

He noted that in a March 1, 2011 memorandum, OWCP found appellant totally and permanently disabled for work.

FACTUAL HISTORY

OWCP accepted that on June 24, 2008 appellant, then a 63-year-old transportation security officer, sustained a disorder of the bursae and tendons of the right shoulder when he lifted a heavy suitcase while in the performance of duty. He stopped work on October 31, 2008 and did not return. Appellant received wage-loss compensation for total disability beginning on November 23, 2008. OWCP placed his case on the periodic rolls effective July 5, 2009.

Appellant initially sought treatment from Dr. Jeffrey Trilling, an attending Board-certified family practitioner, who submitted a June 26, 2008 report, diagnosing a possible right rotator cuff tear.² Dr. Nicholas Divaris, an attending Board-certified orthopedic surgeon, followed appellant in July 2008. He diagnosed a partial right rotator cuff tear with impingement.

Dr. James Penna, an attending Board-certified orthopedic surgeon, treated appellant beginning on September 8, 2008 for a right rotator cuff tear. On October 31, 2008 he performed a biceps tenotomy, subscapularis repair and debridement of a partial rotator cuff tear with subacromial decompression. Dr. Penna held appellant off work through April 6, 2009 due to adhesive capsulitis of the right shoulder.

On April 9, 2009 OWCP obtained a second opinion from Dr. Sanford Wert, a Board-certified orthopedic surgeon, who diagnosed a frozen right shoulder and opined that appellant could perform full-time sedentary duty.

On June 19, 2009 Dr. Penna performed closed manipulation of the right shoulder under general anesthesia. In reports through December 1, 2009, he diagnosed recurrent adhesive capsulitis and recommended arthroscopic lysis of adhesions in the right shoulder.

OWCP obtained an updated second opinion from Dr. Wert on December 27, 2009. Dr. Wert concurred with Dr. Penna and on February 23, 2010 Dr. Penna performed arthroscopic lysis of adhesions of the right shoulder with manipulation of the right shoulder under anesthesia. In reports dated May 24 through September 13, 2010, he found appellant totally disabled for work due to adhesive capsulitis of the right shoulder with weakness and pain. In an October 25, 2010 report, Dr. Penna stated that he no longer took workers' compensation cases and would refer appellant to another surgeon.³

On February 4, 2011 OWCP obtained a second opinion from Dr. P. Warwick Green, a Board-certified orthopedic surgeon, who diagnosed a partial thickness rotator cuff tear with

² June 26, 2008 x-rays of both shoulders showed mild degenerative changes of the acromioclavicular (AC) joints and bilateral calcific tendinitis or bursitis. A July 18, 2008 magnetic resonance imaging scan of the right shoulder showed tendinosis in the biceps tendon, AC osteoarthritis.

³ In a January 25, 2011 report, Dr. Douglas M. Petraco, an attending Board-certified orthopedic surgeon, noted mild weakness in forward elevation of the right shoulder, positive impingement signs and AC tenderness. He diagnosed adhesive capsulitis of the right shoulder, subacromial impingement and a right rotator cuff tear.

adhesive capsulitis of the right shoulder. Dr. Green opined that the accepted injuries remained objectively active and symptomatic. He opined that appellant could perform full-time sedentary duty with permanent restrictions of pushing, pulling, lifting and carrying with the right arm limited to one pound. Dr. Green stated that appellant had reached maximum medical improvement.

In a February 8, 2011 report, Dr. Philip L. Schrank, an attending Board-certified orthopedic surgeon, observed right scapular asymmetry on abduction and forward elevation, tenderness to palpation at the right AC joint, biceps and supraspinatus tendon heads, positive impingement signs and 4/5 weakness in flexion and extension. He diagnosed a capsular contracture. Dr. Schrank recommended trigger point injections and electrodiagnostic testing.⁴ He found appellant disabled for work. Dr. Schrank submitted an April 3, 2011 follow-up report finding appellant's condition unchanged.

In a March 1, 2011 memorandum, OWCP stated that it was "clear, based on a comprehensive review of the evidence on file, that [appellant] (currently 66 years old) is totally (industrially) and permanently disabled from performing any type of duty" due to the June 24, 2008 injury.⁵

In a July 14, 2011 report, Dr. Penna opined that appellant had reached maximum medical improvement as of October 25, 2010, with permanently limited right shoulder motion and chronic pain. He opined that appellant remained totally disabled for work due to the accepted June 24, 2008 injury.

On November 18, 2011 OWCP found a conflict between Dr. Penna, for appellant and Dr. Green for OWCP, regarding the nature and extent of appellant's ongoing injury-related disability. To resolve the conflict, it selected Dr. Arnold Illman, a Board-certified orthopedic surgeon, as impartial medical examiner.

Dr. Illman submitted a January 11, 2012 report reviewing the medical record and statement of accepted facts. On examination, he found anterior flexion and abduction of the right shoulder at 90/160 degrees, a slight loss of internal rotation, right trapezial pain, normal strength and no tenderness to palpation of the right shoulder. Dr. Illman diagnosed partial tears of the subscapularis and rotator cuff with anterior decompression and secondary adhesive capsulitis of the shoulder. He opined that appellant had "disabling residuals of the accepted conditions" but was able to work full time within restrictions. Dr. Illman noted that appellant did not require any further medical treatment or physical therapy as he had attained maximum medical improvement. He found appellant able to "easily handle 15 to 20 pounds occasionally and certainly [was] capable of working with restrictions." Dr. Illman noted that appellant's prognosis for working under restrictions was "excellent" and explained that his main restriction

⁴ In a June 15, 2011 report, Dr. Michael O. Sauter, an attending Board-certified internist and neurologist, noted subjective sensory differences in the C5 distribution on the right. He recommended an electromyography study to rule out brachial plexopathy.

⁵ In March 2011, the employing establishment offered appellant a limited-duty position, which OWCP found to be suitable work. Counsel contended that the position was not within his physical limitations.

would be the number of pounds lifted and no overhead lifting. He completed a work-capacity evaluation (Form OWCP-5c) finding that appellant could return to full-time light duty with lifting, pushing and pulling up to 25 pounds occasionally and no overhead reaching.

On February 1, 2012 the employing establishment offered appellant a limited-duty position as a transportation security officer. Appellant would work as an exit lane monitor for up to two hours each shift, alternating sitting, standing and walking and using a handheld radio with his left hand only. He would also work as a ticket document checker for up to two hours a shift, involving repetitive grasping with both hands. Appellant would also be responsible for clerical duties up to eight hours a shift, including creating e-mail correspondence, photocopying documents and using an industrial scanner. The physical duties required intermittent lifting, pushing and pulling up to 10 pounds with the right hand, intermittent reaching, repetitive motion and operating a vehicle.

In a February 7, 2012 letter, counsel contended that the offered position was not within Dr. Illman's restrictions as it required pushing, pulling and lifting with the right arm for up to eight hours a day.

By letter dated February 13, 2012, OWCP advised appellant that the offered position was suitable work within the limitations provided by Dr. Illman. It further advised him of the penalty provision under section 8106(c) of FECA for refusing suitable work. OWCP afforded appellant 30 days to either accept the offered position or provide valid reasons for his refusal.

In a February 2, 2012 response, imaged into the case record on February 13, 2012, appellant stated that he rejected the limited-duty assignment as he was "medically unable to accept."

In a March 14, 2012 letter, OWCP advised appellant that it had considered his reasons for refusal and found them unacceptable. It afforded him 15 days in which to accept the position or his wage-loss compensation benefits would be terminated. OWCP noted that no further reasons for refusal would be considered. Appellant did not accept the position or submit additional evidence prior to April 6, 2012.

By decision dated April 6, 2012, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement effective April 8, 2012 under 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work. It found that Dr. Penna did not provide objective findings substantiating his opinion that appellant remained totally disabled for work. Therefore, his opinion was insufficient to outweigh that of Dr. Illman as impartial medical examiner.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment

and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁶ In this case, it terminated appellant's compensation under section 8106(c)(2) of FECA, which 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."⁷

OWCP regulations provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee, include the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work.⁸ 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.⁹

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.¹⁰ 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.¹¹ 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.¹²

ANALYSIS

OWCP accepted that appellant sustained a disorder of the tendons and bursae of the right shoulder on June 24, 2008, with surgical repair on October 31, 2008, closed manipulation on June 19, 2009 and arthroscopic lysis of adhesions on February 23, 2010. Dr. Penna, an attending Board-certified orthopedic surgeon, found appellant totally disabled for work through October 2010. Dr. Green a Board-certified orthopedic surgeon and second opinion physician, submitted a February 4, 2011 report finding appellant able to perform full-time sedentary duty

⁶ See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824(1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997) (the claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job; if the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

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

⁸ *Rebecca L. Eckert*, 54 ECAB 183 (2002); see 20 C.F.R. § 10.500(b).

⁹ *Kathy E. Murray*, 55 ECAB 288 (2004).

¹⁰ *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

¹¹ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹² *Id.* at § 10.516.

with a one-pound lifting restriction on the right arm. OWCP found a conflict of opinion between Dr. Penna and Dr. Green and selected Dr. Illman, a Board-certified orthopedic surgeon, as impartial medical examiner. On January 11, 2012 Dr. Illman found appellant able to perform full-time work with occasional lifting, pulling and pushing up to 25 pounds with the right arm and no overhead reaching.

On February 1, 2012 the employing establishment offered appellant a limited-duty position as a transportation security officer, requiring repetitive grasping with the right hand for up to two hours a day, clerical duties including keyboarding up to eight hours a day, using an industrial scanner, intermittent reaching, intermittent lifting, pushing and pulling up to 10 pounds with the right hand and operating a vehicle. OWCP found the position to be suitable work. Appellant declined the position, contending that he was medically unable to perform the required duties. OWCP terminated his wage-loss compensation benefits and schedule award eligibility effective April 8, 2012 under section 8106(c) of FECA on the grounds that he had refused an offer of suitable work.

The Board finds that the offered limited-duty transportation security officer position was within appellant's physical limitation as set forth by Dr. Illman on January 11, 2012.¹³ There is no indication in the job offer as written that any of the described clerical or security duties exceeded Dr. Illman's restrictions. The Board further finds that the February 1, 2012 job offer was procedurally correct, as it was made in writing, provided a detailed description of the assigned duties and their physical requirements, and instructed appellant when to report for work.¹⁴ The Board therefore finds that OWCP met its burden to establish that the position was suitable work.¹⁵

On appeal, counsel asserts that OWCP found appellant permanently and totally disabled on March 1, 2011, then engaged in "doctor shopping" to find any physician who would release appellant to work. The Board notes, however, that there is no indication of record that any of OWCP's medical referrals were improper and that OWCP has the discretion to have a claimant submit to an examination by a physician designated by OWCP as frequently and at the times and places as may be reasonably required.¹⁶

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective April 8, 2012 on the grounds that he refused an offer of suitable work.

¹³ *Richard P. Cortes*, 56 ECAB 2000 (2004).

¹⁴ *See* 20 C.F.R. § 10.507.

¹⁵ *Marilou Carmichael*, 56 ECAB 451 (2005).

¹⁶ *William B. Webb*, 56 ECAB 156 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 6, 2012 is affirmed.

Issued: March 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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