

modified assignment effective August 7, 2006. He stopped work on April 10, 2009 and underwent left shoulder arthroscopy on April 23, 2009.² Appellant was paid wage-loss compensation and medical benefits.

In a May 14, 2009 statement, appellant claimed that he fell on his right side approximately one hour before his April 23, 2009 surgery. He sustained injuries to the right fourth digit, ulna, shoulder and knee.³ Dr. Eric S. Stem, the Board-certified orthopedic surgeon who performed the arthroscopy, detailed this incident in an April 28, 2009 report. On examination, he observed right forearm abrasion and distal tenderness as well as proximal interphalangeal joint tenderness of the right ring finger. X-rays exhibited nondisplaced distal ulnar shaft fracture. Dr. Stem diagnosed status post left shoulder arthroscopy, right hand contusion, nondisplaced right ulnar shaft fracture and possible ring finger dislocation. After reviewing x-rays of appellant's right knee, he diagnosed degenerative joint disease with possible torn medial meniscus in a May 29, 2009 report.⁴

Dr. Seth P. Kupferman, a Board-certified orthopedic surgeon, related in an August 19, 2009 report that appellant sustained right hand and arm symptoms as a result of a fall on April 23, 2009. On examination, he observed left anterior shoulder tenderness. Dr. Kupferman diagnosed status post left shoulder arthroscopy and healed right ulnar shaft fracture. He prohibited use of the left upper extremity on the job for two months. In an October 21, 2009 follow-up report, regarding the left shoulder, Dr. Kupferman advised appellant to avoid lifting items weighing more than 30 pounds and any repetitive overhead activity involving the left upper extremity.⁵

By decision dated December 10, 2009, OWCP denied appellant's consequential injury claim, finding the medical evidence insufficient to establish that his right upper extremity condition stemmed from an accepted condition.⁶

OWCP referred appellant for a second opinion examination to Dr. James F. Bethea, a Board-certified orthopedic surgeon. Questions posed to Dr. Bethea included whether disabling work-related residuals continued and, if so, what were his work restrictions. In an October 20, 2010 report, Dr. Bethea noted that appellant complained of left shoulder pain related to an August 2, 2006 motor vehicle collision. He listed left shoulder examination findings, including limited left shoulder range of motion (ROM). X-rays showed two metal anchors in the proximal

² OWCP authorized the surgery in a March 19, 2009 letter and later accepted a recurrence of disability by decision dated June 29, 2009. Appellant did not return to work following the procedure.

³ Appellant reiterated his allegation in an August 22, 2009 statement.

⁴ Dr. Stem's remaining reports for the period May 8 to July 14, 2009 documented gradual healing of appellant's left shoulder incisions and right ulnar fracture.

⁵ In an April 7, 2010 work capacity form, Dr. Kupferman checked the "no" box indicating that appellant was incapable of performing his former job duties. A subsequent June 22, 2011 note advised that appellant was still subject to these restrictions.

⁶ Pertinent information in the foregoing paragraphs was incorporated into the September 22, 2010 statement of accepted facts.

humerus consistent with rotator cuff surgery. After reviewing the September 22, 2010 statement of accepted facts and the medical file, Dr. Bethea opined that appellant experienced residuals of his accepted left upper extremity injuries that rendered him incapable of performing his former job duties, namely lifting.⁷ He imposed the following permanent work restrictions: pushing, pulling and lifting items weighing up to 20 pounds for two hours each and no climbing, reaching above the shoulder or operating a motor vehicle. OWCP informed the employing establishment in a December 7, 2010 letter that Dr. Bethea's opinion constituted the weight of the medical evidence.

On December 14, 2010 the employing establishment offered appellant the full-time position of laborer/custodian at its processing and distribution center in Charleston, South Carolina, effective December 20, 2010. Duties included sweeping and mopping for two hours, cleaning sinks and toilets for an hour, emptying trash receptacles for two hours and vacuuming for 2.5 hours. The position required standing and walking for 7.5 hours, intermittent pushing, pulling and lifting of items weighing up to 20 pounds between one and two hours and occasional bending, twisting and kneeling between one and two hours. Appellant declined the job offer on December 25, 2010 on the grounds that he was physically and mentally incapable of performing custodial work due to bilateral upper extremity symptoms and depression.

On January 26, 2011 OWCP asked its OWCP medical adviser to review the job offer and Dr. Bethea's October 20, 2010 report to determine if appellant could medically perform the offered position. On that date, the medical adviser responded that appellant was capable of performing the duties outlined in the employing establishment's December 14, 2010 job offer.

In a January 28, 2011 letter, OWCP informed appellant that the laborer/custodian position offered by the employing establishment was suitable in light of his physical capabilities. It noted that the medical evidence of record established that he was partially disabled. It gave appellant 30 days to accept the position without penalty or provide an explanation justifying his refusal.

Appellant's counsel contended in a February 28, 2011 letter that the December 14, 2010 job offer was not suitable because the employing establishment did not guarantee a set number of hours. In particular, he pointed out that the offer letter described the position as "subject to revision based on changes in [appellant's] physical restrictions and/or the availability of adequate work." Alternatively, counsel argued that Dr. Bethea's October 20, 2010 report failed to consider appellant's nonaccepted conditions.

In a March 11, 2011 letter, OWCP informed appellant that his reasons for refusing the laborer/custodian position were invalid and afforded him 15 days to accept the job offer. In March 15 and 17, 2011 letters, appellant's counsel reasserted his argument that the offered job was not suitable.

By decision dated March 31, 2011, OWCP terminated appellant's wage-loss compensation effective April 10, 2011 on the grounds that he refused an offer of suitable work.

⁷ Dr. Bethea also determined that appellant had a seven-percent impairment of the left upper extremity. See American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008).

On April 7, 2011 counsel requested a telephonic oral hearing and reiterated that the offered job was not suitable. On July 11, 2011 he changed his hearing request to a request for a review of the written record. Counsel asserted that the job offer was contradictory and that the medical evidence did not establish that appellant could work. In a July 28, 2011 letter, the employing establishment maintained that its December 14, 2010 job offer satisfied OWCP's procedural requirements.

On November 14, 2011 OWCP's hearing representative affirmed the March 31, 2011 decision. The hearing representative found that the duties of the offered job was physically suitable based on the opinions of Dr. Bethea, Dr. Kupferman and OWCP's medical adviser.

LEGAL PRECEDENT

OWCP may terminate compensation for any partially-disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her.⁸ To meet its burden to justify termination, OWCP must show that the work offered was suitable, the employee was informed of the consequences of refusing to accept such employment, and the employee was afforded a reasonable period to accept or reject the position or submit evidence or reasons why the position was not suitable and could not be accepted.⁹

The threshold issue is whether the position offered by the employing establishment is suitable.¹⁰ Whether an employee has the physical ability to perform the duties of the modified position is primarily a medical question that must be resolved by the medical evidence. In assessing suitability, all preexisting and subsequently-acquired conditions must be considered.¹¹

ANALYSIS

OWCP referred appellant to Dr. Bethea for a second opinion examination to determine the extent of his disability. In an October 20, 2010 report, following a physical evaluation and a review of the September 22, 2010 statement of accepted facts and medical file, Dr. Bethea concluded that appellant continued to experience residuals of his accepted left upper extremity condition that rendered him partially disabled. He limited pushing, pulling and lifting activities to items weighing up to 20 pounds for two hours each and proscribed climbing, reaching above the shoulder and driving. Thereafter, on December 14, 2010 the employing establishment presented a written offer of modified employment as a full-time labor/custodian that satisfied OWCP's procedural requirements.¹²

⁸ 5 U.S.C. § 8106(c)(2). The Board has recognized that section 8106(c) of FECA serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed. *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

⁹ *M.M.*, 59 ECAB 680, 683 (2008). *See also* 20 C.F.R. § 10.515 *et seq.*

¹⁰ *Martha A. McConnell*, 50 ECAB 129 (1998).

¹¹ *Gayle Harris*, 52 ECAB 319, 321 (2001).

¹² *J.N.*, Docket No. 09-1621 (issued July 14, 2010). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (July 1997).

The Board finds that OWCP improperly terminated appellant's wage-loss compensation. As noted, OWCP must consider all preexisting and subsequently-acquired conditions, regardless of etiology, in evaluating the suitability of an offered position.¹³ The case record contains medical evidence from Drs. Stem and Kupferman for the period April 28 to August 19, 2009 that was received by OWCP in advance of the second opinion referral. The reports establish that appellant sustained preexisting degenerative right knee joint disease and a right-hand contusion, ring finger dislocation and nondisplaced ulnar shaft fracture. Dr. Bethea, however, did not consider these injuries in his October 20, 2010 report. In assessing the suitability of the labor/custodian position, OWCP failed to sufficiently consider whether appellant could meet the physical demands of the job in light of all of his medical conditions. Although the hearing representative indicated that appellant's ability to perform the duties of the offered position was supported by the opinions of Drs. Bethea, Kupferman and OWCP's medical adviser, the record indicates that each of the physicians listed restrictions based on appellant's left shoulder condition. The physicians did not consider any of the nonaccepted conditions in defining appellant's work restrictions. Because it did not establish that the assignment offered by the employing establishment was suitable, OWCP did not meet its burden of proof.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation.

¹³ See *J.S.*, Docket No. 06-253 (issued November 24, 2006); *Edward J. Stabell*, 49 ECAB 566 (1998).

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2011 decision of the Office of Workers' Compensation Programs be reversed.

Issued: July 5, 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