

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

N.D., Appellant)

and)

U.S. POSTAL SERVICE, GENERAL MAIL)
FACILITY, Brooklyn, NY, Employer)

Docket No. 15-0027
Issued: February 4, 2016

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 7, 2014 appellant filed a timely appeal of a May 5, 2014 merit decision and a September 2, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established total disability for the period July 27 to August 9, 2013 causally related to her accepted employment injury; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that the employing establishment did not provide her a job offer, but she was advised of an offer by OWCP. She also argues that the job offer did not comply with the requirements of 20 C.F.R. § 10.516.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 6, 2012 appellant, then a 37-year-old mail processing clerk, filed a traumatic injury claim alleging that on that date she injured her right shoulder and arm when she went to grab mail from the postcon. OWCP accepted the claim for strain of right shoulder, upper arm, and right acromioclavicular. Appellant stopped work on October 6, 2012.

Appellant continued to file claims for wage-loss compensation (Forms CA-7) for periods of disability. OWCP paid her wage-loss compensation benefits from November 21, 2012 through July 26, 2013.

In a January 8, 2013 duty status report (Form CA-17), Dr. Manuel Ceja, a treating physician, released appellant to light-duty work, preferably a desk job, effective January 13, 2013. In a January 18, 2013 attending physician's report (Form CA-20), he indicated that appellant was capable of performing light-duty work with restrictions of limited right arm use, no heavy lifting, and desk work, if available.

On January 21, 2013 appellant was referred for a second opinion evaluation with Dr. Hormozan Aprin, a second opinion Board-certified orthopedic surgeon, to determine whether she continued to have residuals and disability due to her accepted conditions and her work capacity.

In a February 11, 2013 report, Dr. Aprin opined that appellant continued to suffer from residuals of her accepted right shoulder, upper arm, and right acromioclavicular strains. He opined that she was permanently disabled from performing her date-of-injury job, but was capable of performing light-duty work. In an attached work capacity evaluation form (Form OWCP-5c), Dr. Aprin noted that appellant was capable of working an eight-hour day with restrictions. The restrictions included no reaching or reaching above the shoulder; no twisting, bending, or stooping; no operating a motor vehicle at work; 2 to 4 hours of pushing, pulling, and lifting up to 20 pounds; no repetitive wrist or elbow movement; no squatting, kneeling, or climbing; and a 15-minute break every 2 hours.

By letter dated April 16, 2013, OWCP informed the employing establishment that the weight of the medical opinion rested with Dr. Aprin. It provided a copy of his report and requested that the employing establishment offer appellant a job within these restrictions found by him.

On June 20, 2013 the employing establishment provided OWCP a copy of the modified light-duty position of passport call center clerk. The effective/available work date was listed as June 24, 2013. Work hours for the offered position were 9:00 a.m. to 5:50 p.m. with Sunday and Thursday as scheduled days off. The location of the position was at the Brooklyn Processing and Distribution Center. Under duties, the employing establishment stated that the position required up to eight hours of computer use; answering the telephone and giving information regarding passport processing, scheduling appointments, mailing information to customers, and retrieving information from e-mail and voicemail. The position required extensive telephone use and extensive computer monitor viewing. The employing establishment noted that the assignment was within appellant's physical restrictions. It noted that the position was "currently available and is subject to revision based on changes in your physical restrictions and/or the availability of adequate work." Under documentation, the employing establishment noted that appellant was

not to exceed four hours of lifting, pushing, and pulling up to 20 pounds; no operating a motor vehicle at work, reaching above the shoulder, and reaching; and a 15-minute break every 2 hours.

By letter dated June 26, 2013 addressed to appellant, OWCP found that the temporary modified job of passport call center clerk was within the restrictions set by Dr. Aprin, the second opinion physician, and, thus, it was found suitable. The job offer as provided by the employing establishment was fully summarized. It allotted appellant 30 days to provide a written explanation for her reasons in declining the position if she chose not to accept. Further, OWCP advised that if, she failed to submit sufficient evidence in support of her claim, "entitlement to compensation for disability for the period claimed may be denied."

Appellant filed a claim for wage-loss compensation (Form CA-7) for the periods July 27 to August 9, 2013.

By decision dated August 16, 2013, OWCP denied appellant's claim for total disability for the period July 27 to August 9, 2013. It explained that the evidence established that she had medical restrictions in place, that a light-duty work assignment within those restrictions was available for her, and that she was previously notified in writing that such light duty was available.

Appellant requested a review of the written record by an OWCP hearing representative on August 28, 2013.

On September 11, 2013 the employing establishment offered appellant temporary light-duty work as a modified manual clerk for 4 hours per day or 20 hours per week. Appellant accepted the offer on that date.

By decision dated February 20, 2014, an OWCP hearing representative affirmed the August 16, 2013 decision.

A February 10, 2014 attending physician's report (Form CA-20) diagnosed right shoulder sprain/strain and labrum tear.² Physical findings included decreased range of motion, tenderness, and numbness. The form noted that appellant had received treatment on October 7, 2012 and February 6 and December 4, 2013.

A February 10, 2014 duty status report from JFK Advanced Medical, P.C. revealed a diagnosis of a right shoulder sprain/strain and indicated that appellant was capable of part-time work up to six hours per day with restrictions.³ Restrictions included no overhead lifting, no lifting more than 10 pounds, no sitting or standing more than two hours at a time. It was also noted that appellant required a chair with lumbar support.

In a February 10, 2014 progress note, Dr. Ceja provided a history of the employment injury and physical findings. He noted that appellant had been working four hours per day with restrictions, but could now work six hours per day. Work restrictions included no more than six hours of work per day, a chair with lumbar support that was comfortable, no lifting or overhead

² The signature on the form is illegible.

³ *Id.*

lifting more than 10 pounds, no sitting or standing more than two hours at a time, and no operation of heavy machinery.

On March 4, 2014 appellant requested reconsideration. She stated that she had not received the June 20, 2013 job offer from the employing establishment as she was out on disability at the time the job was offered, and the employing establishment did not mail her the job offer. Appellant also alleged that the June 20, 2013 job offer was improper as elements of the modified job description were missing.

Appellant submitted requests that the employing establishment provide a copy of a certified mail receipt pertaining to the job offer.

A March 24, 2014 attending physician's report (Form CA-20) diagnosed right shoulder sprain/strain and labrum tear.⁴ Physical findings included decreased range of motion, tenderness, and numbness. The form noted that appellant received treatment on October 7, 2012, February 6, 2013, and March 24, 2014.

A March 24, 2014 duty status report⁵ diagnosed right shoulder sprain/strain and indicating that appellant was capable of part-time work up to six hours per day with restrictions. Restrictions included no overhead lifting, no lifting more than 10 pounds, no sitting or standing more than two hours at a time, and a chair with lumbar support.

By decision dated May 5, 2014, OWCP denied modification. It noted that, contrary to appellant's contentions, the job offer did provide a list of the duties to be performed, the physical requirements, geographical location, and the date the job was available.

In a May 5, 2014 report, Dr. Michael C. Schwartz, an examining Board-certified orthopedic surgeon, reported seeing appellant for a follow up on her neck and right shoulder. Appellant continued to complain of right shoulder pain which limited her activeness. Physical examination and range of motion findings were provided. Diagnoses included C5-6 disc herniation with persistent cervical radiculitis and right shoulder persistent rotator cuff tendinitis. Appellant was released to an eight-hour workday with restrictions of no lifting more than 10 pounds and no overhead activity.

A May 7, 2014 duty status report⁶ reiterated restrictions and findings from prior reports.

A May 7, 2014 attending physician's report diagnosed right shoulder sprain/strain and labrum tear.⁷ The form noted that appellant received treatment on October 7, 2012, February 6, 2013 and May 7, 2014. It also noted that she was partially disabled from February 6, 2013 until the date of the report.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Dr. Ceja, in a May 7, 2014 progress report, provided a history of the employment injury and physical findings. He increased appellant's work hours to eight hours per day with restrictions. Work restrictions included a chair with lumbar support that was comfortable, no lifting or overhead lifting more than 10 pounds, and no sitting or standing more than two hours at a time.

In a June 16, 2014 report, Dr. Schwartz diagnosed cervical sprain and radiculitis and increased her lifting restrictions to 20 pounds.

In attending physician's and duty status reports dated June 18, 2014, Dr. Ceja indicated that appellant was capable of working with restrictions. The restrictions included no lifting more than 20 pounds, no bending, no operating heavy machinery, and no sitting or standing more than one to two hours.

On August 11, 2014 appellant requested reconsideration.

By decision dated September 2, 2014, OWCP denied reconsideration. It found that the medical evidence submitted was irrelevant to the issue of appellant's claim for wage-loss compensation for the period July 27 to August 9, 2013.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁹ For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.¹⁰ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹¹

Section 10.500(a) states that appellant is only entitled to wage-loss compensation for the "periods during which an employee's work-related medical condition prevents him or her from earning the wage earned before the work-related injury." It further provides:

"...an employee is not entitled to compensation for any wage loss claimed on Form CA-7 to the extent that evidence contemporaneous with the period claimed on the CA-7 establishes that the employee had medical work restrictions in place; that light duty within those restrictions was available; and that the employee was previously notified in writing that such duty was available."¹²

⁸ *Supra* note 1.

⁹ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

¹⁰ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

¹¹ See *Edward H. Horton*, 41 ECAB 301 (1989).

¹² 20 C.F.R. § 10.500(a); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(a) (June 2013).

When it is determined that an appellant is no longer totally disabled from work and is not on the periodic rolls, the procedure manual states that the claims examiner “should determine whether light-duty work was available within the claimant’s medical restrictions during the period for which compensation is claimed” and a development letter should be sent to appellant setting forth the standards under section 10.500(a) including medical evidence required to establish a claim for wage-loss compensation. The claims examiner should also obtain documentation from the employing establishment that written notification of light duty availability was provided to the claimant, if not already in the file.¹³ The claims examiner, when adjudicating the claim for wage-loss compensation, must also determine whether the evidence of record establishes that appellant was provided with written notification of a light-duty job assignment, that the job was within appellant’s restrictions, and that the job was available to appellant during the period wage-loss compensation was claimed.¹⁴

ANALYSIS -- ISSUE 1

OWCP accepted the claim for right shoulder and upper arm strain and right acromioclavicular. Appellant stopped work on October 6, 2012 and was released to light-duty work with restrictions by Dr. Ceja on February 6, 2013.

On June 20, 2013 the employing establishment provided OWCP a copy of the modified light-duty job offer of passport call center clerk. The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹⁵ The weight of the evidence in this case clearly establishes that appellant was capable of performing the offered light-duty position. In a January 8, 2013 CA-17 form, Dr. Ceja, a treating physician, released her to light-duty work, preferably a desk job, effective January 13, 2013. In a January 18, 2013 duty status form, he reported that appellant was capable of performing light-duty work with restrictions of limited right arm use, no heavy lifting, and desk work, if available.

Dr. Aprin, in his February 11, 2013 report, opined that appellant was permanently disabled from performing her date-of-injury job, but was capable of performing light-duty work. He determined that she was capable of working eight-hour days with restrictions which included no reaching or reaching above the shoulder; no twisting, bending or stooping; no operating a motor vehicle at work; 2 to 4 hours of pushing, pulling, and lifting up to 20 pounds; no repetitive wrist or elbow movement; no squatting, kneeling, or climbing; and a 15-minute break every 2 hours. The employing establishment’s job offer, which required up to four hours of lifting, pushing, and pulling up to 20 pounds; no operating a motor vehicle at work, reaching above the shoulder, and reaching; and a 15-minute break every 2 hours, is with the restrictions set forth by Dr. Aprin for accommodated work. The Board thus finds that the offered position was medically suitable.

¹³ Federal (FECA) Procedure Manual, *id.*, Chapter 2.814.9(b)(2) (June 2013).

¹⁴ *Id.* at Chapter 2.814.9(b)(3).

¹⁵ See *C.G.*, Docket No. 09-247 (issued January 26, 2010); *T.T.*, 58 ECAB 296 (2007); *Robert Dickinson*, 46 ECAB 1002 (1995).

The Board further finds that OWCP complied with its procedural requirements in advising appellant that the offered position was suitable, providing her with the opportunity to accept the position or provide reasons for her refusal, and notifying her that her claim for wage-loss compensation could be denied if she failed to submit sufficient evidence.

The evidence submitted subsequent to the denial of the claim was not sufficient to establish appellant's entitlement to wage-loss compensation for the period in question. In progress notes dated February 10, 2014, Dr. Ceja noted that she had been working four hours per day with restrictions and increased her work hours to six. He did not address the June 20, 2013 job offer or the issue of appellant's disability during the claimed period.¹⁶ Therefore, Dr. Ceja's progress notes are not relevant to the issue at hand and are of limited probative value.

The reports dated February 10 and March 24, 2014, containing illegible signatures, also indicated that appellant was capable of part-time work up to six hours per day with restrictions. However, as the author of these reports cannot be identified as a physician, they are of no probative value.¹⁷ Similarly, the various reports from JFK Advanced Medical PC containing illegible signatures are of no probative value as the author or authors cannot be identified as physicians.¹⁸

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁹ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²⁰ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received by OWCP within one year of the date of that decision.²¹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.²²

¹⁶ See *William A. Archer*, 55 ECAB 674 (2004).

¹⁷ See *Merton J. Sills*, 39 ECAB 572 (1988).

¹⁸ *Id.*

¹⁹ *Supra* note 1. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

²⁰ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

²¹ *Id.* at § 10.607(a).

²² *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-0440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 0598 (2006).

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

On August 11, 2014 appellant requested reconsideration on the denial of her request for wage-loss compensation for the period July 27 to August 9, 2013. The issue presented on appeal is whether she met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her August 11, 2014 request for reconsideration, appellant failed to show that OWCP had erroneously applied or interpreted a specific point of law. She also failed to advance a new and relevant legal argument not previously considered by OWCP.

In support of her request for reconsideration appellant submitted a May 7, 2014 duty status report and attending physician's report with an illegible signature. These reports do not constitute competent medical evidence as it is unclear that they were prepared by a physician. Thus, these reports are not relevant.²³

Appellant also submitted a May 7, 2014 progress note, June 18, 2014 attending physician's and duty status reports from Dr. Ceja, and May 5 and June 16, 2014 reports of Dr. Schwartz. These reports while new are not relevant because they fail to address the issue of appellant's claim for wage-loss compensation for the period in question. The Board has held that the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim.²⁴ Thus, these reports are insufficient to require OWCP to reopen the claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3), and, thus, OWCP properly declined to reopen her claim for further merit review.²⁵

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss compensation for the period July 27 to August 9, 2013. The Board further finds that OWCP properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

²³ See *Merton J. Sills*, *supra* note 17.

²⁴ *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *D'Wayne Avila*, 57 ECAB 642 (2006).

²⁵ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, *supra* note 20 (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 2 and May 5, 2014 are affirmed.

Issued: February 4, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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