

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 3, 2023, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a temporary full-time limited-duty assignment.

FACTUAL HISTORY

On January 30, 2020 appellant, then a 46-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 29, 2020 he sustained injury to his left side, including his neck, elbow, and shoulder, when he lifted the back door of a postal vehicle while in the performance of duty. He stopped work on January 29, 2020. OWCP initially accepted the claim for left trapezius strain, and thoracic and cervical sprains. It paid appellant wage-loss compensation on the supplemental rolls effective March 15, 2020, and on the periodic rolls commencing November 8, 2020.

On March 29, 2021 OWCP referred appellant, the medical record, a March 11, 2021 statement of accepted facts (SOAF), and a series of questions to Dr. Jesu Jacob, an osteopathic Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of the accepted conditions, the appropriate treatment, and appellant's work capacity.

In a report dated April 19, 2021, Dr. Jacob recounted appellant's medical history and reported the findings of the physical examination he conducted on that date. He found that appellant continued to have residuals of the accepted cervical injury, which he diagnosed as cervical spine sprain, herniated disc, and radiculopathy. Dr. Jacob determined that appellant was capable of working on a full-time basis with restrictions of no lifting or carrying more than 20 pounds for six hours per day, no extending sitting, standing, or walking for more than six hours per day. In a June 12, 2021 work capacity evaluation (Form OWCP-5c), he indicated that appellant was capable of performing light-duty work for eight hours per day with restrictions of no lifting, pushing, or pulling more than 20 pounds, and checked "Yes" to limitations on sitting, walking, standing, reaching and reaching above his shoulder.

In a report dated June 29, 2021, Dr. Sushil K. Basra, a Board-certified orthopedic surgeon, noted that a March 29, 2021 magnetic resonance imaging (MRI) scan revealed a C6-7 herniated nucleus pulposus; and an October 6, 2020 electromyogram (EMG) study revealed cervical radiculopathy. He provided examination findings and advised that appellant was disabled from work due to his cervical conditions.

On July 7, 2021 the employing establishment offered appellant a modified carrier technician position working eight hours per day, which was effective June 10, 2021. The duties of the position included one to two hours of casing mail and six to seven hours of delivering mail and parcels weighing up to 20 pounds. The position required up to eight hours per day of repetitive wrist and elbow "movements" up to 20 pounds; up to eight hours per day of pushing, lifting, and pulling up to 20 pounds; and five to six hours per day of driving a vehicle. Appellant refused the position on July 14, 2021.

By decision dated August 4, 2021, OWCP expanded the acceptance of the claim to include cervical herniated disc and cervical radiculopathy.

In a July 21, 2021 report, Dr. Neal H. Frauwirth, a specialist in pain medicine, physical medicine and rehabilitation, related that all conservative treatment methods had failed to provide adequate relief, therefore appellant was referred for interlaminar epidural steroid injection at C6-7.

In an attending physician's report (Form CA-20) dated January 20, 2022, Dr. Basra noted appellant's January 29, 2020 history of injury, related appellant's examination findings and diagnosed C6-7 herniated nucleus pulposus and cervical radiculopathy. He found appellant totally disabled due to the diagnosed conditions.

OWCP continued to receive medical reports from Dr. Basra, which indicated that appellant was totally disabled.

On April 22, 2022 OWCP referred appellant, together with a February 28, 2022 SOAF, medical record, and list of questions, to Dr. Brian Kincaid, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Basra, an attending physician, and Dr. Jacob, an OWCP second opinion physician, regarding appellant's work capacity.

In a report dated May 24, 2022, Dr. Kincaid noted his review of the medical record, including the SOAF. He provided appellant's physical examination findings and diagnosed left trapezius and thoracic strain, cervical sprain, cervical radiculopathy, and herniated cervical disc. Dr. Kincaid found appellant's work-related conditions had not resolved based on examination findings of weakness, limited cervical range of motion, and altered sensation consistent with cervical radiculopathy. He reviewed the offered modified carrier technician position, which he found appellant was unable to perform. Dr. Kincaid indicated that appellant was unable to lift, pull, or push up to 20 pounds, but was capable of performing sedentary work. In an attached Form OWCP-5c, he indicated that appellant was capable of performing sedentary work. Dr. Kincaid also found appellant had not reached maximum medical improvement (MMI).

On August 25, 2022 the employing establishment offered appellant a modified carrier position, effective September 10, 2022. The duties of the position were listed as one to two hours of casing mail with chair available, one to two hours of filing paperwork, one to two hours of editing books, and one to two hours of data entry. The physical requirements of the modified position included one to eight hours per day of sitting, less than two hours per day of occasional walking and standing, and occasional lifting, carrying, and pushing, and pulling up to 10 pounds. The annual salary was listed as \$72,845.00. On the second page, the offer of modified assignment noted that "this assignment will remain within the physical restrictions furnished by your treating physician. You are advised not to exceed these restrictions. This assignment is currently available and is subject to revision based on the changes in your physical restrictions and/or the availability of adequate work. If a revision is necessary, you will be given a revised written modified assignment." The offer also advised on the third page that this "[j]ob offer is available indefinitely, during the period of recovery while [appellant's] work restrictions are temporary in nature and until medical documentation compels a change."

Appellant refused the position on September 7, 2022.

OWCP received additional medical reports from Dr. Basra, wherein he continued to opine that appellant was totally disabled from work.

In a notice of proposed reduction dated September 19, 2022, OWCP advised appellant of the proposed reduction of his wage-loss compensation, in accordance with 20 C.F.R. § 10.500(a),

based upon his declination of a temporary light-duty assignment deemed by OWCP to appropriately accommodate his existing work restrictions. It advised him that his current work restrictions were represented by those provided on May 24, 2022 by Dr. Kincaid, the impartial medical examiner (IME). OWCP informed appellant that, if he continued to decline the position, he had 30 days to provide adequate justification for the declination.

OWCP subsequently received an August 31, 2022 report from Dr. Basra noting his review of the offered modified position and Dr. Kincaid's report. Dr. Basra opined that it would be difficult for appellant to perform the duties of the offered position and that it would aggravate his condition. He agreed with Dr. Kincaid that appellant's accepted conditions had not resolved and had not reached MMI. Dr. Basra concluded that appellant was unable to perform the sedentary duties detailed in the offered position as appellant could not lift, pull, or push up to 20 pounds.

In an October 25, 2022 supplemental report, Dr. Kincaid found appellant was capable of performing sedentary work including occasional lifting, pulling, and pushing up to 10 pounds for up to 2 hours and 40 minutes per eight-hour day.

On March 30, 2023 OWCP confirmed that the job offer remained available.

By decision dated April 3, 2023, OWCP reduced appellant's wage-loss compensation, effective that date, under 20 C.F.R. § 10.500(a). It found that he did not provide adequate justification for not accepting the offered light-duty assignment, which was within his medical restrictions. In reducing appellant's wage-loss compensation, OWCP applied the *Shadrick* formula to calculate his loss of wage-earning capacity, a formula that was derived from principles contained in the case of *Albert C. Shadrick*.⁴

OWCP subsequently received reports dated November 21, 2022 and June 2, 2023 from Dr. Basra's office, which were repetitive of prior reports. The June 2, 2023 report was signed by Colleen A. Kelly, a physician assistant.

On August 30, 2023 appellant, through counsel, requested reconsideration. In support of his request, counsel submitted an August 7, 2023 report from Dr. Basra. Dr. Basra recounted appellant's medical course of treatment and concluded that appellant remained disabled from work due to his C6-7 herniated nucleus pulposus and cervical radiculopathy.

A report dated September 7, 2023 from Ms. Kelly was unchanged from prior reports.

By decision dated November 28, 2023, 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.⁵

⁴ 5 ECAB 376 (1953); codified at 20 C.F.R. §§ 10.403(d)-(e).

⁵ *C.G.*, Docket No. 21-0171 (issued November 29, 2021); *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).

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 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.”⁶

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.⁷ OWCP’s procedures require that, if an employee declines an offered appropriate assignment, it shall issue “a notice of proposed termination or reduction of compensation for the duration of the temporary assignment, whether specified or indefinite, and provide the claimant with 30 days to respond.”⁸ The notice should advise the claimant of the requirements of section 10.500, and identify the light-duty assignment by its name and/or date.⁹

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 IME) who shall make an examination.¹⁰ For a conflict to arise the opposing physicians’ viewpoints must be of virtually equal weight and rationale.¹¹ When OWCP has referred the case to an IME for the purpose of resolving the conflict,

⁶ 20 C.F.R. § 10.500(a).

⁷ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1) (June 2013).

⁸ *Id.* at Chapter 2.814.9c(5).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8123(a); *see S.A.*, Docket No. 20-1168 (issued March 29, 2023); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹¹ *H.B.*, Docket No. 19-0926 (issued September 10, 2020); *C.H.*, Docket No. 18-1065 (issued November 29, 2018); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective April 3, 2023, pursuant to 20 C.F.R. § 10.500(a).

OWCP terminated appellant's wage-loss compensation on April 3, 2023, pursuant to 20 C.F.R. § 10.500(a). The Board, however, is unable to determine from the current record whether its reduction of his benefits is proper under 20 C.F.R. § 10.500(a) since it cannot be established whether he had been offered a temporary or a permanent employment position. OWCP's procedures require that, when an employing establishment provides an alternate employment position to a partially disabled employee who cannot perform his or her date-of-injury position, it must be determined whether the offered position is permanent or temporary in nature. If the employment offered to an employee on the periodic rolls is temporary and the employee does not accept the position, section 20 C.F.R. § 10.500(a) applies.¹³ However, if the offered employment is permanent in nature and the employee does not accept the position the penalty provisions under 5 U.S.C. § 8106(c) apply.¹⁴

The evidence of record contains a written job offer, dated August 25, 2022, for a modified carrier technician position beginning September 10, 2022. The job offer noted the duties and physical requirements of the modified assignment. The assignment was for full-time work and had an annual salary of \$72,845.00. The offer also indicated that the position was available indefinitely during the period of recovery while the claimant's work restrictions were temporary in nature. OWCP subsequently issued a notice of proposed reduction of wage-loss compensation on September 19, 2022. It noted that appellant had been provided with a temporary light-duty assignment as a modified carrier technician on August 25, 2022. The Board finds, however, that neither the August 25, 2022 job offer, nor the attached cover letter, indicated that the position was temporary.

Appellant began receiving wage-loss compensation on the periodic rolls, effective November 8, 2020, and remained on the periodic rolls at the time of the August 25, 2022 job offer. Therefore, to reduce his wage-loss compensation benefits pursuant to 20 C.F.R. § 10.500(a), OWCP had the burden of proof to establish that the offered employment position was temporary in nature. This determination is critical as a permanent job offer would require OWCP to terminate benefits in compliance with the strict provisions of 5 U.S.C. § 8106(c). As it cannot be established that appellant's job offer was a temporary position, the Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation pursuant to 20 C.F.R. § 10.500(a).¹⁵

¹² *S.S.*, Docket No. 19-0766 (issued December 13, 2019); *W.M.*, Docket No. 18-0957 (issued October 15, 2018); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, *id.*

¹³ *D.S.*, Docket No. 23-0667 (issued November 16, 2023); *A.W.*, Docket No. 21-1287 (issued September 22, 2023); *R.S.*, Docket No. 20-1004 (issued March 15, 2021).

¹⁴ *See A.W.*, *id.*

¹⁵ *A.W.*, *id.*; *C.W.*, Docket No. 18-1779 (issued May 6, 2019).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective April 3, 2023, pursuant to 20 C.F.R. § 10.500(a).

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 5, 2024
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