United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 15-0506**
	)	**Issued: August 12, 2016**
U.S. POSTAL SERVICE, MOBILE VEHICLE REPAIR FACILITY, Peoria, AZ, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Oral Argument January 12, 2016

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 7, 2015 appellant, through counsel, filed a timely appeal of a July 11, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective June 19, 2013 pursuant to 5 U.S.C. § 8106(c)(2).

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 5, 2010 appellant, then a 59-year-old automotive technician, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right shoulder and neck strain as a result of closing an overhead door spring which broke and fell on him. On January 31, 2011 OWCP accepted appellant's claim for sprain of the right shoulder and upper arm as well as sprain of the neck. Appellant received compensation benefits on the periodic rolls as of July 3, 2011.

On July 14, 2011 appellant underwent authorized surgical procedures of arthroscopic debridement of the glenohumeral joint, open distal clavicle excision with anterior acromioplasty, an open rotator cuff repair, and deltoid repair. Dr. Neil E. Motzkin, a Board certified orthopedic surgeon, performed the procedures and noted diagnoses of right shoulder pain secondary to acromioclavicular joint arthritis, a rotator cuff tear, intra-articular synovitis, chondromalacia, and a superior labrum anterior and posterior lesion.

In a second opinion report dated October 12, 2011, Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon, examined appellant and diagnosed degenerative arthritis of the cervical spine, neck pain, and a postoperative right shoulder. He reviewed appellant's history of present illness and appellant's prior medical records. Dr. Lampert found that there were objective findings related to these conditions, noting that appellant had undergone shoulder surgery on July 14, 2011. In response to OWCP's inquiry as to whether appellant required work restrictions, Dr. Lampert noted that appellant needed to complete physical rehabilitation before it could be determined what type of position was suitable.

On October 21, 2011 Dr. Ramoun D. Jones, an anesthesiologist, prescribed Oxycodone at a dosage of one to two tablets every six hours as needed for pain, and noted restrictions of no driving and no use of hazardous machinery.[3] He explained that this medication could cause drowsiness and therefore he should not use it at work.

By letter dated December 8, 2011, OWCP advised appellant that it proposed to terminate his compensation for wage-loss and medical benefits for the condition of neck sprain. It noted that this decision would not affect benefits for the accepted conditions of the right shoulder. OWCP finalized the termination of appellant's compensation for neck sprain effective March 23, 2012. On September 17, 2012 a hearing representative affirmed OWCP's termination of benefits for neck sprain, finding that OWCP met its burden of proof.

By letter dated August 24, 2012, appellant was notified of a second opinion examination that had been scheduled on September 11, 2012.

On September 11, 2012 Dr. John A. Soscia, a Board-certified orthopedic surgeon, reviewed appellant's medical history and provided results on examination. He noted that appellant had undergone arthroscopic surgery of the shoulder on July 14, 2011. Dr. Soscia noted that appellant had no objective findings to support the condition of sprain of the shoulder, and that the traction injury to his arm, due to the falling door, seemed to have resolved within a few days. He noted that appellant had some weakness in external rotation of his right shoulder,

[3] Dr. Jones' certification in a medical specialty could not be confirmed with the American Board of Medical Specialties or the American Osteopathic Association.

which could be a finding consistent with shoulder sprain, but could also be a post-surgical change. Dr. Soscia concluded that appellant had reached maximum medical improvement (MMI). He indicated that none of the treatments appellant had undergone to the present had provided any lasting relief and commented that "[h]is medical regiment may be giving him some relief of symptoms although I am concerned about his increasing use of [O]xycodone. It appears that [appellant] is slowly increasing his usage over time. I don't feel that any treatment will increase the workers physical function." Dr. Soscia concluded that appellant would not be able to return to his position as an automotive technician without restrictions and suggested that a functional capacity evaluation (FCE) be performed.

By letter dated October 4, 2012, Dr. Soscia examined the results of the FCE. He noted that appellant exhibited self-limiting behavior on 67 percent of tasks, but reported that without additional data supporting a higher functional level, appellant should be restricted to sedentary work for an eight-hour day.

In a work capacity evaluation dated October 9, 2012, Dr. Soscia set forth work restrictions including operating a motor vehicle to/from work no more than one hour per day; sitting no more than six hours; walking no more than four hours; standing no more than two hours; pushing and pulling 10 pounds no more than two hours; lifting 10 pounds no more than three hours; twisting, squatting, kneeling, and climbing no more than one hour per day; no reaching or reaching above the shoulder; and no operating a motor vehicle at work.

By letter dated October 19, 2012, the employing establishment offered appellant a permanent modified position as an automotive mechanic. The duties of the position were described in the offer as receiving and making telephone calls and performing clerical duties. The physical requirements were described as intermittent lifting up to one hour per day, continuous sitting of up to six hours per day, intermittent standing of up to one hour per day, intermittent walking of up to one hour per day, intermittent simple grasping from four to six hours per day, intermittent fine manipulation from four to six hours per day, and no climbing, kneeling, bending, stooping, twisting, pushing, pulling, or reaching above the shoulder.

On November 1, 2012 appellant returned the modified job offer. He wrote, "On the advice of counsel I neither accept or reject this job offer."

By letter dated November 7, 2012, the employing establishment requested a suitability ruling on the modified job offer, noting that appellant had not accepted the offer.

On February 13, 2013 OWCP advised appellant that it found that job offer from the employing establishment to be a suitable position stating that the position as an Automotive Mechanic Modified is found by OWCP to be suitable to your work capabilities. It determined that the physical requirements of the job included intermittent lifting up to one hour per day, intermittent to continuous sitting up to six hours per day, intermittent standing up to one hour per day, intermittent walking up to one hour per day, intermittent grasping four to six hours per day, intermittent fine manipulation four to six hours per day, and no climbing, kneeling, bending, stooping, twisting, pulling/pushing or reaching above shoulder. OWCP further determined that the work restrictions provided by Dr. Soscia are as follows: sitting 6 hours, walking 4 hours, standing 2 hours, twisting 1 hour, operating a motor vehicle to/from work 1 hour, pushing and pulling up to 10 pounds 1 to 2 hours, lifting 1-3 hours, squatting, kneeling and climbing 1 hour,

15-minute breaks every 3 to 4 hours, no reaching above shoulder with the right arm. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2), and notified that he should accept the position or provide reasons for not doing so within 30 days.

By letter dated February 16, 2013, counsel requested a copy of the job offer from the employing establishment. He acknowledged that job tasks in the offer were reasonable, but that the physical requirements as outlined in OWCP's letter of February 13, 2013 were unreasonable as they did not contain restrictions on the amount of weight appellant would be required to lift or restrictions on the amount of time appellant would be required to engage in nonoverhead reaching.

On March 7, 2013 the employing establishment submitted a letter to clarify the job offer of October 19, 2012. It noted that appellant would not be involved with casing or processing mail. The employing establishment further noted that the offered position would not require him to reach above his right shoulder, or reach with his right arm, as these tasks could be accomplished with the left arm.

On March 11, 2013 OWCP responded to a request for a copy of the case record. It further noted, "As a point of clarification: Though in my letter dated February 13, 2012 I inadvertently omitted the weight restriction on lifting, the lifting requirement is clearly stated on the U.S. Postal Service Job Offer of October 19, 2012 as LIFTING: Intermittent (zero to five hours per day), which is well within the work restrictions provided by Dr. Soscia."

By letter dated April 10, 2013, the employing establishment noted that appellant had still not accepted the job offer, and asked the claims examiner when it could anticipate a final termination order.

On April 18, 2013 OWCP notified appellant that it had found his reasons for not accepting the offered position to be insufficient. It noted that the employing establishment had confirmed that the offered position would not require reaching with his right arm or processing of mail. OWCP afforded appellant 15 days to accept the position.

By letter dated March 15, 2013, appellant's counsel requested that OWCP ask the employing establishment to reoffer the modified position, including the clarifications of March 7, 2013. He further noted that the lifting requirement of up to five hours per day was unreasonable.

By decision dated June 19, 2013, OWCP terminated appellant's compensation for wage loss, effective that same date. It found that he had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

By letter dated June 26, 2013, appellant advised OWCP that his address had changed as of June 20, 2013.

On June 28, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

The hearing was held on November 15, 2013. At the hearing, counsel noted that appellant had a work restriction of driving to and from work no more than one hour per day. He

offered to send MapQuest results demonstrating that the commute from appellant's home to the employing establishment at the time of the job offer was more than 60 minutes per day. Counsel further noted that the job offer contained duties of filing, but appellant was restricted from kneeling, bending, stooping, pushing, or pulling. Counsel stated that he hoped the employing establishment would explain how a person could file in a horizontal or vertical cabinet without kneeling, bending, stooping, twisting, or pulling. Appellant noted at the hearing that the nearest bus stop to his address as of the date of the job offer was 1.42 miles away and required four transfers to arrive at the employing establishment. He explained that his new address was even further from the employing establishment than his address as of the date of the job offer. The hearing representative agreed to keep the record open for 15 days for the submission of additional evidence.

On December 6, 2013 counsel submitted MapQuest driving directions from appellant's home as of the date of the job offer, demonstrating that the offered position was 26.54 miles away, which was estimated to take 34 minutes in one direction. Hence, according to MapQuest, the total time required to commute to and from work daily would be approximately one hour and eight minutes.

By letter dated December 6, 2013, counsel noted that the offered position violated appellant's work restriction of driving to and from work no more than one hour per day. He stated that if appellant accepted the position and arrived at work, he could be terminated the first day for violating his medical restrictions.

On December 13, 2013 the employing establishment responded to appellant's arguments at the oral hearing. It attached driving directions from Google Maps, which demonstrated a commute of 26.7 miles from appellant's home as of the date of the job offer, which was estimated to take about 30 minutes in one direction. Hence, according to Google Maps, the total time required to commute to and from work daily would be one hour.

By decision dated December 20, 2013, the hearing representative affirmed OWCP's June 19, 2013 termination decision. He found that objections to the commuting distance from appellant's prior and current homes and the work site were unfounded, as the travel time between these residences and the work site was less than one hour. The hearing representative noted that Dr. Soscia's one-hour driving restriction meant one hour each way. He found that OWCP properly accorded weight to Dr. Soscia's opinion, as the reports from appellant's treating physicians were not well rationalized and did not opine specifically as to appellant's work capacity. The hearing representative concluded that Dr. Jones had not opined as to appellant's capacity to drive.

On February 11, 2014 appellant requested reconsideration of OWCP's December 20, 2013 decision. With his request, he enclosed a report from Dr. Jones. In a January 21, 2014 report, Dr. Jones noted, "The patient understands my recommendations not to operate a motor vehicle, heavy machinery or make important legal decisions while on [pain medication.]"

On July 11, 2014 OWCP evaluated the evidence submitted on reconsideration and declined to modify its prior decision. It noted that the January 21, 2014 report from Dr. Jones did not specifically discuss why appellant would not be able to perform the permanent modified position, which did not require driving or use of heavy machinery.

LEGAL PRECEDENT

Section 8106(c) of FECA provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[5] The implementing regulations 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 a showing before entitlement to compensation is terminated.[6] 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.[7] In determining what constitutes suitable work for a particular disabled employee, OWCP considers 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 and other relevant factors.[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] OWCP procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[10]

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.[11] 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. 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] The employee, however, remains entitled to medical benefits.

Section 8123(a) of FECA provides in pertinent part: If there is disagreement between the physician making the examination for the United States and the physician of the employee, the

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[4] 5 U.S.C. § 8106(c).

[5] *Joyce M. Doll*, 53 ECAB 790 (2002).

[6] 20 C.F.R. § 10.517(a).

[7] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*., 43 ECAB 818 (1992).

[8] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[11] 20 C.F.R. § 10.516.

[12] *Id*. at § 10.517(b).

Secretary shall appoint a third physician who shall make an examination.[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The issue is whether OWCP properly terminated appellant's compensation benefits for refusal to accept suitable work. The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation for refusal of suitable work.

OWCP terminated appellant's compensation benefits relying upon the work restrictions provided by Dr. Soscia, determining that the modified automobile mechanic position was a suitable offer of employment as it fell within the work restrictions he had set forth. It found that Dr. Soscia was the only physician of record to provide a clear and rationalized medical opinion as to appellant's work capacity and he was therefore afforded the weight of the evidence.

The Board finds that the work restrictions of Dr. Soscia are insufficiently rationalized to be afforded the weight of the evidence, that the physical requirements of the offered position have not been sufficiently explained, and that there exists a conflict in the medical record of evidence as to appellant's work restrictions.

In his medical reports Dr. Soscia noted appellant's ongoing and increasing use of Oxycodone, however he did not provide an opinion as to whether the use of this drug was necessary nor did he explain how its use impacted appellant's ability to work or commute to work. Alternatively, Dr. Jones has consistently noted in his medical reports that appellant should not operate a motor vehicle or heavy machinery or make important legal decisions while on the pain medication. Also, in setting forth restrictions, Dr. Soscia indicates that appellant is capable of operating a motor vehicle to/from work no more than one hour per day, yet he also indicates that appellant is restricted from operating a motor vehicle at work. The vague nature of his driving restrictions is insufficient. Clarification of the driving restriction is especially important as the OWCP hearing representative interpreted Dr. Soscia's one-hour driving restriction to and from work to mean one hour each way, rather than one cumulative hour per day as had been OWCP's prior interpretation.[15] Finally, Dr. Soscia provides no discussion as to whether the restrictions he has set forth in his report of October 9, 2012 are consistent with his opinion that appellant should be restricted to sedentary level work. The Board has found that medical conclusions unsupported by medical rationale are of little probative value.[16] The Board therefore

[13] 5 U.S.C. § 8123(a).

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[15] *See B.S.*, Docket No. 09-1067 (issued February 2, 2010) (An acceptable reason, if supported by medical evidence, for refusing an offer of suitable work is an inability to travel to work. Where OWCP has failed to develop the issue of whether the claimant's physical restrictions render the commute impossible, it has not met its burden of proof in terminating compensation benefits for failure to accept suitable work.)

[16] *A.D.*, 58 ECAB 149 (2006); *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1949).

finds that the work restrictions set forth by Dr. Soscia are of limited probative value, should not be afforded the weight, and therefore are insufficient for OWCP to meet its burden of proof to terminate compensation benefits.

Furthermore, as noted, the physical requirements of the offered position of modified automobile mechanic are found to be insufficiently detailed, thus precluding an accurate determination of whether the offered position is suitable. In noting the clerical duties performed, the description notes that light filing is a specific, required task. However, the offer of employment does not set forth the extent or duration of the physical activities required to perform filing. The description states that no kneeling, bending, stooping, twisting, pushing or pulling are required, but does not explain how filing can be performed without these activities even when asked to provide such an explanation. As OWCP bears the burden of proof to justify termination of benefits, the failure to set forth an accurate and complete job offer precludes a finding in support of termination.

Finally, in its decision dated December 20, 2013, the hearing representative found that OWCP had afforded proper weight to Dr. Soscia's report and work restrictions, as the reports of Dr. Jones were not well rationalized. He found that Dr. Jones had not opined as to appellant's capacity to drive. In its decision upon reconsideration dated July 11, 2014, OWCP again noted that the January 21, 2014 report from Dr. Jones did not specifically discuss why appellant would not be able to perform the permanent modified position, which did not require driving or use of heavy machinery.[17] The Board finds that Dr. Jones specifically restricted appellant from driving while using Oxycodone.

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.[18] The work restrictions offered by Dr. Soscia and Dr. Jones differed, in part, as to whether appellant was able to drive to and from work. In his report on work restrictions dated October 9, 2012, Dr. Soscia noted that appellant was able to drive one hour per day to and from work.[19] Dr. Jones, in a report dated October 21, 2011, recommended restrictions of no driving and no use of hazardous machinery while on Oxycodone. He explained that this medication could cause drowsiness. Dr. Soscia, in a September 11, 2012 report, noted that appellant's prescribed dosage of Oxycodone had increased since that time. On reconsideration, OWCP received a January 21, 2014 note from Dr. Jones stating, "The patient understands my recommendations not to operate a motor vehicle, heavy machinery or make important legal decisions while on [pain medication.]" The Board finds that the reports of Drs. Soscia and Jones are of virtually equal weight and rationale on the issue of appellant's work restrictions regarding driving and therefore OWCP could not meet its burden of proof to justify termination of benefits.

[17] The Board notes that work restrictions are not limited to the specific duties of the modified position, but may also include restrictions regarding ability to travel to and from a work location. *See supra* note 7.

[18] *Supra* note 14.

[19] Contrary to the hearing representative's assertion in the decision of December 20, 2013, Dr. Soscia's work restriction was one hour of driving to and from work each day total -- not one hour in each direction. The work capacity evaluation form asks physicians to report the number of hours total a worker can perform a particular task daily, and as such there is no basis for interpreting the number of hours spent operating a motor vehicle to and from work daily any differently than the number of hours performing any other task with a limitation.

Dr. Jones explained that the medication could cause drowsiness and recommended no driving, whereas Dr. Soscia was inconsistent with his driving restrictions and expressed concern over appellant's increasing dosage of Oxycodone. OWCP failed to afford Dr. Jones' recommended work restrictions the proper probative value when it found that Dr. Soscia's report constituted the weight of medical evidence. Both reports contained virtually equal levels of rationale on the issue of appellant's restrictions for driving to and from work.

Therefore, the Board finds that OWCP did not discharge its burden of proof to justify termination of appellant's compensation under section 8106(c)(2). The Board will reverse OWCP's July 11, 2014 termination decision.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 12, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board