulder complaints due to overuse to compensate for her right arm injury. Dr. Antin opined that appellant could not return to her date-of injury position and completed a Form OWCP-5c finding that she was not capable of sedentary work. The Board notes that his report did not provide support that she was capable of working in the modified-duty, sedentary position offered by the employing establishment on February 23, 2023.⁹

In his October 11, 2011 report, Dr. Kasdan advised that appellant was able to return to her date-of-job injury as a rural carrier. In his Form OWCP-5c, he reported that she was capable of working in a modified-duty sedentary position for four hours per day, noting her predominant restriction as no use of the right arm/hand. The modified position offered to appellant on February 23, 2023 required computer work, which entailed e-mailing customers and recording case notes from the findings of the investigations. As the duties of the temporary light-duty assignment exceeded appellant's work restrictions as specified by Dr. Kasdan, the Board finds that OWCP has failed to establish that she was capable of performing the February 23, 2023 job position.¹⁰ Therefore, OWCP has not met its burden of proof to terminate wage-loss compensation pursuant to section 10.500(a).¹¹

⁶ *Id.* at Chapter 2.814.9c(1)(b).

⁷ *Id.* at Chapter 2.814.9c(1)(d).

⁸ *Id.* at Chapter 2.814.9c(8).

⁹ *See C.G.*, Docket No. 21-0171 (issued November 29, 2021).

¹⁰ *See S.S.*, Docket No. 17-0557 (issued December 21, 2017).

¹¹ *See J.C.*, Docket No. 19-0751 (issued September 3, 2019).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective June 29, 2023, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 24, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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