

developed repetitive strain of her right arm and shoulder and right rotator cuff strain due to factors of her federal employment. By decision dated January 8, 2002, OWCP accepted her claim for right shoulder and upper arm strain.

OWCP proposed to terminate appellant's compensation benefits on July 12, 2007 and finalized this decision on October 25, 2007 based on the report of an impartial medical specialist, Dr. William Thieme, a Board-certified orthopedic surgeon. In its October 1, 2008 decision,² the Board found that Dr. Thieme's report was not supported by medical reasoning and was not entitled to the weight of the medical evidence; thus, OWCP had not met its burden of proof to terminate appellant's compensation benefits. The Board reversed the October 27, 2007 OWCP decision. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Appellant's attending physician, Dr. Margaret Forgette, a physician Board-certified in physical medicine and rehabilitation, provided work restrictions on August 25, 2009 and indicated that appellant could not reach above the shoulder and that she could operate a motor vehicle at work or drive to work for only one hour each. She also restricted appellant's pushing, pulling and lifting.

The employing establishment offered appellant a limited-duty position on November 20, 2009. Appellant stated that she neither accepted nor refused this position on November 20, 2009. Dr. Forgette completed a note on November 18, 2009 and stated that appellant had developed left shoulder pain with no injury or trauma. She diagnosed right shoulder strain, impingement or repetitive strain injury and new left shoulder pain and limited range of motion consistent with impingement or tendinitis. Dr. Forgette stated that she would like to review the proposed modified position description and recommended a gradual return to full-time duties.

OWCP provided Dr. Forgette with the offered position on December 4, 2009. In a note dated December 14, 2009, Dr. Forgette stated that the position description was not in sufficient detail for her to understand the physical activities of the job. She again noted that appellant's left shoulder pain and loss of range of motion were interfering with the use of that upper extremity. Dr. Forgette recommended further left shoulder treatment.

In a letter dated December 23, 2009, OWCP requested that the employing establishment more fully explain the actual physical activities entailed in the modified work position. On January 5, 2010 Steve Allen, the postmaster, provided a letter detailing the requirements of each duty. On March 15, 2010 Dr. Forgette responded and provided further restrictions. She stated, "Please note, [appellant] is currently dealing with other health issues that might affect her ability to return to work. Please confer with her other treating physicians regarding those conditions."

The employing establishment offered appellant a second light-duty position on April 14, 2010 which required no reaching above the shoulder, up to 1 hour of lifting between 5 and 10 pounds, up to 1 hour of pushing and pulling with no overhead work and 4 hours of work per day. Appellant neither accepted nor declined this position. OWCP referred this position to

² Docket No. 08-540 (issued November 24, 2008).

Dr. Forgette on April 14, 2010. In a report dated April 15, 2010, Dr. Forgette opined that appellant's right shoulder condition permitted her to perform the duties of the offered position. She stated, "However, [appellant] is currently being treated for left frozen shoulder by Dr. Dirk Gouge in Port Angeles. This condition might affect her ability to return to work at this time, but you would need to check with Dr. Gouge about that."

In a letter dated April 20, 2010, OWCP stated that the light-duty position was suitable work and that the position was currently available. It noted Dr. Forgette's comments regarding appellant's left shoulder and stated that there was no evidence that this condition impacted appellant's ability to perform the duties of the offered position. OWCP allowed 30 days for a response and informed appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2).

In a letter dated May 19, 2010, counsel responded and provided work restrictions regarding appellant's left shoulder. He stated that appellant could not perform the offered position based on these restrictions. Dr. Gouge, an osteopath, completed a work restriction evaluation on May 11, 2010 and indicated that appellant could not use her left upper extremity. He restricted her to no reaching, no reaching above the shoulder, no twisting, no repetitive movements of the wrists and elbows as well as no pushing, pulling, lifting or climbing. Dr. Gouge also indicated that appellant could operate a motor vehicle at work for one and one-half hours and drive to and from work for one and one-half hours.

OWCP provided appellant with notice on May 26, 2010 that the reasons provided for refusing the offered position were not considered valid as Dr. Gouge did not provide objective findings supporting the given restrictions. It allowed appellant 15 days to accept the offered suitable work position and informed her that if she refused her wage loss and schedule award benefits would be terminated.

By decision dated June 11, 2010, OWCP terminated appellant's compensation benefits in accordance with section 8106(c) of FECA (5 U.S.C. § 8106(c)), effective that date.

Appellant requested an oral hearing before an OWCP hearing representative on July 1, 2010. At the oral hearing on October 19, 2010 counsel argued that appellant established a left shoulder condition which had arisen since the compensable injury and which disabled her from her offered position. Appellant testified that she had a frozen left shoulder and could not lift her left arm more than 45 degrees making it difficult to restock packing supplies.

Following the oral hearing, appellant submitted a series of progress notes from Dr. Gouge beginning January 21, 2010 diagnosing left shoulder pain due to adhesive capsulitis. He attributed her shoulder condition to overusing her left shoulder due to her right shoulder injury. Dr. Gouge indicated that appellant had limited range of motion of the left shoulder and recommended physical therapy as well as a cortisone injection. He also indicated that she was to undergo thyroid surgery in the next week. On March 4, 2010 Dr. Gouge noted that appellant completed three weeks of physical therapy with no real improvement. He diagnosed left shoulder adhesive capsulitis. Dr. Gouge provided appellant with a cortisone injection on April 13, 2010. He examined her on May 11, 2010 for her frozen left shoulder and found restricted range of motion. In a note dated July 6, 2010, Dr. Gouge diagnosed left shoulder adhesive capsulitis and stated that appellant had no significant gains with therapy. On

October 21, 2010 he stated that she was significantly impaired on the left side and had not made progress with physical therapy. Dr. Gouge again diagnosed left shoulder adhesive capsulitis.

By decision dated December 15, 2010, the hearing representative found the medical records did not include a rationalized medical opinion establishing that appellant was unable to perform the offered position of modified rural carrier due to her frozen left shoulder. She concluded that appellant had refused an offer of suitable work and that OWCP had properly terminated her compensation benefits.

LEGAL PRECEDENT

It is well settled that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ As OWCP in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), it must establish that appellant refused an offer of suitable work. Section 8106(c) of FECA⁴ 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. Section 10.517 of the applicable regulations⁵ provide that an employee who refuses or neglects to work after suitable work has been offered or secure for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. 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.⁶ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.⁷ It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁸

ANALYSIS

OWCP accepted appellant's claim for right shoulder and upper arm strain. The employing establishment offered her a modified work position on April 14, 2010 which required no reaching above the shoulder, up to one hour of lifting between 5 and 10 pounds, up to one hour of pushing and pulling with no overhead work and four hours of work per day. Appellant's attending physician, Dr. Forgette, approved this position in regard to appellant's right upper extremity on April 15, 2010. However, she noted left shoulder pain beginning on November 18,

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ 5 U.S.C. § 8106(c)(2).

⁵ 20 C.F.R. § 10.517(a).

⁶ *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

⁷ *Stephen A Pasquale*, 57 ECAB 396, 402 (2006).

⁸ *Richard P. Cortes*, 56 ECAB 200 (2004).

2009 and on April 15, 2010 stated that Dr. Gouge was providing treatment for appellant's left shoulder and that this condition could prevent her from performing the offered position.

OWCP informed appellant that the offered position was suitable on April 20, 2010 and noted that appellant had provided no medical evidence regarding her left shoulder. It allowed 30 days for a response. Appellant responded on May 19, 2010 and submitted a work restriction evaluation completed by Dr. Gouge on May 11, 2010 indicating that appellant was unable to use her left arm to perform repetitive movements of wrists and elbows or any reaching, pushing, pulling or lifting. As the April 14, 2010 position description required up to one hour of lifting between 5 and 10 pounds and up to one hour of pushing and pulling with no overhead work, this report suggests that appellant's refusal to work was reasonable or justified based on her subsequently arising left upper extremity condition. Furthermore, following the oral hearing, appellant also submitted further medical evidence diagnosing adhesive capsulitis of the left upper extremity and indicating that she had limited of motion of the left shoulder. These reports from Dr. Gouge establish a diagnosed left shoulder condition and indicate that this condition could prevent appellant from performing the duties of the offered position.

The Board finds that in this case OWCP should have considered appellant's nonwork-related condition and its effect on her ability to perform the duties of the April 14, 2010 position deemed suitable work. OWCP did not develop this aspect of the case by requesting further clarification from Dr. Gouge as to whether appellant's left arm condition would prevent her from perform the specific duties of the April 14, 2010 position. It, therefore, did not have an appropriate basis on which to terminate appellant's compensation for refusal to accept suitable work.⁹

CONCLUSION

The Board finds that the December 15, 2010 decision of OWCP must be reversed as it is not supported by the medical evidence. Consequently, OWCP did not meet its burden of proof to terminate compensation effective June 11, 2010.

⁹ *Janice S. Hodges*, 52 ECAB 379, 381 (2001); *Donna M. Stroud*, 51 ECAB 264 (2000).

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 19, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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