

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

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C.L., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, Green Bay, WI, Employer )

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**Docket No. 12-1610  
Issued: May 9, 2013**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On July 23, 2012 appellant, through counsel, timely appealed the July 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly terminated appellant's compensation benefits effective April 18, 2011 for refusing to accept suitable work.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> The record on appeal contains evidence received after OWCP issued its July 2, 2012 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2011).

## **FACTUAL HISTORY**

Appellant, a 47-year-old transportation security officer, has an accepted claim for left shoulder sprain and joint pain which arose on December 29, 2006. He attributed his left shoulder injury to lifting bags. On February 7, 2007 appellant underwent OWCP-approved arthroscopic surgery to repair a torn left rotator cuff. Appellant received wage-loss compensation and returned to work in a full-time, limited-duty capacity on April 16, 2007. Within six months, his surgeon released him to resume his regular duties without limitation. OWCP subsequently granted a schedule award for six percent permanent impairment of the left upper extremity, which the Board affirmed.<sup>3</sup>

In April 2008, appellant developed symptoms in his right shoulder. He was diagnosed with tendinitis and right rotator cuff tear and placed on work restrictions with respect to the use of his right upper extremity. Appellant filed a claim alleging that his right shoulder condition was a consequence of the previously accepted left shoulder injury.

Effective October 1, 2008, the employing establishment discharged appellant because of his inability to perform the essential elements of his job as a transportation security officer. The October 1, 2008 nondisciplinary removal action noted, *inter alia*, that the employing establishment was unable to continue accommodating appellant “indefinitely in a light[-]duty status with lifting restrictions of 50 pounds.”<sup>4</sup> The employing establishment further indicated it was “unable to provide any position that [would] accommodate [appellant’s] restrictions permanently.”

On November 13, 2008, OWCP advised appellant that it had accepted the conditions of right shoulder tendinitis and right rotator cuff tear as consequential injuries. In light of appellant’s October 1, 2008 removal, OWCP paid wage-loss compensation and placed him on the periodic compensation rolls. On February 11, 2009 appellant underwent an OWCP-authorized right shoulder arthroscopic procedure.<sup>5</sup>

On January 18, 2011 the employing establishment offered appellant a limited-duty assignment as a modified, dual function transportation security officer. The job offer was patterned after the December 20, 2010 permanent restrictions imposed by Dr. Stephen E. Barron, a Board-certified orthopedic surgeon and impartial medical examiner (IME).<sup>6</sup> Dr. Barron imposed a 50-pound lifting restriction with respect to appellant’s right upper extremity. He also precluded right-side above shoulder repetitive work.

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<sup>3</sup> Docket No. 09-1287 (issued December 30, 2009).

<sup>4</sup> As part of his regular duties, appellant was expected to lift baggage weighing up to 70 pounds, unassisted.

<sup>5</sup> Dr. Thomas A. Sullivan, a Board-certified orthopedic surgeon, performed the latest surgery. He also performed appellant’s February 7, 2007 left shoulder arthroscopy.

<sup>6</sup> A conflict arose between appellant’s surgeon, Dr. Sullivan, and Dr. Kenneth H. Yuska, an OWCP referral physician, who examined appellant on September 13, 2010, as to appellant’s capacity to work. Consequently, OWCP selected Dr. Barron to resolve the conflict.

Appellant declined the offer on the advice of his surgeon. At the time, he was undergoing further evaluation for a possible diagnosis of complex regional pain syndrome (CRPS).

OWCP obtained an April 13, 2011 supplemental report from the IME, who reviewed additional medical evidence as well as the January 18, 2011 job offer and found appellant capable of performing the assigned duties. The IME also found no evidence of CRPS based on his December 20, 2010 examination. On April 14, 2011 the employing establishment confirmed that appellant had not yet returned to work and that the January 18, 2011 limited-duty job offer remained available.

OWCP found the January 18, 2011 limited-duty job offer suitable and apprised appellant of his rights and responsibilities under 5 U.S.C. § 8106(c). After issuing 30-day and 15-day notices, OWCP terminated appellant's compensation benefits effective April 18, 2011.

Appellant requested a hearing and by decision dated October 25, 2011, the Branch of Hearings and Review set aside OWCP's April 18, 2011 decision terminating compensation. Having noted it was OWCP's burden to justify termination of benefits, the hearing representative set aside the April 18, 2011 decision because it was "unclear whether the January 18, 2011 job offer [was] temporary or permanent, or whether there [was] a specified time period when [the employing establishment] could provide work accommodations." The hearing representative specifically instructed OWCP to request a written statement from the employing establishment regarding whether the January 18, 2011 job offer was permanent.

In a November 9, 2011 letter to the claims examiner, the employing establishment represented that the January 18, 2011 offer was a "permanent job assignment."

By decision dated January 4, 2012, OWCP effectively reinstated its April 18, 2011 decision terminating benefits. It found that the employing establishment's November 9, 2011 statement provided "further confirmation that their job offer ... was and is a suitable one." OWCP also indicated that because the November 9, 2011 correspondence "was provided ... solely to confirm the suitability of the [January 18, 2011] job offer, the basis of [the April 18, 2011] decision [remained] intact." Additionally, OWCP stated it had "no obligation to further develop ... or allow [appellant] further opportunity to submit" information in support of his refusal of the offered position. Accordingly, OWCP terminated compensation effective April 25, 2011.<sup>7</sup>

In a decision dated July 2, 2012, the Branch of Hearings & Review affirmed OWCP's January 4, 2012 decision.

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<sup>7</sup> The April 25, 2011 effective date is likely a typographical error given that OWCP initially terminated benefits effective April 18, 2011.

## LEGAL PRECEDENT

A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.<sup>8</sup> It is the employee's burden to show that this refusal or failure to work was reasonable or justified.<sup>9</sup> Whether an employee has the ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.<sup>10</sup> In evaluating the suitability of a particular position, OWCP must consider preexisting and subsequently acquired medical conditions.<sup>11</sup> If medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently-acquired condition is not work related.<sup>12</sup>

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; and (5) the date by which a response to the job offer is required.<sup>13</sup> The employing establishment should also provide pay rate information for the offered job.<sup>14</sup> A temporary job will be considered unsuitable "unless the claimant was a temporary employee when injured...."<sup>15</sup>

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford him 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.<sup>16</sup> If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that he has 15 days within which to accept the offered work without penalty.<sup>17</sup> After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to

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<sup>8</sup> 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517.

<sup>9</sup> 20 C.F.R. § 10.517.

<sup>10</sup> *Gayle Harris*, 52 ECAB 319, 321 (2001).

<sup>11</sup> *Id.*; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.4b(4) (July 1997).

<sup>13</sup> *Id.* at Chapter 2.814.4a.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at Chapter 2.814.4b(3).

<sup>16</sup> 20 C.F.R. § 10.516.

<sup>17</sup> *Id.* The 15-day notification need not explain why OWCP found the employee's reasons for refusal unacceptable. *Id.*

further wage-loss compensation and schedule award benefits.<sup>18</sup> However, the employee remains entitled to medical benefits.<sup>19</sup>

### ANALYSIS

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.<sup>20</sup> This includes cases where OWCP terminates compensation under 5 U.S.C. § 8106(c) for refusal of suitable work.<sup>21</sup> Section 8106(c) is a penalty provision and shall be narrowly construed.<sup>22</sup>

OWCP initially terminated compensation benefits by decision dated April 18, 2011. However, the Branch of Hearings & Review set aside the decision and remanded the case to OWCP. The hearing representative set aside OWCP's April 18, 2011 decision because it was unclear whether the January 18, 2011 limited-duty assignment was a permanent job offer, and therefore, suitable. The job offer did not specifically indicate that the position was permanent and the "RELDA" form used by the employing establishment suggested otherwise.<sup>23</sup> The form included an acknowledgement that appellant was required "to provide continuing medical documentation to substantiate continued limited duty...." Notwithstanding the fact that the IME identified "permanent" work restrictions, the duration of the January 18, 2011 job offer appeared to be contingent on appellant providing additional medical evidence substantiating his need for work restrictions.

The permanency of the January 18, 2011 position is called into question by the employing establishment's October 1, 2008 removal action. The employing establishment previously released appellant because it either could not or would not "indefinitely" and "permanently" accommodate his right upper extremity limitations. The restrictions in place at the time were essentially the same as the restrictions the IME imposed in December 2010. Because the record was unclear regarding the suitability of the January 18, 2011 job offer, OWCP had not met its burden when it terminated benefits effective April 18, 2011. Rather than setting aside the April 18, 2011 decision, the hearing representative should have reversed the termination of benefits and reinstated appellant's compensation retroactive to April 18, 2011.

On remand, the employing establishment indicated that the January 18, 2011 offer was for a permanent job assignment. However, it made no attempt to reconcile the October 1, 2008 removal action with its latest statement regarding the permanency of the January 18, 2011 limited-duty job offer. OWCP accepted the employer's November 9, 2011 statement without

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<sup>18</sup> 20 C.F.R. § 10.517(b).

<sup>19</sup> *Id.*

<sup>20</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow Jr.*, 44 ECAB 157 (1992).

<sup>21</sup> *Y.A.*, 59 ECAB 701, 706 (2008); *Henry W. Sheperd III*, 48 ECAB 382, 384 (1997); *Shirley B. Livingston*, 42 ECAB 855, 860 (1991).

<sup>22</sup> *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

<sup>23</sup> RELDA: Recovering Employee's Limited[-]Duty Assignment.

question. However, it was not free to reinstate its April 18, 2011 decision once it received the employing establishment's November 9, 2011 statement.

Contrary to OWCP's finding, the employing establishment's November 9, 2011 statement was not "further confirmation that their job offer ... was and is a suitable one." The pre-April 18, 2011 record did not support a finding of suitability. OWCP cannot retroactively establish suitability based on evidence that was not part of the record at the time it terminated benefits.<sup>24</sup> Therefore, OWCP could not rely on its previous 30-day and 15-day notices. Accordingly, the Board finds that appellant was entitled to a new suitability determination and an opportunity to accept the position or provide reasons for declining the offer.

The Board further notes that OWCP erroneously deferred to the IME's opinion regarding the diagnosis of CRPS. When OWCP initially referred the case to the IME, the question of whether appellant had a pain disorder was not at issue. This was not part of the medical conflict the IME was asked to resolve. Therefore, the IME's supplemental finding with regard to the diagnosis of CRPS is not entitled to determinative weight. Moreover, OWCP erroneously focused on whether appellant's pain disorder was causally related to the accepted employment injury. If medical evidence documents a subsequently acquired condition which disables the claimant from the offered position, the job will be considered unsuitable even if the subsequently-acquired condition is not work related.<sup>25</sup>

### CONCLUSION

The Board finds that OWCP improperly terminated appellant's entitlement to compensation benefits effective April 18, 2011. Accordingly, compensation benefits shall be reinstated retroactive to the date of termination.

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<sup>24</sup> *Y.A.*, *supra* note 22 at 709-10.

<sup>25</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.4b(4).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 2, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 9, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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