

arm rotator cuff, bicipital tenosynovitis, right disorder of the bursae and tendinitis of the right shoulder. It paid wage-loss benefits. Under subsidiary file number xxxxxx748, OWCP accepted the conditions of bilateral carpal tunnel syndrome and degenerative arthritis of both thumbs and hands.

By decision dated November 14, 2008, OWCP granted a schedule award for 48 percent impairment of the right arm.² The period of the award ran 49.92 weeks from December 5, 2007 through November 18, 2008. Appellant missed partial days from work as of September 28, 2012 and stopped work completely as of October 13, 2012. OWCP retained her on the periodic compensation rolls as of October 13, 2012. On March 21, 2013 appellant was referred to OWCP's vocational rehabilitation program. She underwent a functional capacity evaluation on May 9, 2013.

In a July 12, 2013 report, Dr. Jay M. Brooker, a Board-certified orthopedic surgeon, reported that the functional capacity evaluation showed that appellant could function at a light category of work, carrying 20 pounds or less intermittently, which was the extent of work he had limited. Appellant's symptoms would remain stable as long as she adhered to her physical restrictions. Dr. Brooker opined that, while the functional capacity evaluation recommended that she have work conditioning, he did not recommend it as it would probably aggravate her condition.

On July 24, 2013 the employing establishment offered appellant a position as a modified sales, service and distribution associate. The duties of the modified assignment included scanning, sorting and writing notices for two hours a day; being a lobby director and assisting customers five hours a day and restocking the lobby one hour a day. The physical requirements included: sitting, standing, walking, kneeling, climbing, bending, stooping, and twisting, lifting, carrying, pushing and pulling 10 to 20 pounds; no reaching or repetitive use of wrists and elbows for eight hours a day.

On August 8, 2013 appellant accepted the July 24, 2013 job offer, but failed to report to work.

In an August 13, 2013 letter, OWCP advised appellant that the job offer was suitable and in accordance with her medical restrictions as provided by Dr. Brooker. It noted that on August 13, 2013 the employing establishment confirmed that the position remained open and available to her. OWCP allowed appellant 30 days to accept the position or provide her reasons for refusal. Appellant was advised that an employee who refuses an offer of suitable work without reasonable cause was not entitled to compensation. She was also advised that the fact that she was participating in an OWCP-sponsored vocational rehabilitation program was not a valid reason for refusing a suitable offer of employment. Appellant did not respond to OWCP's August 13, 2013 letter.

OWCP received additional medical reports from Dr. Brooker. On August 26, 2013 Dr. Brooker noted a follow-up for rotator cuff syndrome and stated that appellant was not yet

² OWCP noted that as it previously paid 32 percent impairment of the right upper extremity, appellant would receive 16 percent impairment under the current claim.

able to return to work. On August 25, 2013 he reported that she had a flare-up of pain. Examination revealed a positive drop arm test and weakness to abduction, positive impingement. An August 29, 2013 work slip indicated that appellant called on August 1, 2013 for an appointment, but could not be scheduled until August 26, 2013 as the doctor was out of town. In the September 13, 2013 report, Dr. Brooker advised that she could return to work in three weeks. In the September 13, 2013 note, he noted that an injection helped appellant's pain and that she was working on her exercises to restore her mobility and strength. Dr. Brooker noted that she had a chronic rotator cuff tear and would always have restrictions in terms of repetition and lifting and usage of the shoulder. He kept appellant off work for another three weeks.

In an October 9, 2013 report, Dr. Brooker opined that appellant could resume light duty as of November 1, 2013. In the October 9, 2013 report, he noted her pain had improved and she was functioning more effectively. Dr. Brooker noted that the examination revealed mildly positive drop arm test, weakness to abduction and adduction. Appellant had negative Speed's and Yergason's test and was intact neurologically and vascularly. She was cleared for light duty in three weeks' time, around the beginning of November.

By decision dated October 31, 2013, OWCP terminated appellant's entitlement to monetary compensation effective October 31, 2013 that she refused suitable work.³ It determined that her reasons for failing to report to the offered position were not justified because the job was suitable based on Dr. Brooker's July 12, 2013 work restrictions. Appellant did not provide sufficient medical evidence or argument as to why she could not perform the duties of the July 24, 2013 suitable job offer.

Appellant returned to work on November 16, 2013 for eight hours a day on a modified distribution assistant assignment.

On November 13, 2013 appellant requested reconsideration of OWCP's October 31, 2013 decision. In a November 13, 2013 statement, she noted that she received a letter indicating her compensation was terminated as of October 31, 2013 due to failure to report for suitable work. Appellant stated that she was under her doctor's care from August 26 to October 31, 2013 and released to return to limited duty on November 1, 2013. She stated that the modified job offered to her had been assigned to another employee due to her inability to work.

In a November 13, 2013 work status note, Dr. Brooker indicated that appellant was completely incapacitated from all job duties from August 26 through October 31, 2013 and was returned to limited duty on November 1, 2013.

In a December 4, 2013 letter, the employing establishment advised that the initial job offer of July 24, 2013 was sent out to appellant, who replied on August 10, 2013 that she was experiencing a bad reaction from her medication and had an appointment with her doctor on August 26, 2013. It noted that the job duties contained in the July 24, 2013 job offer were not

³ The record contains an October 10, 2013 decision terminating appellant's compensation for wage-loss and schedule award benefits effective October 10, 2013 on the basis that she refused suitable work. However, it does not appear that OWCP issued this decision.

given to another employee. Although appellant had signed the job offer, her manager waited over a month to find out why she did not return to work as scheduled.⁴

By decision dated February 10, 2014, OWCP denied modification of its October 31, 2013 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA provides in pertinent part, “A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to compensation.⁵ However, to justify such termination, OWCP must show that the work offered was suitable.⁶ An employee who refuses or neglects to work after suitable work has been offered to [her] has the burden of showing that such refusal to work was justified.⁷”

When OWCP informs a claimant that it has determined that a given offered position is suitable and invites him or her to write and give reasons for not accepting, OWCP acknowledges that its determination is not yet final and that a reasonable explanation may support the claimant’s refusal of the position and result in the continuation of his or her compensation for disability. Certain explanations will, of course, justify a claimant’s refusal to accept an offer of employment. OWCP’s procedure manual itself lists a number of reasons that are considered acceptable.⁸ If a claimant refuses the employment offered and provides such a reason, OWCP will consider his or her refusal justified and will continue his or her compensation for disability.⁹

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, OWCP must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can OWCP afford the claimant an opportunity to accept or refuse an offer of suitable work. Only after it has finalized its decision on suitability can OWCP notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.¹⁰

⁴ OWCP received medical reports concerning appellant’s bilateral thumb carpometacarpal joint osteoarthritis and left hand surgery were received. Additional reports from Dr. Brooker did not address the issue of refusal of suitable work.

⁵ 5 U.S.C. § 8106(c)(2).

⁶ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁷ 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (June 2013).

⁹ *Id.*

¹⁰ *See Maggie L. Moore*, 42 ECAB 484 (1991); *reaff’d on recon.*, 43 ECAB 818 (1992).

OWCP's regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.¹¹ After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.¹² However, the employee remains entitled to medical benefits.¹³

ANALYSIS

The Board finds that OWCP properly terminated appellant's compensation on the grounds that she refused suitable work under 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant had several right shoulder conditions, bilateral hand and bilateral carpal tunnel syndrome. It terminated her monetary compensation effective October 31, 2013 based on her failure to accept suitable work.

The Board finds that the offered modified sales, service and distribution associate position was within appellant's physical limitations as set forth by Dr. Brooker on July 12, 2013. Dr. Brooker advised that she could work at a light category of work carrying 20 pounds or less intermittently. There is no evidence of record in the job offer as written that any of the described duties exceeded his restrictions. The physical requirements of the job offer included: sitting, standing, walking, kneeling, climbing, bending, stooping and twisting, lifting, carrying, pushing and pulling 10 to 20 pounds; no reaching or repetitive use of wrists and elbows for 8 hours a day. There is also no dispute that appellant meets the qualifications of the position.

The Board further finds that OWCP complied with its procedural requirements in advising appellant that the position was found suitable, providing her with the opportunity to accept the position or provide her reasons for refusing the job offer and notifying her of the penalty provision of section 8106(c). The Board notes that appellant never responded to OWCP's August 13, 2013 suitability determination letter requesting that she submit evidence supporting her refusal of the offered employment during the 30-day period specified by the letter. Appellant did not provide OWCP with any response as to why the position was not suitable. At the time of termination, there was no medical evidence to establish that she could not perform the duties of the offered position.

Although additional reports from Dr. Brooker indicated that appellant could not return to work until the end of October 2013 because of a flare-up of pain and difficulty with usage of her shoulder, he failed to support that she could not perform the duties of the offered position. The

¹¹ 20 C.F.R. § 10.516.

¹² *Id.* at § 10.517(b).

¹³ See *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, *supra* note 10; *S.B.*, Docket No. 14-441 (issued June 24, 2014).

Board finds that OWCP properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Appellant subsequently indicated that she was under physician's care from August 26 to October 31, 2013 and released to light duty on November 1, 2013. While Dr. Brooker opined in a November 13, 2013 work status note that appellant was incapacitated from all job duties from August 26 through October 31, 2013 and was returned to limited duty on November 1, 2013, he provided insufficient medical rationale as to why she was incapacitated for that period or how her flare-up of pain and difficulty with usage of her shoulder prevented her from performing the light duties of the offered position. Such an explanation is needed to support that appellant was disabled from performing the offered position to reverse the sanction decision. Furthermore, contrary to appellant's assertion, the employing establishment indicated on December 4, 2013 that the job duties contained in the July 24, 2013 job offer were not given to another employee. The Board finds that her arguments are without merit and that she failed to provide an acceptable reason for neglecting to work in the suitable work position. Thus, OWCP properly denied modification of its sanction decision.

On appeal, appellant argues that she did accept the job offer but was unable to start until her doctor released her from care. As discussed, Dr. Brooker provided no medical rationale as to why she was incapacitated from all job duties during that period or how her flare-up of pain and difficulty with usage of her shoulder prevented her from performing the duties of the offered position as of October 31, 2013.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation effective October 31, 2013 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 2, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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