

loss and schedule award compensation, effective July 26, 2015, because he refused suitable work under 5 U.S.C. § 8106(c)(2).

On appeal counsel argues that OWCP erred in terminating appellant's compensation as the offered position was unsuitable and OWCP abused its discretion in denying authorization for left shoulder surgery due to an unresolved conflict in the medical opinion evidence.

FACTUAL HISTORY

On February 22, 2013 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained a left shoulder fracture when he was attacked by two dogs while delivering mail. OWCP accepted the claim for left complete rotator cuff rupture, left shoulder and upper arm acromioclavicular sprain, and left unspecified closed shoulder dislocation and authorized left shoulder rotator cuff repair and arthroscopic surgery, which was performed on June 7, 2013. Appellant stopped work on February 23, 2013. By letter dated November 15, 2013, OWCP placed him on the periodic rolls for total disability compensation, effective September 14, 2013.

On April 21, 2014 appellant was referred for a second opinion evaluation with Dr. Leon Sultan, a Board-certified orthopedic surgeon, to determine appellant's work capacity and whether he continued to have residuals from the accepted conditions. In a report dated May 7, 2014, Dr. Sultan, based upon a review of medical evidence, statement of accepted facts, and physical examination, diagnosed left shoulder rotator cuff tear and residual significant left shoulder adhesive capsulitis. He opined that appellant's accepted left shoulder condition was permanent as it would not resolve. Dr. Sultan found appellant disabled from performing his job as a mail carrier due to the accepted shoulder injury. However, he opined that appellant was capable of performing light-duty/sedentary work with restrictions. The restrictions included no reaching above the shoulder and no pushing, pulling, or lifting more than 15 pounds using both hands. Dr. Sultan also opined that additional left shoulder surgery was unnecessary and unwarranted.

On October 6, 2014 OWCP received a request for authorization for left shoulder arthroscopic surgery.

On October 14, 2014 OWCP received a work capacity evaluation form (Form OWCP-5c) and September 30, 2014 report from Dr. Kenneth Kearns, a treating physician specializing in orthopedic surgery. Dr. Kearns opined that appellant was currently disabled from performing any type of work.

OWCP received a September 30, 2014 report from Dr. Kearns on October 15, 2014. Dr. Kearns provided physical examination findings, reviewed a magnetic resonance imaging (MRI) scan, and diagnosed rotator cuff rupture. He reported the MRI scan revealed a recurrent rotator cuff tear and recommended surgery. Dr. Kearns opined that appellant was currently totally disabled as he required shoulder surgery.

On October 20, 2014 the employing establishment offered appellant a modified city carrier position working 8:00 a.m. to 4:30 p.m. at the Baldwin, NY Post Office. The duties of

the position were listed as one to two hours of casing mail and six to seven hours of delivering mail weighing no more than 15 pounds inside the mail satchel. The physical restrictions of the assignment were no reaching above the left shoulder, one to eight hours of pushing, pulling, and lifting up to 15 pounds using both hands, and up to eight hours of standing, walking, sitting, twisting, reaching, bending, stooping, squatting, kneeling, and operating a motor vehicle.

Appellant refused the job offer on October 26, 2014 based on his treating physician's recommendation that additional shoulder surgery was required.

In a letter dated October 31, 2014, OWCP advised appellant of its determination that the modified city carrier position offered by the employing establishment on October 20, 2014 was suitable. It indicated that the position was based upon the opinion of Dr. Sultan, a second opinion Board-certified orthopedic surgeon, who opined that appellant was capable of working eight hours per day with restrictions. 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. Appellant was advised that his right to wage loss and schedule award compensation could be terminated under 5 U.S.C. § 8106(c) of FECA if he refused suitable work.

In reports dated November 4 and 12, 2014, Dr. Kearns diagnosed left rotator cuff syndrome and cervicgia. He recommended left shoulder arthroscopic rotator cuff surgery, which he deemed medically necessary. Dr. Kearns explained the surgery was necessary based on an MRI scan showing a recurrent left rotator cuff tear and there would be irreparable harm if the tendon was not repaired by surgery. He found that appellant was currently unable to work due to left shoulder condition and the necessity for surgery. Physical examination findings of the left shoulder included 90 degrees forward flexion, 20 degrees external rotation, and decreased cervical range of motion. Dr. Kearns concluded that appellant remained disabled from work due to the required additional surgery.

In letter dated November 24, 2014, counsel contended that there was an unresolved conflict in the medical opinion evidence between Dr. Kearns and Dr. Sultan on the issues of restrictions and work capacity. As there remained an unresolved conflict, counsel argued that OWCP should have referred appellant for an impartial medical examination.

By decision dated December 1, 2014, OWCP denied authorization for left shoulder surgery. It relied upon Dr. Sultan's opinion that additional surgery was unnecessary.

By letter dated December 24, 2014, OWCP found that the reasons given by appellant for refusing the offered position were invalid. 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 advised that it would not consider any further reasons for refusal of the offered position.

On December 29, 2014 OWCP received a December 2, 2014 report from Dr. Kearns. The recommendations and examination findings were unchanged from prior reports.

In correspondence dated January 5, 2015, counsel informed OWCP that appellant was refusing the modified job offer. He explained that appellant was following the recommendations of his treating physician regarding treatment and restrictions for his employment injuries.

In a June 16, 2015 form report, Dr. Kearns provided a treatment history, physical examination findings, and reviewed an MRI scan. Examination findings, diagnoses and recommendations were unchanged from his prior reports.

By decision dated July 21, 2015, OWCP terminated appellant's wage-loss compensation benefits, effective July 26, 2015, as it found that he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c). It found that the offered position was based on Dr. Sultan's opinion regarding work restrictions, which it found represented the weight of the medical opinion evidence.

On November 20, 2015 counsel requested reconsideration of the December 1, 2014 and July 21, 2015 decisions. He argued that there was an unresolved conflict in the medical opinion evidence with respect to whether left shoulder surgery should be authorized and whether the offered position was suitable. Counsel also submitted reports from Dr. Kearns in support of his reconsideration request.

Dr. Kearns, in reports dated February 3 and June 16, 2015, detailed the history of the February 22, 2013 employment injury and medical treatment provided. A physical examination of the left shoulder revealed 40 degrees flexion, 90 degrees pronation, 40 degrees external rotation, no atrophy or deformity, and positive impingement sign and drop-arm testing. Dr. Kearns noted pain on range of motion endpoints and a limited examination due to pain. Based on a review of a January 24, 2014 MRI scan, he recommended surgery. The MRI scan revealed a recurrent left rotator cuff tear and capsular thickening. Dr. Kearns diagnosed cervicgia and left rotator rupture and that appellant was currently totally disabled impaired. Lastly, he attributed appellant's current condition to the February 22, 2013 dog attack.

By decision dated March 17, 2016, OWCP denied appellant's request for modification of the December 1, 2014 and July 21, 2015 decisions. It found that the evidence and arguments presented on reconsideration were insufficient to warrant modification of the December 1, 2014 decision denying authorization for shoulder surgery and the July 21, 2015 decision terminating appellant's compensation pursuant to section 8106(c).

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of FECA³ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.⁴ In interpreting section 8103, the Board has recognized that OWCP has broad

³ *Id.*

⁴ 5 U.S.C. § 8103; *see R.L.*, Docket No. 08-0855 (issued October 6, 2008); *Sean O'Connell*, 56 ECAB 195 (2004); *Thomas W. Stevens*, 50 ECAB 288 (1999).

discretion in approving services provided under FECA.⁵ The only limitation on OWCP's authority is that of reasonableness.⁶ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied authorization for the requested left rotator cuff surgery.

OWCP accepted appellant's claim for left complete rotator cuff rupture, left shoulder and upper arm acromioclavicular sprain, and left unspecified closed shoulder dislocation. It authorized left shoulder rotator cuff repair and arthroscopic surgery, which was performed on June 7, 2013.

Dr. Kearns, a treating physician specializing in orthopedic surgery, recommended left shoulder arthroscopic surgery in various reports covering the period September 30, 2014 to June 16, 2015. In reports dated November 4 and 12, 2014, he explained that surgery was necessary based on an MRI scan which showed a recurrent rotator cuff tear and that appellant would suffer irreparable harm if the tendon, which he attributed to the original injury, was not repaired. Dr. Kearns did not adequately explain why the requested surgery was warranted or how it was causally related to the accepted February 22, 2013 injury, especially in light of the fact that appellant previously had left shoulder rotator cuff repair and arthroscopic surgery on June 7, 2013.⁸

In a May 7, 2014 report, Dr. Sultan, a second opinion physician Board-certified in orthopedic surgery, diagnosed left shoulder rotator cuff and residual significant left shoulder adhesive capsulitis. He opined that appellant's accepted left shoulder condition was permanent and would not resolve. Dr. Sultan determined that additional left shoulder surgery was unnecessary and unwarranted.

The only restriction on OWCP's authority to authorize medical treatment is one of reasonableness.⁹ Dr. Sultan's opinion contained sufficient medical rationale to support OWCP's December 1, 2014 and March 17, 2016 decisions. He stated unequivocally, based on a thorough review of the medical evidence, that the requested surgical procedure was unwarranted and unnecessary as appellant's left shoulder condition was permanent and unresolvable. Dr. Sultan's

⁵ *A.O.*, Docket No. 08-0580 (issued January 28, 2009); *Joseph P. Hofmann*, 57 ECAB 456 (2006).

⁶ *D.C.*, 58 ECAB 620 (2007); *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

⁷ *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁸ *See R.L.*, Docket No. 08-0855, (issued October 6, 2008); *Joseph P. Hofmann*, 57 ECAB 456 (2006).

⁹ *Supra* note 6; *see also A.W.*, Docket No. 14-0708 (issued January 2, 2015) (the Board found that OWCP did not abuse its discretion by relying on the opinion of the second opinion examiner as the weight of the evidence in denying approval for elective spinal surgery).

report is sufficiently probative, rationalized, and based upon a proper factual background.¹⁰ The Board, therefore, finds that OWCP did not abuse its discretion by relying on the opinion of Dr. Sultan to deny approval for the left rotator cuff surgery.

On appeal counsel contends that there is an unresolved conflict in the medical opinion evidence between Dr. Sultan and Dr. Kearns regarding whether the requested shoulder surgery should be authorized. As discussed above, the Board finds that OWCP did not abuse its discretion by relying on Dr. Sultan's report to deny authorization for the second rotator cuff surgery based upon Dr. Sultan's opinion.

LEGAL PRECEDENT -- ISSUE 2

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.¹¹ 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.¹² 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.¹³

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.¹⁴ 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.¹⁵ Section 10.516 of the Code of Federal Regulations¹⁶ provides 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.¹⁷

The determination of whether an employee is capable of performing modified duty is a medical question that must be resolved by probative medical opinion.¹⁸ OWCP's procedures

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8106(c)(2).

¹² *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹³ *H. Adrian Osborne*, 48 ECAB 556 (1997).

¹⁴ *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

¹⁶ 20 C.F.R. § 10.516.

¹⁷ See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹⁸ See *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 EAB 1002 (1995).

provide that an acceptable reason for refusing a job offer includes medical evidence that the claimant's refusal was based upon the attending physician's advice, and that such advice included medical rationale in support of the opinion.¹⁹

ANALYSIS -- ISSUE 2

On appeal counsel contends that appellant is unable to perform the duties of the offered position based on the advice of his treating physician. He also contends there is an unresolved conflict in the medical opinion evidence. The Board finds that OWCP met its burden of proof to terminate appellant's entitlement to wage loss and schedule award compensation. The Board finds that there is no unresolved conflict in the medical opinion evidence.

The evidence of record establishes that appellant is capable of performing the modified city carrier position offered by the employing establishment and determined to be suitable by OWCP in an October 31, 2014 letter. The job offer required him to case mail for one to two hours and deliver mail weighing no more than 15 pounds six to seven hours per day. The job offer also indicated that appellant would not be required to reach above the left shoulder, could lift, push, and pull up to 15 pounds using both hands for one to eight hours a day and up to eight hours a day of standing, walking, sitting, twisting, reaching, bending, stooping, squatting, kneeling, and operating a motor vehicle. The modified clerk position was not temporary or seasonal in nature.²⁰

The issue 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 medical evidence.²¹ The Board finds that the weight of the medical evidence in this case establishes that appellant was capable of performing the modified city carrier position. In a May 7, 2014 report, Dr. Sultan, an OWCP referral physician, provided a comprehensive medical report in which he reviewed appellant's history of injury and medical treatment, presented examination findings, and found that appellant could perform light-duty/sedentary work with restrictions he specified. The employing establishment prepared a modified-duty job offer conforming with Dr. Sultan's sedentary physical restrictions, which OWCP reviewed and found suitable to appellant's physical limitations.

In his May 7, 2014 report, Dr. Sultan was provided with the appropriate medical records and a statement of accepted facts in order to have a sufficient history to render a well-reasoned opinion regarding the extent of disability following his examination. He found that, while appellant's left shoulder condition was permanent and would not resolve, his physical examination and objective evidence indicated that appellant was able to work with restrictions. Dr. Sultan restricted appellant to no reaching above the shoulder and no pushing, pulling, or lifting more than 15 pounds using both hands.

¹⁹ *Supra* note 15 at Chapter 2.814.5(a)(4) (June 2013); *see B.H.*, Docket No. 11-0379 (issued October 17, 2011).

²⁰ *See supra* note 15 at Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

²¹ *Robert Dickinson, supra* note 18; *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

Dr. Sultan opined that appellant had reached maximum medical improvement regarding the accepted left shoulder conditions, detailed his specific findings and provided medical rationale to support his conclusion that appellant could return to work with limitations.

Appellant submitted several reports in which Dr. Kearns, an attending physician specializing in orthopedic surgery, indicated that appellant was totally disabled until additional left shoulder arthroscopic surgery was performed. For example, in an October 14, 2014 OWCP-5 form, reports dated September 30, November 4 and 12, and December 2, 2014, and a form report dated June 16, 2015, Dr. Kearns indicated that appellant was disabled pending the required left shoulder surgery. He referenced a MRI scan showing a rotator cuff tear in support of his opinion that appellant was disabled pending the recommended surgery. These reports are of limited probative value because they do not contain sufficient medical rationale supporting their opinions on total disability. Dr. Kearns merely opined that appellant was totally disabled until the recommended surgery was performed, but did provide sufficient rationalization as to why appellant was totally disabled or how it was causally related to the accepted work injuries.²² Thus, the Board concludes that the weight of the medical opinion evidence rests with Dr. Sultan's opinion.

The Board notes that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing him with an opportunity to accept the offered position after informing him that his reasons for initially refusing the position were not valid.²³ Therefore, OWCP established that the modified city carrier position offered by the employing establishment was suitable.

Once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of proof to show that such refusal to work was justified.²⁴ The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified clerk position and notes that the evidence of record is insufficient to justify his refusal of the position.

In support of his reconsideration request, appellant submitted reports from Dr. Kearns dated February 3 and June 16, 2015, reiterating his opinion that appellant was currently totally disabled and attributing the condition to the accepted February 22, 2013 employment injury. As noted these reports did not provide sufficient medical rationale explaining how the diagnosed conditions precluded appellant from accepting the offered position. Appellant has not provided evidence sufficient to establish that the job offered to him required performance of any duties beyond the work restrictions imposed by Dr. Sultan, an OWCP referral physician.

Appellant failed to submit medical evidence indicating that his refusal to accept the October 20, 2014 modified job offer was reasonable or justified.²⁵ Accordingly, he has failed to

²² See *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

²³ See generally *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

²⁴ *M.S.*, 58 ECAB 328 (2007).

²⁵ *Id.*

meet his burden to provide evidence sufficient to warrant modification of the July 21, 2015 termination decision. The Board finds that OWCP properly terminated appellant's monetary compensation due to his refusal of suitable work and that he did not thereafter establish that his refusal of suitable work was justified. The July 21, 2015 OWCP decision is affirmed.

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 did not abuse its discretion by denying authorization for left shoulder surgery. The Board further finds that OWCP properly terminated appellant's entitlement to wage loss and schedule award compensation, effective July 26, 2015, because he refused suitable work under pursuant 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2016 is affirmed.

Issued: September 7, 2017
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