

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

C.A., Appellant)

and)

U.S. POSTAL SERVICE, SAN BERNARDINO)
MAIN POST OFFICE, San Bernardino, CA,)
Employer)
-----)

**Docket No. 24-0442
Issued: June 4, 2024**

Appearances:
Appellant, pro se
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 March 22, 2024 appellant filed a timely appeal from an October 11, 2023 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.²

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 October 11, 2023 because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the October 11, 2023 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.*

FACTUAL HISTORY

On February 8, 2021 appellant, then a 57-year-old senior delivery performance specialist, filed a traumatic injury claim (Form CA-1) alleging that on July 24, 2019 she injured her right shoulder from wear and tear over 28 years of carrying and delivering mail and parcels. She stopped work on February 5, 2021. OWCP converted appellant's claim to an occupational disease claim and accepted it for right shoulder lesions and right shoulder complete rotator cuff tear or rupture. It paid her wage-loss compensation on the supplemental rolls commencing April 7, 2021.

In progress notes from December 1, 2022 through February 2, 2023, Dr. Ronny G. Ghazal, a Board-certified orthopedic surgeon, noted that appellant had tenderness in the paracervical muscles and foraminal compression tests produced shooting pain down the right arm. Regarding the right shoulder, he related that appellant had tenderness over the coracoacromial arch, positive Hawkins/Neer impingement signs, and weakness of the rotator cuff. Dr. Ghazal diagnosed cervical stenosis at C5-C6 with diffused degenerative disc disease, and rotator cuff tear of the right shoulder. He opined that appellant was totally disabled.

On February 6, 2023 OWCP referred appellant to Dr. Michael Einbund, a Board-certified orthopedic surgeon, for a second opinion examination to assess appellant's work capacity. It provided Dr. Einbund with a December 20, 2021 statement of accepted facts (SOAF), medical record, and series of questions. The SOAF noted that appellant stopped work on July 25, 2019 and has not returned to work.

In a report dated March 16, 2023, Dr. Einbund recounted appellant's medical course regarding her right shoulder and diagnosed complete right shoulder rotator cuff tear due to the accepted employment injury. He also noted Dr. Ghazal's findings regarding appellant's cervical condition, however, he related that appellant's cervical compression test and spurling tests were negative. Regarding appellant's right shoulder physical examination findings, Dr. Einbund related that appellant had diffuse tenderness over the rotator cuff, with significant loss of active motion, and obvious weakness throughout the right shoulder musculature. He found appellant was capable of working eight hours per day with restrictions, which included no reaching above her shoulder, up to two hours of reaching, and up to two hours of lifting, pushing, and pulling no more than 10 pounds. Dr. Einbund also completed an OWCP-5c form on March 28, 2023 wherein he reiterated the same restrictions.

On June 13, 2023 the employing establishment offered appellant a limited-duty job position as a modified city carrier. The offer indicated that appellant would "need to self-accommodate to work within her medical restrictions while performing modified job assignment duties" and that assistance would be provided for items weighing more than 10 pounds. The duties of the modified position were listed as up to eight hours on a delivery route. The physical requirements of the position were described as up to two hours of lifting, carrying, pushing, or pulling up to 10 pounds; up to eight hours of walking, standing, kneeling, bending, or stooping; up to eight hours of driving; and up to eight hours of simple grasping, reaching, fine manipulation.

On June 13, 2023 appellant refused the offered position.

On August 10, 2023 the employing establishment updated its modified city carrier job offer to appellant to reflect physical requirements of up to two hours of lifting, carrying, pushing, or pulling up to 10 pounds; up to eight hours of walking, standing, kneeling, bending, or stooping;

up to eight hours of driving; and up to eight hours of simple grasping or fine manipulation. Appellant again refused the job offer.

On August 18, 2023 the employing establishment confirmed that the offered position remained available.

By letter dated August 23, 2023, OWCP advised appellant that it had determined that the August 10, 2023 offered position was suitable and afforded her 30 days to accept the position or provide reasons for her refusal. It found that the position was in accordance with the limitations provided by Dr. Einbund in his March 16, 2023 report. OWCP informed appellant that an employee who refused an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation. It further notified her that she would receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

In a letter dated September 11, 2023, appellant asserted that she was unable to work as her right shoulder function had completely deteriorated. She related that she could not perform normal everyday activities including taking a shower, dressing, or combing her hair by herself.

On September 25, 2023 OWCP notified appellant that the job remained available to her and that she had 15 days to accept the offered modified position and report for work. It further notified her that if she either did not provide a valid reason for accepting the job offer, or failed to report for work, it would terminate her compensation benefits and entitlement to a schedule award, pursuant to 5 U.S.C. § 8106(c)(2).

In a letter dated October 8, 2023, appellant asserted that she had difficulty moving her arm and did not believe she could drive safely to work with her shoulder, neck, and back pain.

By decision dated October 11, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective that date, as she had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Under FECA,³ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁴ Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation.⁵

Section 10.517 of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has

³ *Supra* note 1.

⁴ *H.L.*, Docket No. 22-1114 (issued February 27, 2024); *M.S.*, Docket No. 20-0676 (issued May 6, 2021); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Supra* note 1 at § 8106(c)(2); *see also H.L., id.; M.S., id.; M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

the burden of proof to show that such refusal or failure to work was reasonable or justified.⁶ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁷

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.⁸ Section 8106(c)(2) 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 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner 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.¹¹

ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective October 11, 2023, pursuant to 5 U.S.C. § 8106(c)(2).

In progress notes from December 1, 2022 through February 2, 2023, appellant's treating physician, Dr. Ghazal noted appellant's physical examination findings regarding her cervical spine and right shoulder. He related that appellant had tenderness in the paracervical muscles and foraminal compression tests produced shooting pain down the right arm. Regarding the right shoulder, Dr. Ghazal related that appellant had tenderness over the coracoacromial arch, positive Hawkins/Neer impingement signs, and weakness of the rotator cuff. He diagnosed cervical stenosis at C5-C6 with diffused degenerative disc disease, and rotator cuff tear of the right shoulder and he concluded that appellant was totally disabled.

OWCP thereafter referred appellant for a second opinion evaluation with Dr. Einbund. In a report dated March 16, 2023, Dr. Einbund noted Dr. Ghazal's findings regarding appellant's

⁶ 20 C.F.R. § 10.517.

⁷ *Id.* at § 10.516; *see H.L., supra* note 4; *M.S., supra* note 4; *Ronald M. Jones*, 52 ECAB 406 (2003).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013). *See also C.G.*, Docket No. 23-0842 (issued October 31, 2023); *R.A.*, Docket No. 19-0065 (issued May 14, 2019).

⁹ *H.L., supra* note 4; *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *see also Joan F. Burke*, 54 ECAB 406 (2003).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *D.C.*, Docket No. 20-0897 (issued August 11, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

cervical condition, however, he related that appellant's cervical compression test and spurling tests were negative. Regarding appellant's right shoulder physical examination findings, he related that appellant had diffuse tenderness over the rotator cuff, with significant loss of active motion, and obvious weakness throughout the right shoulder musculature. Dr. Einbund concluded that appellant was capable of returning to work eight hours per day with restrictions, which included no reaching above her shoulder, up to two hours of reaching, and up to two hours of lifting, pushing, and pulling no more than 10 pounds.

In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.¹² As a penalty provision, the termination of compensation benefits is narrowly construed.¹³

The Board finds that Dr. Ghazal and Dr. Einbund provided conflicting physical examination findings regarding appellant's cervical condition and conflicting conclusions regarding appellant's ability to return to work. Appellant's treating physician and OWCP's second opinion physician disagreed regarding whether she had the physical capacity to perform the duties of the offered position. The Board finds that a conflict of medical opinion exists relative to this issue, pursuant to 5 U.S.C. § 8123(a). OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.¹⁴ As it failed to resolve the conflict in medical opinion evidence, it has not met its burden of proof to justify the termination of appellant's compensation benefits and entitlement to a schedule award for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).¹⁵

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 October 11, 2023, pursuant to 5 U.S.C. § 8106(c)(2).

¹² See *C.G.*, Docket No. 23-0842 (issued October 31, 2023); *J.M.*, Docket No. 23-0097 (issued June 21, 2023); *L.H.*, Docket No. 21-0244 (issued October 27, 2022); *B.H.*, Docket No. 20-0729 (issued March 19, 2021).

¹³ *C.G.*, *id.*; *R.M.*, Docket No. 19-1236 (issued January 24, 2020); *R.A.*, Docket No. 19-0065 (issued May 14, 2019).

¹⁴ *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

¹⁵ *E.L.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 4, 2024
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