

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

D.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Austin, TX, Employer**

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**Docket No. 16-1492
Issued: January 3, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 12, 2016 appellant filed a timely appeal from a January 14, 2016 merit 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.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation effective February 8, 2016 for refusal of suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On November 15, 2013 appellant, then a 69-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging right shoulder and right ankle injuries as a result of his federal employment. On the claim form he asserted that he had been on a walking route for 17

¹ 5 U.S.C. § 8101 *et seq.*

years as a letter carrier, and he was also constantly standing, climbing, lifting, and delivering mail. The reverse of the form indicated that appellant stopped work on July 23, 2013. In a December 16, 2013 letter, the employing establishment indicated that appellant had not been performing a walking route for the prior two years. Appellant filed claims for compensation (Form CA-7) commencing December 21, 2013.

Appellant submitted a December 2, 2013 report from Dr. Helo Chen, an osteopathic physician specializing in occupational medicine, who provided a history and results on examination. Dr. Chen diagnosed right shoulder internal derangement, rotator cuff syndrome, and right ankle internal derangement and enthesopathy. He opined the conditions were causally related to appellant's employment as a letter carrier.

On January 27, 2014 OWCP accepted right shoulder disorder of bursae and tendons, right shoulder articular cartilage disorder, right ankle enthesopathy, and right ankle articular cartilage disorder. Appellant began receiving compensation for wage loss as of December 21, 2013.

Appellant underwent right shoulder arthroscopic surgery on May 20, 2014. In a report of that date, Dr. Gordon Marshall, a Board-certified orthopedic surgeon, described the procedure and provided a postoperative diagnosis of right rotator cuff tear, right acromioclavicular joint arthritis, right shoulder impingement syndrome, and probable degenerative tear of the right shoulder labrum.

In a report dated June 10, 2014, Dr. Chen indicated that appellant was using his left arm for daily activities following the surgery. He noted that a magnetic resonance imaging (MRI) scan of the right ankle, dated September 16, 2013, showed extensive bimalleolar soft tissue edema along with extensive dorsal foot edema, mild sinus tarsi inflammation, tendinopathy and tenosynovitis of the peroneus brevis and bogus, and intact collateral ligaments.

Dr. Marshall submitted a July 11, 2014 report indicating that appellant was slowly healing from the shoulder surgery but remained disabled. He provided results on examination and indicated that appellant should begin exercising the shoulder, and if he was not a lot better in four weeks regarding shoulder motion, he would begin physical therapy. In a report dated July 30, 2014, Dr. Chen reported that appellant had developed adhesive capsulitis in the right shoulder. He indicated that appellant had decreased range of motion and Dr. Chen prescribed a shoulder flexionator device in conjunction with rehabilitative therapy. In a report dated August 8, 2014, Dr. Marshall reported that appellant should continue with abduction exercises, but should wait until four months after surgery to work on strength. Dr. Marshall reported lifting restrictions of five pounds and no repetitive activity. The diagnoses included bilateral ankle pain.

In a report dated September 26, 2014, Dr. Marshall reported that appellant had been taking pain medicine and been unable to return to work. He provided results on examination, and with respect to the lower extremities, reported significant swelling in both legs, with tenderness over the calf and ankle. Dr. Marshall diagnosed right shoulder pain, right shoulder impingement syndrome and rotator cuff tear (traumatic), right shoulder joint derangement, and bilateral ankle pain. He recommended that appellant "not return to doing his mail routes as of yet."

Dr. Marshall completed a state workers' compensation work status report dated September 26, 2014. On the form he indicated that appellant had restrictions with respect to the right shoulder. Dr. Marshall checked a box on a form report indicating no overhead reaching and indicated that appellant had a five-pound lifting restriction. Other restrictions noted were no repetitive motion with the right shoulder.

By report dated October 6, 2014, Dr. Chen provided results on examination, noting that appellant had a slightly antalgic gait and was unable to make a fist with the right hand. He indicated that appellant should continue physical therapy.

The record contains a job offer dated October 8, 2014 for a modified letter carrier position. The job offer indicated that the position required no lifting over five pounds with the right shoulder, up to two hours casing mail, and six hours of mail delivery with the left hand. The second page of the job offer indicated that there would be no repetitive motion of the right shoulder, no lifting over five pounds, no overhead reaching, and casing of mail with the left hand. The employing establishment issued an October 9, 2014 letter to appellant, describing the job offer as in accord with Dr. Marshall's September 26, 2014 work restrictions.

In a letter dated October 9, 2014, Dr. Chen wrote that appellant was being treated for right foot, right ankle, and right shoulder conditions. He asserted that the work status information provided by the orthopedic surgeon was incorrect, and he should be the physician providing work restrictions.

Dr. Marshall submitted an October 15, 2014 report, relating that appellant had been receiving physical therapy and been unable to return to work. He provided results on examination and indicated that revised work restrictions had been provided for the right shoulder only. Dr. Marshall explained that he was treating appellant only for the right shoulder and the work restrictions were based only on the right shoulder. He noted that appellant had complained of ankle and knee pain while standing. Dr. Marshall indicated that he would not provide work restrictions for the lower extremities because he was not treating those symptoms. As to work restrictions for the shoulder, he completed a Form CA-17 dated October 15, 2014 and indicated that appellant had a three-pound lifting restriction for the right arm. Dr. Marshall indicated that appellant was limited to two hours sitting, six hours standing and walking, and five hours of climbing, kneeling, bending, stooping, and twisting.

By letter dated October 30, 2014, OWCP advised appellant that it found the job offer from the employing establishment to be suitable. Appellant was notified of the provisions of 5 U.S.C. § 8106(c)(2), and indicated the case record would be held open for 30 days.

On November 3, 2014 appellant submitted a duty status report (Form CA-17) dated October 21, 2014 from Dr. Chen. Dr. Chen indicated that appellant was totally disabled for work. In narrative reports dated November 5 and 19, 2014, he provided results on examination and indicated that appellant should continue physical therapy.

By letter dated December 4, 2014, OWCP advised appellant that he had not provided a valid reason for refusing suitable work. It indicated that he had 15 days to accept the position or his compensation would be terminated.

In a report dated December 12, 2014, Dr. Marshall indicated that appellant felt his right shoulder was becoming stronger. He indicated an impairment rating should be ordered as appellant had reached maximum medical improvement. By report dated December 29, 2014, Dr. Chen provided results on examination and reported that appellant continued to have functional deficits with right shoulder motion and strength that prohibited performing job duties to full capacity.

Appellant submitted a letter dated January 22, 2015² in which he related that he had retired on November 28, 2014. He requested that his compensation be terminated effective that date.

By decision dated January 29, 2015, OWCP found that appellant had refused suitable work. It determined appellant's compensation for wage loss was terminated effective February 8, 2015 pursuant to 5 U.S.C. § 8106(c)(2).

On February 23, 2015 appellant requested an oral hearing before an OWCP hearing representative. He submitted a March 17, 2015 report from Dr. Thomas Martens, an osteopathic physician. Dr. Martens wrote that appellant had not been released to duty in October 2014, and had not been released to accept the job offer. Appellant submitted additional reports from Dr. Chen providing results on examination and recommending continuing physical therapy.

A telephonic hearing was held on November 4, 2015. Appellant argued that casing mail cannot be performed without working overhead, and the job could not be performed with one hand. He also noted that Dr. Marshall had reduced the lifting from five pounds to three pounds.

By decision dated January 14, 2016, the hearing representative affirmed the January 29, 2015 OWCP decision. She found the evidence supported a finding that the job offer was suitable.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) 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." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.³ To justify such a termination, OWCP must show that the work offered was suitable.⁴ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁵

² The letter was apparently misdated January 22, 2014.

³ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁴ *John E. Lemker*, 45 ECAB 258 (1993).

⁵ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

ANALYSIS

As the legal precedent indicates, it is OWCP that has the burden of proof to establish that the offered position was medically suitable. The Board has reviewed the medical evidence and finds it is insufficient to meet OWCP's burden of proof in this case.

The offered position of modified letter carrier, dated October 8, 2014, purports to be in accord with Dr. Marshall's September 26, 2014 report. The job offer did describe restrictions that were proposed by Dr. Marshall in that report, but in this regard there are two issues that OWCP failed to properly address. The first issue is that there was additional medical evidence received by OWCP, including subsequent reports from Dr. Marshall. In the October 15, 2014 Form CA-17, Dr. Marshall revised his work restrictions and indicated that appellant had a three-pound lifting restriction. OWCP did not acknowledge this report in its decisions or explain why the offered position complied with these work restrictions. In addition, Dr. Chen provided a Form CA-17 dated October 21, 2014 indicating that appellant was totally disabled. OWCP did not address this evidence in its decisions. When a claimant submits additional medical evidence after the job offer is made, OWCP must consider the evidence in determining medical suitability.⁶

The second issue raised by the medical evidence was whether appellant had restrictions related to the lower extremity. It is well established that OWCP must consider all accepted conditions in evaluating the suitability of an offered position.⁷ The hearing representative found there was no evidence that there were work restrictions based on the ankles or feet. Dr. Marshall, in his September 26, 2014 report, notes significant swelling in both legs, with tenderness over the calves and ankles. He also specifically reported in his October 15, 2014 report that he was not addressing any restrictions for the lower extremities because he was treating only the right shoulder.

The Board has held that, for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.⁸ As a penalty provision, section 8106(c)(2) must be narrowly construed.⁹ In this case the medical evidence was not clear on the issue. OWCP did not secure a medical report that reviewed the job offer and provided a reasoned opinion as to its suitability for appellant, considering all work-related conditions.¹⁰

It is OWCP's burden of proof to establish the offered position of modified letter carrier was medically suitable. The Board finds OWCP did not meet its burden of proof in this case.

⁶ See, e.g., *S.R.*, Docket No. 10-1154 (issued December 8, 2010); *D.H.*, Docket No. 09-0381 (issued November 3, 2009); *L.N.*, Docket No. 06-0694 (issued May 2, 2007).

⁷ *Richard P. Cortes*, 56 ECAB 200 (2004).

⁸ *Annette Quimby*, 49 ECAB 304 (1998).

⁹ See *Stephen A. Pasquale*, 57 ECAB 396 (2006).

¹⁰ Cf. *B.P.*, Docket No. 15-1096 (issued January 20, 2016) (second opinion physician reviewed the offered position and provided a reasoned opinion that the position was suitable).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective February 8, 2016 for refusal of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 14, 2016 is reversed.

Issued: January 3, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board