United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 14-1264**
	)	**Issued: March 9, 2015**
U.S. POSTAL SERVICE, NORTH RICHLAND HILLS POST OFFICE, North Richland Hills, TX, Employer	)	

Appearances:
Debra Hauser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2014 appellant, through counsel, filed a timely appeal of a March 12, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective March 19, 2013 because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the March 12, 2014 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal, counsel argues that the offered job was not suitable and, thus, OWCP improperly terminated appellant's compensation benefits.

FACTUAL HISTORY

On January 7, 1999 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that on June 24, 1998 he first became aware of his bilateral thumb condition. OWCP accepted the claim for temporary aggravation of bilateral thumb arthritis.[3] Appellant was placed on the periodic rolls for temporary total disability effective October 21, 2010.

On February 10, 2011 OWCP referred appellant to Dr. Robert E. Holladay, IV, a second opinion Board-certified orthopedic surgeon, to determine appellant's current medical condition and work capability. In a March 15, 2011 report, Dr. Holladay diagnosed bilateral hand and thumb osteoarthritis, performed a physical examination, and reviewed the medical evidence, statement of accepted facts, and list of questions. A physical examinatoin revealed intact bilateral upper extremity and hand sensation, evidence of osteoarthritic changes in both hands, restricted right thumb range of motion and no evidence of either hand atrophy. Dr. Holladay also reported that appellant was able to make a full fist bilaterally, had full extension of digits in right and left hands, and had some restricted right thumb range of motion. He stated that appellant was capable of working an eight-hour day with restrictions of limited grasping and carrying mail with both hands, up to 10 pounds of lifting, and no climbing.

On April 7, 2011 Dr. Luiz C. Toledo, an attending Board-certified orthopedic surgeon, reviewed and agreed with Dr. Holladay's opinion that appellant could work an eight-hour day with restrictions.

On February 1, 2012 Dr. Holladay responded to OWCP's request for clarification on appellant's work restriction regarding grasping and carrying mail. He clarified that appellant was restricted to eight hours of pushing, pulling, and lifting up to 10 pounds and eight hours of limited repetitive wrist and elbow movements.

In a February 12, 2012 work capacity evaluation form, Dr. Toledo indicated that appellant was capable of working an eight-hour day with restrictions of no lifting more than 10 pounds.

On March 29, 2012 Dr. Toledo completed an updated work capacity evaluation form in which he provided additional work restrictions for appellant. The updated restrictions included no grasping, fine manipulation, pushing, pulling, or lifting.

On December 12, 2012 OWCP referred appellant to Dr. Bill Alexander, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Toledo, appellant's attending physician, and Dr. Holladay, a second opinion physician, on the issue of appellant's work restrictions.

[3] By decision dated October 26, 2007, OWCP granted appellant a schedule award for an 11 percent permanent impairment of the right upper extremity.

In a January 3, 2013 report, Dr. Alexander, based upon a review of the medical evidence, statement of accepted facts, and physical examination, diagnosed bilateral thumb arthritis. He noted the history of appellant's injury and that he underwent right thumb carpometacarpal joint arthroplasty in February 2005. A physical examination revealed excellent bilateral hand and thumb range of motion and mild bilateral arthritic spur formation changes in the distal interphalangeal joints (DIP). Dr. Alexander stated that he agreed with Dr. Holladay's work restrictions. In support of this conclusion, he stated that appellant's pain complaints did not correlate with the objective findings and were very subjective. Dr. Alexander also found no impairment with his ability to perform fine manipulation or grasping. He reviewed the offered modified carrier position and opined that appellant was capable of performing the duties of the position. Dr. Alexander indicated that his "restrictions would necessarily be associated with findings on functional capacity evaluation (FCE)." In an attached work capacity evaluation form, he provided permanent work restrictions which included one to two hours of operating a motor vehicle at work; one to two hours operating a motor vehicle to and from work; up to four hours of pushing/pulling; and up to two hours of lifting no more than 10 pounds. Dr. Alexander indicated that appellant was capable of bilateral hand manipulation by minimizing frequent use of his thumbs and he was capable of typing and using the telephone by frequent use of fingertips only.

On January 7, 2013 an FCE was performed by a licensed physical therapist to determine appellant's work capability and work restrictions. Based on the findings from the test, appellant's work restrictions were determined to be two hours of sitting, walking, or standing for up to six to eight hours per day; up to 10 pounds of occasional lifting; occasional pushing/pulling; and 0 pounds frequent lifting. The test indicated that appellant demonstrated average gross manipulation and poor fine motor manipulation when using both hands. It noted that she was capable of frequent bilateral hand manipulation by minimizing thumb use for pinching and using the middle and index fingers for pinching and that accuracy is lost when "manipulating very small objects."

On March 20, 2013 appellant accepted from the employing establishment a limited-duty job offer as a full-time regular city carrier. The duties of the position included one to two hours of casing on routes; four to six hours of carry, park, and loop and one to two hours of carry curbside deliveries. Restrictions of the position were listed as up to eight hours of simple grasping/fine manipulation; up to eight hours of walking/standing; up to two hours of lifting no more than 10 pounds; and up to four hours per day of pushing/pulling. Appellant started work on March 27, 2013 and stopped on March 29, 2013.

On April 1, 2013 OWCP determined that the March 20, 2013 job offer was not suitable as it exceeded appellant's work restrictions and that clarification would be sought from Dr. Alexander with respect to appellant's job duties and work restrictions.

On April 2, 2013 the employing establishment proposed a modified city carrier position. The duties of the position included 5.50 hours of delivering mail and 2.50 hours of lobby assistance. Physical restrictions included up to 5.33 hours a day of simple grasping/fine manipulation; up to 8 hours of standing and walking; up to 2 hours of lifting up to 10 pounds and up to 4 hours of pulling/pushing.

In an April 4, 2013 addendum, Dr. Alexander responded to OWCP's request for clarification regarding appellant's physical work restriction and job duties. He indicated that appellant could use both thumbs up to 5.50 hours out of an 8-hour workday. Dr. Alexander reviewed the April 2, 2013 modified city carrier job offer and concluded that appellant was capable of performing all the duties of the offered position.

On May 10, 2013 the employing establishment offered appellant the position of modified city carrier at the Seminary Hill Station. On May 13, 2013 appellant refused the offered position because he claimed that the park and loop delivery of mail required lifting of more than 10 pounds.

In a letter dated May 22, 2013, OWCP advised appellant of its determination that the modified city carrier position offered by the employing establishment on May 10, 2013 was suitable. The duties of the position had been reviewed and approved by Dr. Alexander. The employing establishment confirmed that the position remained available to appellant. OWCP instructed him that he must, within 30 days, either accept the position or provide a written explanation as to why he did not accept the position or he could lose his right to compensation under 5 U.S.C. § 8106(c) of FECA.

In a May 22, 2013 report, Dr. Deepak V. Chavda, a treating orthopedic surgeon,[4] diagnosed bilateral hand and wrist osteoarthritis; bilateral carpal tunnel syndrome more on the left than the right, bilateral de Quervain's syndrome and left side thenar atrophy. A physical examination of the left and right hands and wrists "shows well[-]healed scar over the carpometacarpal (CMC) joint area extending towards the wrist area," thenar atropy; normal wrist and digits range of motion; and positive Finkelstein's, Tinel's, and Phalen's tests. The right hand and wrist physical also showed grip and pinch weakness. Dr. Chavda's review of x-ray interpretations of both hands showed major CMC joint arthropathy and mild intercarpal (IP) and CMC joint arthropathy. He provided recommendations, which included bilateral wrist splints, a magnetic resonance imaging (MRI) scan of both hands and wrists, and limited or no use of both hands at work.

On May 28, 2013 OWCP received a May 21, 2013 duty status report from Dr. Chavda, indicating that appellant had limited use of both his thumbs and that appellant was off work pending an MRI scan.

In June 5 and 13, 2013 reports, Dr. Chavda reviewed MRI scans of both appellant's hands and wrists. He indicated that appellant was capable of working with limited use of both hands. Based on a review of the MRI scan, Dr. Chavda diagnosed bilateral wrist and hand osteoarthritis; clinical bilateral carpal tunnel syndrome; bilateral de Quervain's syndrome; left side Thenar atropy; severe left first CMC osteoarthrits; left IP joint effusion; left subchrondral cyst in the lateral lunate and distal scaphoid; right subchondrol edema in the lateral lunate; and right separated bone fragment seen anteromedially. He indicated that appellant was capable of working with limited use of his hands.

[4] The ABMS Board Certification Credentials Profile indicates a Board certification in orthopedic surgery with the status of "Not certified."

In June 5 and 13, 2013 duty status reports, Dr. Chavda indicated that appellant was disabled from work and noted work restrictions of no driving a motor vehicle at work and limited to no use of both his wrists/hands.

In a July 3, 2013 letter, OWCP found that the reasons given by appellant for refusing the offered position were not valid. It gave him 15 additional days to accept the position or to make arrangements to report to this position. OWCP noted that if appellant did not accept the position within 15 days of the date of the letter, his right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106 of FECA. It would not consider any further reasons for refusal of the offered position.

Subsequent to OWCP's July 3, 2013 letter, it received a duty status report and additional reports dated June 27 and July 18, 2013 from Dr. Chavda reiterating prior findings and diagnoses Dr. Chava again stated that appellant was capable of working light duty with limited use of both hands. OWCP also received duty status reports dated June 28 and July 17, 2013 from Dr. Chavda restricting appellant's use of his hands and no driving a motor vehicle.

On August 22, 2013 OWCP terminated appellant's wage-loss compensation benefits effective August 16, 2013 for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

Following the August 22, 2013 OWCP decision, additional reports from Dr. Chavda were received. The July 18, August 29, and October 11, 2013 reports reiterated physical findings and diagnoses from Dr. Chavda's prior reports. He reitierated work restrictions of limited use of appellant's hands and wrists. A September 17, 2013 duty status report indicated that appellant was restricted from driving a motor vehicle as well as limited use of both hands and wrists.

On September 17, 2013 appellant's counsel requested a review of the written record by an OWCP hearing representative. She contended that Dr. Alexander's opinion was inconsistent, lacked medical reasoning and she contended that Dr. Alexander's work restrictions were inconsistent with the restrictions found in the FCE. Lastly, appellant contended that the offered position was outside appellant's work restrictions on driving to and from work.

In addition, counsel provided evidence of a June 14, 2103 agreed order whereby Dr. Alexander was disciplined by the Texas Medical Board. The order constituted a public reprimand of Dr. Alexander and, among other things, restricted Dr. Alexander to the practice of administrative medicine and included a prohibition of engaging "in the clinical practice of medicine in any capacity that involves direct or indirect patient contact." The basis for the disciplinary action was Dr. Alexander's arrest for use of and transporting marijuana for drug traffickers. This order required that such prohibition would take effect on the date of the agreed order and any violation of this order would be subject to further disciplinary action or prosecution for practicing without a license in Texas. Counsel argued that this evidence should disqualify Dr. Alexander from serving as the impartial medical specialist.

By decision dated March 12, 2014, the hearing represenative affirmed the August 22, 2013 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him or her is not entitled to compensation.[5] Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.[6] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[7] To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[8] According to OWCP's procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.[9] Section 10.516 of the Code of Federal Regulations[10] provide that an employee who refuses or neglects to work after suitable work has been offered or secured 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.[11]

Section 8123(a) of FECA[12] provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[13] The implementing regulations provide in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[14] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if

[5] 5 U.S.C. § 8106(c)(2).

[6] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[7] *H. Adrian Osborne*, 48 ECAB 556 (1997).

[8] *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

[10] 20 C.F.R. § 10.516.

[11] *See Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[12] 5 U.S.C. § 8123(a).

[13] *Id.*; *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Geraldine Foster*, 54 ECAB 435 (2003).

[14] 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[15]

OWCP's procedures provide:

> "A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. OWCP is responsible for evaluating the explanation offered. Examples of circumstances under which the claimant may participate in the selection include (but are not limited to)--
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> (a) Documented bias by the selected physician;
>
> (b) Documented unprofessional conduct by the selected physician;
>
> "If the reason is considered acceptable, OWCP will prepare a list of three specialists, including a candidate from a minority group if indicated and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested."[16]

ANALYSIS

OWCP accepted the claim for temporary aggravation of bilateral thumb arthritis. Appellant stopped work and received compensation on the periodic rolls. By decision dated August 22, 2013, OWCP terminated his compensation for wage-loss benefits on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

OWCP found that a conflict in medical opinion between appellant's treating physician, Dr. Toledo, and the second opinion examiner, Dr. Holladay, on appellant's physical restrictions. It properly referred appellant to Dr. Alexander for an impartial medical examination to resolve the medical conflict, pursuant to 5 U.S.C. § 8123(a).

The Board finds that, in the January 3, 2013 report, Dr. Alexander provided thorough physical examination findings, advising that appellant had excellent bilateral and thumb range or motion and mild bilateral arthritic spur formation changes in the distal interphalangeal joints. Dr. Alexander agreed with the restrictions provided by Dr. Holladay who advised that he could work an eight-hour day with restrictions that included limited grasping and carrying mail with both hands, no lifting more than 10 pounds, and no climbing. He also found no impairment with appellant's ability to perform fine manipulation or grasping. In an April 4, 2013 addendum, Dr. Alexander indicated that appellant could use both thumbs up to 5.50 hours out of an 8-hour

[15] *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

[16] *Supra* note 9, Part 3 -- Medical Examinations, Chapter 3.500.4(b)(4) (March 1994).

workday. He reviewed the April 2, 2013 modified city carrier job offer and concluded that appellant was capable of performing all the duties of the offered position.

The Board finds that Dr. Alexander provided a complete and rationalized opinion based on an accurate factual and medical background. His opinion that appellant could return to full-time light-duty work with restrictions on grasping, using both thumbs, carrying mail, and lifting is accorded special weight due to his status as an impartial medical examiner.[17] Appellant did not submit sufficient medical evidence to establish that he could not return to light-duty work within the restrictions recommended by Dr. Alexander. Although Dr. Chavda submitted reports reiterating that either appellant was disabled until an MRI scan could be performed or that he was capable of working with limited bilateral use of his hands, Dr. Chavda's reports provided no rationale for his opinion. The Board has held that a medical opinion not fortified by medical rationale is of diminished probative value.[18] Furthermore, Dr. Chavda did not address the suitability of the offered position or otherwise explain how appellant's medical conditions prevented him from performing the offered position.[19] The Board finds that Dr. Alexander's medical opinion constitutes the special weight of the medical evidence and establishes that appellant is no longer totally disabled for work due to the effects of the employment-related injuries.

The employing establishment offered appellant a light-duty position as a modified city letter carrier based on the physical limitations of the impartial medical specialist. The physical requirements for the position included: 1 to 5.33 hours per day of simple grasping/fine manipulation; 1 to 8 hours of standing and walking; 1 to 2 hours of lifting up to 10 pounds; and 1 to 4 hours of pulling/pushing. The Board finds that the physical requirements of the offered modified city letter carrier position fall within appellant's work restrictions as defined by Dr. Alexander. The weight of the medical evidence establishes that he was no longer totally disabled from work, but had the physical capacity to perform the duties listed in the May 10, 2013 job offer.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), OWCP advised appellant on May 22, 2013 that it found the job to be suitable and gave him an opportunity to provide reasons for refusing the position within 30 days. After reviewing the medical evidence of record, OWCP advised appellant in a July 3, 2013 letter that the evidence submitted was insufficient to support his refusal to accept the job offer and provided him an additional 15 days to accept the position without penalty.[20] The Board finds that OWCP

[17] *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *R.C.*, 58 ECAB 238 (2006); *Bryan O. Crane*, 56 ECAB 713 (2005); *Sharyn D. Bannick*, 54 ECAB 537 (2003).

[18] *F.T.*, Docket No. 09-919 (issued December 7, 2009); *Elizabeth H. Kramm*, 57 ECAB 117, 124 (2005); *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[19] *See Gayle Harris*, 52 ECAB 319 (2001).

[20] *Supra* note 9 at Chapter 2.814.5(a)(3) (June 2013) (acceptable reasons for refusing to accept suitable employment include medical evidence establishing that a claimant is disabled due to a worsening of an accepted condition).

followed established procedures prior to the termination of compensation pursuant to section 8106(c) of FECA.

On appeal counsel argues that Dr. Alexander's opinion was inconsistent and lacked medical reasoning. She also contended that Dr. Alexander's work restrictions were inconsistent with the restrictions found by FCE. Lastly, counsel argues that the offered position was outside appellant's work restrictions and his restrictions on driving to and from work and that his attempt to work aggravated his condition. For the reasons discussed above, the Board finds appellant's arguments unfounded regarding Dr. Alexander's opinion as it has found it to be well rationalized and the work restrictions appropriate based on the medical evidence.

In addition, counsel proffered evidence of an agreed order issued by the Texas Medical Board on June 14, 2013, which constituted a public reprimand of Dr. Alexander and, among other things, restricted Dr. Alexander to the practice of administrative medicine. This restriction included a prohibition of engaging "in the clinical practice of medicine in any capacity that involves direct or indirect patient contact." This agreed order required that such prohibition would take effect on the date of the agreed order and any violation of this order would be subject to further disciplinary action or prosecution for practicing without a license in Texas. Counsel argued that this evidence should disqualify Dr. Alexander from serving as the impartial medical specialist.

The Board has found that an impartial medical specialist properly selected under OWCP's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise.[21] The Board notes that OWCP has specific procedures for contesting the selection of an impartial medical specialist prior to the examination which counsel failed to invoke.[22]

Although counsel failed to contest the selection of an impartial medical specialist prior to the examination, this would not preclude the Board from evaluating the selection process of the impartial specialist or considering the evidence proffered by counsel as to the documented bias or unprofessional conduct of the physician.[23] While appellant did present evidence of a disciplinary action against Dr. Alexander by the Texas Medical Board, such action was not effective until June 14, 2013. The examination of appellant by Dr. Alexander took place on January 3, 2013 and he submitted a clarification memorandum to OWCP on April 4, 2013. The Board finds that the evidence submitted by counsel fails to establish documented bias or unprofessional conduct sufficient to disqualify Dr. Alexander at the time he served as the impartial medical specialist in this case and finds that OWCP properly relied upon his opinion in finding appellant refused an offer of suitable work.

[21] *See Roger S. Wilcox*, 45 ECAB 265, 275 (1993).

[22] *Supra* note 16. *Cf., J.D.*, Docket No. 12-920 (issued February 15, 2013); *J.S.*, Docket No. 10-2198 (July 26, 2011); *Geraldine Foster*, 54 ECAB 435 (2003).

[23] *See Leonard W. Waggoner*, 37 ECAB 676, 682-83 (1986).

The Board finds that the position offered was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP met its burden of proof to terminate appellant's compensation benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation effective August 16, 2013 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 12, 2014 is affirmed.

Issued: March 9, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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