

of the left shoulder and upper arm at the acromioclavicular joint. Appellant received compensation for total disability beginning September 16, 2009.

In a January 14, 2010 work status report, Dr. Richard R. Maguire, a Board-certified orthopedic surgeon, diagnosed a rotator cuff tear. He released appellant to return to work with restrictions against lifting, pushing, pulling, reaching or grasping over 30 pounds with her left arm and no bending, stooping or kneeling. In a progress report of the same date, Dr. Maguire diagnosed shoulder impingement, bursitis and tendinitis. He noted that appellant wanted to wait until summer to have back surgery.

On February 4, 2010 the employing establishment offered appellant a modified position; however, she declined the position, asserting that she was in another motor vehicle accident on January 26, 2010.²

In a progress report dated February 25, 2010, Dr. Maguire related that appellant's neck, back and left shoulder pain had increased following a second motor vehicle accident. He diagnosed cervical sprain/strain, shoulder impingement and bursitis/tendinitis. Dr. Maguire indicated that appellant took hydrocodone every six to eight hours as needed for pain. In a work status report, he found that she could work with restrictions against lifting, pushing, pulling, reaching or grasping over 10 pounds with her left arm. Dr. Maguire further advised that appellant could pick up 30 pounds using both arms together but could not drive or operate machinery while taking prescription pain medication.

On March 12, 2010 the employing establishment offered appellant a position as a modified rural carrier associate. The position required pushing, pulling, reaching and grasping no more than 10 pounds, no overhead use of the left arm and lifting a combined weight of up to 30 pounds with both arms. The duties included sorting mail, loading and unloading mail from a vehicle and delivering sorted mail on routes for three to eight hours per day.

In a March 29, 2010 progress report, Dr. Maguire found positive impingement of the shoulder. He diagnosed a cervical strain, shoulder impingement, lumbar strain and a rotator cuff tear. Dr. Maguire scheduled appellant for surgery and indicated that her current medication included hydrocodone, flexeril and meloxicam. In a work status report dated March 29, 2010, he again found that she could work with restrictions on lifting, pushing, pulling, reaching and grasping of 10 pounds with the left arm and again indicated that she could not drive or operate machinery while on prescription pain medication.

By letter dated March 31, 2010, appellant's attorney contended that the offered position was not suitable given her work limitations. He asserted that Dr. Maguire prohibited bending and that the use of her left arm in driving a vehicle might exceed her work restrictions. Counsel also noted that appellant's need for medications including hydrocodone, flexeril and mobic due to her injury prevented her "from operating a motor vehicle to perform the duties of a rural carrier." He also argued that a magnetic resonance imaging (MRI) scan study of the cervical

² In a February 11, 2010 note, Dr. David J. Gower, a Board-certified neurosurgeon, found that appellant was unable to work from February 11 to March 10, 2010.

spine showed bulging disc and spondylosis and that her right knee was also injured.³ Counsel contended that OWCP did not properly consider these injuries in finding that appellant could return to work. He maintained that it was not reasonable to find that she could return to work prior to surgery to repair her torn rotator cuff.

On April 1, 2010 OWCP advised appellant that the position of rural carrier associate offered March 12, 2010 was found suitable and provided her 30 days to accept the position or provide a written explanation of her refusal. It considered the reasons already provided and found that they were not acceptable.

By letter dated May 4, 2010, OWCP noted that it had not received additional evidence regarding the offered position. It provided appellant an additional 15 days to accept the position or have her compensation terminated.

On May 13, 2010 Harold W. Haddle, Jr., Ph.D., a clinical psychologist, related that he was treating appellant for “anxiety and depression resulting from chronic pain and stressors related to physical injury to her shoulder, neck and back. I have advised her to be absent from work for the next 30 days in order for her to have time to regain emotional stability necessary to function on a job.”

On May 14, 2010 appellant’s attorney noted that OWCP had to consider all conditions prior to terminating compensation due to refusal of suitable work. He argued that the psychologist’s report established that appellant was disabled from work.

On May 20, 2010 OWCP confirmed that appellant had not returned to the offered position.

By decision dated May 26, 2010, OWCP terminated appellant’s monetary compensation benefits effective that date for refusing an offer of suitable work under section 8106(c).

On June 25, 2010 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.⁴ On September 9, 2010 she notified OWCP that her attorney was no longer representing her and requested a telephone hearing.⁵

At the telephone hearing held on October 14, 2010, appellant related that the nurse assigned by OWCP insisted that her physician release her for work. She injured her back as well as her shoulder but physicians treated her shoulder first.

³ Counsel cites as support an August 24, 2009 MRI scan study of the cervical spine finding bulging discs at C3-4 and C5-6 and C6-7 foraminal stenosis/spondylosis and a September 9, 2009 report from Dr. Gower discussing appellant’s complaints of pain and stiffness in her knee causing trouble walking.

⁴ In a progress report dated May 24, 2010, Dr. Maguire noted that appellant was scheduled for a rotator cuff repair on June 4, 2010.

⁵ In a report dated June 7, 2010, received by OWCP on October 25, 2010, Dr. Anthony C. Carantzas, a Board-certified orthopedic surgeon, diagnosed a near complete rotator cuff tear of the left shoulder with impingement and recommended surgery. On June 30, 2010 he noted that appellant was status post rotator cuff repair with decompression.

By decision dated December 27, 2010, an OWCP hearing representative affirmed the May 26, 2010 decision.

On January 7, 2010 appellant requested reconsideration. She submitted the results of diagnostic studies and a report from Dr. Munjal G. Shroff, an osteopath, who discussed her history of depression for several years. Dr. Shroff diagnosed recurrent, severe major depressive disorder with psychosis, dysthymic disorder and anxiety.⁶ He diagnosed recurrent, severe major depressive disorder with psychosis, dysthymic disorder and anxiety.

By decision dated April 8, 2011, OWCP denied modification of its December 27, 2010 decision. It found that the medical evidence was insufficient to establish that appellant was unable to perform the offered position.

On appeal, appellant argued that her physician found that she was unable to work.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁷ Section 8106(c)(2) of FECA⁸ 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.⁹ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.¹⁰ 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.¹¹

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 by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.¹² Pursuant to section 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.¹³

⁶ Appellant submitted chart notes from Dr. Haddle dated August 20, 2009 through June 10, 2010. A February 5, 2010 lumbar MRI scan study revealed small right disc protrusions at T12-L1 and L5-S1. On February 10, 2010 a physician found that appellant could return to work with limited use of the left arm. On February 11, 2010 Dr. Gower found that she was disabled from February 11 to March 10, 2010.

⁷ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁸ *Supra* note 1.

⁹ *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ *Ronald M. Jones*, 52 ECAB 190 (2000).

¹¹ *Joan F. Burke*, 54 ECAB 406 (2003).

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

¹³ *Id.* at § 10.516.

Before compensation can be terminated OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.¹⁴ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, it has the burden of showing that the work offered to and refused by appellant was suitable.¹⁵

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain, neck sprain and a sprain of the left shoulder and upper arm at the acromioclavicular joint due to an August 1, 2009 motor vehicle accident. It paid compensation for total disability beginning September 16, 2009. On March 12, 2010 the employing establishment offered appellant a position as a modified rural carrier associate. The duties of the position consisted of loading and unloading mail from a vehicle, sorting mail and delivering the sorted mail. OWCP determined that the position was suitable based on Dr. Maguire's February 25, 2010 work restrictions. Dr. Maguire, however, indicated in a February 25, 2010 report that appellant was taking hydrocodone every six to eight hours as needed. In a work restriction evaluation of the same date, he found that she was unable to operate a motor vehicle while on prescription medication for pain. The March 12, 2010 position of modified rural carrier required loading sorted mail into a vehicle and delivering the sorted mail, presumably by vehicle. Dr. Maguire's February 25, 2010 report is insufficient to establish that offered position was suitable as he found that appellant was unable to operate a motor vehicle while taking prescription pain medication and that she was currently taking hydrocodone. In order to justify termination of compensation, OWCP has the burden of showing that the work offered to and refused by her was suitable.¹⁶ As the medical evidence fails to establish that appellant was capable of performing the duties of a modified rural carrier, OWCP did not meet its burden of proof to establish that she refused an offer of suitable work.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

¹⁴ See *Linda Hilton*, 52 ECAB 476 (2001).

¹⁵ *Id.*

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 23, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board