United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 17-1014**
	)	**Issued: October 3, 2017**
DEPARTMENT OF VETERANS AFFAIRS, DENVER ACQUISITION & LOGISTICS CENTER, Lakewood, CO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 10, 2017 appellant, through counsel, filed a timely appeal from a February 15, 2017 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.

[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.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits on January 27, 2015 pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

FACTUAL HISTORY

On May 2, 2011 appellant, then a 52-year-old hearing-impaired voucher examiner, filed a traumatic injury claim (Form CA-1) alleging that she injured her left shoulder when she tripped going into an elevator that day. On August 9, 2011 OWCP accepted tear of supraspinatus and subscapularis tendons, and tendinosis of the rotator cuff and biceps tendon of the left arm. Appellant stopped work that day, August 9, 2011, and filed a claim for compensation (Form CA-7). She received wage-loss compensation beginning that day and was placed on the periodic compensation rolls in October 2011.

Dr. David Schneider, an attending Board-certified orthopedic surgeon, performed arthroscopic rotator cuff repair and subacromial decompression on October 6, 2011. On February 23, 2012 OWCP notified appellant that her accepted conditions had been expanded to include left shoulder supraspinatus and subscapularis sprains, calcifying tendinitis of the left shoulder, unspecified disorder of bursae and tendons of the left shoulder, and right shoulder and upper arm acromioclavicular (AC) sprain.

In June 2012, OWCP referred appellant to Dr. A.C. Lotman, Board-certified in orthopedic surgery, for a second opinion evaluation. In reports dated July 4 and 20, and September 3, 2012, Dr. Lotman noted that she was accompanied by a sign language interpreter. He recorded appellant's complaint that the left shoulder surgery was not beneficial with continued pain, stiffness, and loss of shoulder motion. Dr. Lotman noted the severity of her injury and advised that she also suffered from significant anxiety and depression. He advised that appellant's right AC sprain had resolved and that she continued to have employment-related residuals of the left. Dr. Lotman recommended an aggressive rehabilitation program, and advised that she could work modified duty.

In October 2012, OWCP also referred appellant for a second opinion examination with Dr. Randolph W. Pock, a Board-certified psychiatrist. In a January 18, 2013 report, Dr. Pock noted that she was accompanied by a sign language interpreter. He performed testing and diagnosed adjustment reaction with depression and anxiety as a result of appellant's injury with subsequent pain and limitation of use of her arms. Dr. Pock opined that her psychological disorder would continue as long as her physical symptoms continued. He recommended antidepressant and antianxiety medication.

On March 1, 2013 OWCP accepted the additional condition of temporary adjustment disorder with depression and anxiety due to pain. On a psychiatric work capacity evaluation (OWCP Form 5a), Dr. Pock advised that appellant's psychiatric condition did not prevent her from working.

On April 23, 2013 OWCP asked that the employing establishment prepare a modified job offer that comported with the restrictions provided by Dr. Lotman.

In April 2013, OWCP referred appellant to Ellen Goren, a rehabilitation specialist, for vocational rehabilitation services. Ms. Goren submitted monthly reports beginning in May 2013.

In a report dated June 4, 2013, Dr. Richard Hathaway, an attending Board-certified orthopedist, advised that appellant had developed rotator cuff arthropathy on the right, and that her left shoulder continued to be problematic. He recommended magnetic resonance imaging (MRI) scans of both shoulders. A June 16, 2013 left shoulder MRI scan showed an interval rotator cuff repair with overall improvement, a question of minimal remaining undersurface fraying, and shallow remaining undercutting the superior labrum. A right shoulder MRI scan that day revealed status post rotator cuff repair with a massive residual cuff tearing. On August 13, 2013 Dr. Hathaway reported that appellant had right shoulder surgery and could not work for three or four months to allow her shoulder to heal.[3]

On July 11, 2013 the employing establishment offered appellant a modified voucher examiner position with primary duties of analyzing and verifying the accuracy of invoice content, entering data from vendor invoices into a computerized system, researching credit memos, certified invoices, and vendor inquiries regarding payments, and processing incoming mail, all of which could be accomplished sitting at a desk or workstation and using a computer. Medical restrictions included no reaching away from the body, no reaching above the shoulder, no operation of a motor vehicle at the workplace, no pushing or pulling more than five pounds for two hours daily, and no climbing.

In May 2014, OWCP referred appellant to Dr. John D. Douthit, a Board-certified orthopedist, for a second opinion evaluation. In a June 11, 2014 report, Dr. Douthit noted that she was accompanied by a sign language interpreter and her mother. He described the employment injury, noted his review of the record, including the statement of accepted facts, and appellant's report that she could not return to work even at a sedentary level due to dizziness and the inability to lift her arms or use her hands for any length of time due to bilateral shoulder pain. Examination revealed good balance, a fair gait, symptom magnification, and extreme pain behavior on examination of the upper extremities and the cervical spine. Lower extremity examination was normal. Dr. Douthit diagnosed severe pain behavior with pain syndrome, both shoulders, history of tendinosis and tendon injuries with resultant surgery of both shoulders, and type 2 diabetes. He advised that appellant continued to have disabling residuals with severe bilateral shoulder pain and restricted motion and could permanently perform sedentary work with lifting restricted to five pounds, but also indicated that she could not return to work due to psychological overlay and pain behavior. Dr. Douthit did not recommend further treatment.

On July 3, 2014 Ms. Goren, the rehabilitation specialist, indicated that appellant did not respond to the employing establishment's job offer.

[3] On February 3, 2014 OWCP issued a notice of proposed termination of the accepted right AC shoulder sprain. The record does not contain a final decision terminating the condition.

By letter dated August 27, 2014, OWCP advised appellant that the position offered was suitable. Appellant was notified that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.

In an October 2, 2014 supplemental report, Dr. Douthit indicated that there was no objective evidence to support that appellant's arms were as disabled as she claimed, and that he had no direct knowledge regarding her report of dizziness.

On October 30, 2014 and January 7, 2015, the employing establishment confirmed that the offered position remained available.

By letter dated January 8, 2015, OWCP advised appellant that it had received notice that she refused to accept or report to the offered position. Appellant was given an additional 15 days to accept. She did not respond to the 15-day letter. On January 27, 2015 OWCP terminated appellant's wage-loss compensation because she refused an offer of suitable work. It noted that the weight of the medical evidence rested with the opinion of Dr. Douthit who opined that objective findings did not support total disability.

Appellant timely requested a hearing. At the hearing, held on September 17, 2015, she, through an interpreter, testified regarding the employment injury and her subsequent care. Appellant noted that she was on disability retirement and maintained that she also injured her right shoulder and neck on May 2, 2011, and that she also had a cardiac condition, diabetes, dizziness, headaches, stress, and was unable to perform activities of daily living. The record was left open for 30 days.

Appellant thereafter submitted a discharge summary of hospitalization from February 14 to 15, 2012 in which a non-ST-elevation myocardial infarction, pneumonia, type 2 diabetes, hypertension, hyperlipidemia, bipolar disorder, and history of anxiety were diagnosed. A Medicare disability determination dated September 9, 2015 found appellant disabled due to severe disorders of muscle, ligament, and fascia, severe hearing loss not treated with cochlear implantation, severe ischemic heart disease, and nonsevere diabetes mellitus. The determination described physicians' reports and included unsigned documentation of treatment at Kaiser Permanente.

By decision dated December 2, 2015, an OWCP hearing representative found the medical evidence sufficient to establish that appellant was physically capable of performing the offered position and affirmed the January 27, 2015 decision.

Appellant, through counsel, requested reconsideration. Additional medical evidence included a June 13, 2016 left shoulder MRI scan that indicated a previous rotator cuff repair with no recurrent tear, and a biceps tear or previous tenotomy suggesting tenodesis in the groove. In a July 28, 2016 report, Dr. Jeffrey R. Chain, Board-certified in otolaryngology, noted appellant's complaint of dizziness that began one year previously with associated headaches and issues with balance. Following examination, he diagnosed congenital deafness with signs of ataxia and ordered diagnostic tests. On August 5, 2016 Dr. Chain advised that vestibular testing was within normal limits and referred appellant for neurological evaluation.

In correspondence dated August 24, 2016, Dr. Jon J. Cram, Board-certified in family medicine, noted that he recently became appellant's primary care physician. He noted her complaints of severe shoulder and neck pain and dizziness and described physical limitations in transferring and bathing due to shoulder pain and weakness. In treatment notes dated July 5 to September 8, 2016, Dr. Cram diagnosed anxiety, diabetes mellitus, diabetic peripheral neuropathy, benign essential hypertension, and dizziness.

In a merit decision dated February 15, 2017, OWCP found the evidence submitted insufficient to modify the prior decisions.

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 of proof 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 the employee was informed of the consequences of her 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] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

[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] *Maurissa Mack*, 50 ECAB 498 (1999).

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.[11] If possible, the employing establishment should offer suitable employment in the location where the employee currently resides. If this is not practical, it may offer suitable reemployment at the employee's former duty station or other location.[12]

Before compensation can be terminated, however, OWCP has the burden of proof to demonstrate that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions, and setting for the specific job requirements of the position.[13] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[14] In a suitable work determination, it must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.[15]

ANALYSIS

OWCP accepted that on May 12, 2011 appellant sustained left shoulder supraspinatus and subscapularis sprains, calcifying tendinitis of the left shoulder, unspecified disorder of bursae and tendons of the left shoulder, right shoulder and upper arm AC sprain, and temporary adjustment disorder with depression and anxiety due to pain. Appellant stopped work in August 2011 and was placed on the periodic compensation rolls. On July 11, 2013 the employing establishment offered a modified voucher examiner position, which she refused. In a January 27, 2015 decision, OWCP terminated appellant's wage-loss compensation effective that day as she had refused the offer of suitable work.

The Board finds that OWCP has failed to establish that appellant was capable of performing the position of voucher examiner given the accepted adjustment disorder and other medical conditions, including diabetes mellitus, cardiovascular disease, and dizziness.[16]

OWCP relied on the opinion of Dr. Douthit, an OWCP referral physician, who opined on June 11, 2014 that, while appellant continued to have disabling residuals with severe bilateral shoulder pain and restricted motion, she could permanently perform sedentary work with lifting restricted to five pounds. Dr. Douthit, however, also indicated that she could not return to work due to psychological overlay and pain behavior. In light of the accepted adjustment disorder, the Board finds his opinion of diminished probative value.

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

[12] 20 C.F.R. § 10.508; *see S.H.*, Docket No. 15-0329 (issued June 5, 2015).

[13] *See Linda Hilton, supra* note 7.

[14] *Supra* note 9.

[15] *See Richard P. Cortes*, 56 ECAB 200 (2004).

[16] *See H.L.*, Docket No. 16-1810 (issued March 16, 2017).

Although Dr. Pock, a referral psychiatrist, advised that appellant's psychiatric condition did not prevent her from working, he examined her on January 18, 2013, several years prior to the suitable work termination on January 27, 2015.[17]

The record includes evidence that appellant had a heart attack in 2012, has diabetes mellitus with peripheral neuropathy, and dizziness. As previously noted, OWCP must consider all of appellant's conditions, preexisting, work related, and subsequently acquired in determining whether an offered position is suitable.[18] The record in this case does not substantiate that OWCP considered the entirety of her medical conditions before terminating her wage-loss compensation on January 27, 2015.

As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.[19] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within her physical limitations and capabilities. Consequently, OWCP did not meet its burden of proof to justify the termination of her compensation benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits on January 27, 2015 pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

[17] The Board has held that state medical evidence cannot form the basis for current evaluation of residual symptomatology, disability determination, or other medical determinations. *See generally T.M.*, Docket No. 16-1033 (issued June 22, 2017); *G.M.*, Docket No. 14-2057 (issued May 12, 2015).

[18] *Supra* note 16.

[19] *Supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2017 decision of the Office of Workers' Compensation is reversed.

Issued: October 3, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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