

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

_____)	
T.J., Appellant)	
)	
and)	Docket No. 24-0811
)	Issued: September 13, 2024
U.S. POSTAL SERVICE, BUSHWICK POST OFFICE, Brooklyn, NY, Employer)	
_____)	

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
JANICE B. ASKIN, Judge

JURISDICTION

On August 5, 2024 appellant filed a timely appeal from a July 3, 2024 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 3, 2024 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.*

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 July 3, 2024, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On January 23, 2023 appellant, then a 35-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 19, 2023 she injured her right shoulder when placing mail in a mailbox while in the performance of duty. She stopped work on January 20, 2023. OWCP accepted the claim for adhesive capsulitis of right shoulder. It paid appellant wage-loss compensation for disability on the supplemental rolls, effective March 7, 2023, and on the periodic rolls, effective April 23, 2023.

On April 11, 2023 Dr. Roman Issac, a Board-certified orthopedic surgeon, performed an arthroscopic debridement and subacromial decompression with partial acromioplasty of appellant's right shoulder. He diagnosed right shoulder adhesive capsulitis, superior labral anterior posterior lesion (SLAP) type 1 tear, subacromial bursitis and impingement. Dr. Issac, in a report dated May 31, 2023, related that appellant was temporarily disabled due to her right shoulder condition.

In an October 3, 2023 report, Dr. Leon Sultan, a Board-certified orthopedic surgeon serving as OWCP's second opinion physician, reviewed a statement of accepted facts (SOAF) and appellant's medical record. He discussed the history of her January 19, 2023 work injury and medical course of treatment, including her April 11, 2023 right shoulder surgery. Dr. Sultan opined that appellant sustained a type 1 SLAP tear, post-traumatic adhesive capsulitis and subacromial bursitis with impingement causally related to the January 19, 2023 employment incident. He opined that the work-related conditions had not fully resolved as there was clinical evidence to support that the work-related conditions were partially active and caused objective orthopedic examination findings. Dr. Sultan opined that appellant was not currently capable of returning to her date-of-injury position as a city carrier. In an October 3, 2023 work capacity evaluation (Form OWCP-5c), he opined that she was capable of working sedentary and light-duty work for eight hours a day with restrictions on pushing, pulling and lifting up to 20 pounds.

On December 19, 2023 Dr. Issac manipulated appellant's right shoulder joint under anesthesia for a frozen right shoulder.

On January 23, 2024 the employing establishment provided a limited-duty job offer to appellant. The letter did not indicate whether the offered position was temporary or permanent. Appellant was advised to report to the Kingsbridge Station to begin this limited-duty work no later than January 29, 2024. In the attached January 23, 2024 offer of modified assignment, the employing establishment offered her a modified assignment (limited duty) at the Bushwick Station. The January 23, 2024 job offer did not provide a job title, level/step of the position, or salary. It noted that appellant's work hours were 7:30 a.m. through 9:30 a.m. for two hours of casing and strapping mail with Sunday/Rotating days off. The physical requirements of the

modified assignment were noted as sedentary work up to eight hours and within Dr. Sultan's October 3, 2023 work restrictions. No response was received from appellant.

In a March 13, 2024 notice, OWCP informed appellant that it had been advised that she refused or failed to report to her modified assignment. It informed her that it had reviewed the offered position and found it was suitable and in accordance with the medical restrictions provided by Dr. Sultan. Pursuant to 5 U.S.C. § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position, or to provide adequate reasons for refusal. It informed her that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation. No response was received from appellant.

By decision dated July 3, 2024, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective that date, as she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.³ 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.⁴ To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.⁵ 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.⁶

The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.⁷ OWCP's 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 In a suitable work determination,

³ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁴ 5 U.S.C. § 8106(c)(2); see also *Geraldine Foster*, 54 ECAB 435 (2003).

⁵ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁷ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); see also *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.⁹

When the employing establishment extends an offer of modified-duty work, the offer must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the workload or unusual working conditions; (3) the organizational and geographical location of the job; (4) the date on which the job will first be available; (5) the claimant's work schedule; (6) pay rate salary information; and (7) the date by which a response to the job offer is required.¹⁰

OWCP's procedures further provide that ideally, a job offer should be made for the number of hours for which a claimant has been released to work. If this is not possible, the employing establishment may offer a job for fewer hours than the claimant was actually released to work. As long as the job offer is for at least half of the total hours for which the claimant has been released to work, the job offer can be found suitable.¹¹

ANALYSIS

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 July 3, 2024.

On October 3, 2023 Dr. Sultan, OWCP's second opinion physician, opined that appellant sustained a type 1 SLAP tear, post-traumatic adhesive capsulitis and subacromial bursitis with impingement causally related to the January 19, 2023 employment incident and that her work-related conditions had not fully resolved as there were objective orthopedic examination findings. He opined that appellant was capable of working sedentary work for eight hours per day with restrictions of pushing, pulling and lifting up to 20 pounds.

On January 23, 2024 the employing establishment provided a limited-duty job offer to appellant for a modified/limited position at the Bushwick Station. It noted that appellant's work hours were 7:30 a.m. through 9:30 a.m. for two hours of casing and strapping mail with Sunday/Rotating days off. The physical requirements of the modified assignment were noted as sedentary work up to eight hours and within Dr. Sultan's October 3, 2023 work restrictions. The January 23, 2024 job offer, however, did not include a job title, the level/step of the position, or the salary. As previously noted, OWCP's procedures require that job offers include the pay rate/salary information.¹² Furthermore, the job offer contains contradictory information. While the job offer indicated that appellant's work hours were 7:30 a.m. through 9:30 a.m. for two hours of casing and strapping mail with Sunday/Rotating days off, the physical requirements of the modified assignment were noted as sedentary work up to eight hours.

⁹ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁰ *Supra* note 8 at Chapter 2.814.4a(1) (June 2013).

¹¹ *Id.* at Chapter 2.814.4(c)(1)(2) (June 2013).

¹² *Supra* note 8.

As a penalty provision, section 8106(c)(2) must be narrowly construed.¹³ Given the above-described deficiencies, the evidence of record does not demonstrate the suitability of the January 23, 2024 job offer.¹⁴ Consequently, OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective July 3, 2023, pursuant to 5 U.S.C. § 8106(c)(2).

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 July 3, 2024.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 13, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹³ See *J.O.*, Docket No. 24-0278 (issued May 17, 2024); *B.H.*, Docket No. 22-0993 (issued November 28, 2022); *S.S.*, Docket No. 20-0123 (issued July 28, 2022); *A.M.*, Docket No. 12-1301 (issued March 14, 2013).

¹⁴ See *C.G.*, Docket No. 24-0210 (issued August 27, 2024); *J.O., id.*; *Laurie Murrell*, Docket No. 04-0153 (issued June 14, 2004).