

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 11, 1998 appellant, then a 26-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging a pinched nerve, tendinitis, and an aggravation of bursae in her right shoulder causally related to factors of her federal employment. OWCP accepted the claim for right shoulder and upper arm strain, right acromioclavicular (AC) shoulder and upper arm strain, other joint derangement of the right shoulder, and cervical sprain. Appellant stopped work on May 29, 1998 and returned to modified work on November 23, 1998. She had intermittent periods of disability until September 17, 2010, when she stopped work and did not return. OWCP paid wage-loss compensation for total disability beginning September 17, 2010.³

Appellant underwent numerous right shoulder surgeries, including capsulorrhaphies on April 12, 1999 and January 4, 2001, an anterior shoulder arthroscopic reconstruction on April 24, 2008, an extensive debridement of the labrum and open anterior capsulorrhaphy with coracoid transfer on September 17, 2010, a revision anterior capsulorrhaphy and removal of a deep implant and iliac crest bone graft on November 5, 2010, and an intraarticular debridement and AC joint resection on October 30, 2013.

On January 15, 2015 Dr. Gregory Gramstad, a Board-certified orthopedic surgeon, requested authorization from OWCP for additional right shoulder surgery.⁴

The employing establishment, on September 28, 2015, offered appellant a full-time modified mail processing clerk position in Coppell, Texas. This entailed intermittent sitting for seven to eight hours per day, intermittent simple grasping using a computer mouse for four hours per day, intermittent use of the hands for data entry on a keyboard for four to six hours per day, and using a telephone with a headset intermittently for six to seven hours per day.

On October 23, 2015 Dr. Gramstad performed a revision of the anterior posterior capsulorrhaphy for recurrent multidirectional instability of the right shoulder and a limited debridement of the glenohumeral joint.

² Docket No. 09-2088 (issued April 8, 2010).

³ OWCP previously accepted that appellant sustained right shoulder strain on March 27, 2000 under File No. xxxxxx703. It also accepted her 2006 occupational disease claim for an aggravation of right shoulder and arm sprain/strain and an aggravation of joint derangement of the right shoulder, assigned File No. xxxxxx325. The cases were combined under the current File No. xxxxxx330.

⁴ On May 14, 2015 Dr. Ronald L. Teed, a Board-certified orthopedic surgeon and second opinion physician, found that appellant should not have shoulder surgery. He opined that she could work with restrictions. OWCP determined that a conflict in medical opinion existed regarding the extent of disability and need for surgery. On July 1, 2015 Dr. Thomas L. Gritzka, a Board-certified orthopedic surgeon and impartial medical examiner, diagnosed generalized ligamentous hyperlaxity and found that additional surgery was appropriate and causally related to the accepted injury. He opined that appellant could perform light work.

On January 25, 2016 appellant accepted the September 28, 2015 offered position conditional on a change in location to Portland, Oregon, for continuity of medical treatment.

In reports dated January 25 and March 3, 2016, Dr. Kevin J. Kane, an attending osteopath, diagnosed status post shoulder surgery, cervical strain, right shoulder and arm strain, and right shoulder joint derangement. He indicated that a “job analysis [was] approved with conditions.”

OWCP, by letter dated March 10, 2016, notified appellant that the offered position was suitable based on Dr. Kane’s finding in his January 25, 2016 report that it was within her restrictions. It found that there were numerous orthopedic surgeons in the area of Sulphur Springs, TX, and informed her that residing in a different geographical area was not an acceptable reason to refuse the offered position. OWCP provided appellant 30 days to accept the position or have her compensation terminated.

On March 15, 2016 Dr. Kane noted that appellant had undergone seven shoulder surgeries and that her attending orthopedic surgeons found that she could not drive over 30 minutes or work more than four hours per day. He advised that he had reviewed her file and she was “clearly unable to meet the demands of the job description provided by the [employing establishment] for my approval.” Dr. Kane indicated that appellant was permanently disabled.⁵

In a March 16, 2016 work capacity evaluation (Form OWCP-5c), Dr. Kane found that appellant could perform sedentary work for four hours per day. He specified that she could reach for one hour per day, twist, bend, squat, and stoop for four hours per day, perform repetitive wrist and elbow movements for four hours per day, and push, pull, and lift up to 10 pounds for four hours per day. Dr. Kane determined that appellant could not reach over her shoulder, kneel, or climb. He found that she could operate a motor vehicle at work for three hours per day and to and from work for 30 minutes a day.

The employing establishment, on April 29, 2016, offered appellant a position as a sales retention team member for four hours per day five days a week in Coppell, Texas. The physical requirements including using a computer mouse intermittently for four hours per day, using a keyboard for data entry no more than four hours per day, and pushing, pulling, and lifting up to 10 pounds no more than four hours per day.

On April 29, 2016 Dr. Kane diagnosed cervical strain, right shoulder and arm strain, and right shoulder joint derangement. He opined that appellant was unable to perform the position offered by the employing establishment and provided for his approval.

The employing establishment advised OWCP on May 10, 2016 that there was no work available within appellant’s restrictions in her current geographical area of Portland, OR.

By letter dated May 10, 2016, OWCP informed appellant that the April 29, 2016 job offer was suitable as it was within the work restrictions provided by Dr. Kane on March 16, 2016. It provided her 30 days to accept the position or offer reasons for her refusal, and informed her of the penalties for refusing a suitable position. OWCP notified appellant that it would pay her wage-

⁵ Dr. Kane provided a similar report on March 29, 2016.

loss compensation for the difference between pay of the offered position and her current pay rate for her date-of-injury position. It further noted that she was still on the rolls of the employing establishment and thus not entitled to relocation expenses.

On May 16, 2016 appellant telephoned OWCP and advised that she still owned her former house in Texas, but that it was located more than a 30-minute drive from the offered position. In a letter dated June 7, 2016, she related that, after the employing establishment informed her in 2011 that there was no position within her restrictions, she moved to an area with more career options. Appellant described her difficulty with pain and noted that the position was over 97 miles from the home she still owned.

Dr. Kane, on May 27, 2016, measured appellant's right shoulder range of motion and again noted that she had seven shoulder surgeries. He diagnosed strain of the cervical spine, right shoulder and arm, and right shoulder joint derangement. Dr. Kane opined that appellant was unable to perform the duties of the job offered by the employing establishment and submitted for his approval. In a May 31, 2016 work capacity evaluation (OWCP-5c), he found that appellant was totally and permanently disabled from employment.

Appellant, on June 7, 2016, submitted a November 24, 2015 report from Dr. Julie Raggio, a Board-certified nephrologist. Dr. Raggio diagnosed stage three chronic kidney disease, polycystic kidney disease, and hypertension. She opined that a move "might adversely affect her health" and recommended continued nephrology care in Portland, OR.

On June 13, 2016 OWCP informed appellant that her reasons for refusing the offered position were not valid and provided her 15 days to accept the position or have her compensation terminated.⁶ It found that Dr. Raggio did not explain why she could not receive appropriate treatment in another location and that Dr. Kane did not provide rationale or objective findings supporting his disability determination.

Dr. Kane, in a June 21, 2016 progress report, measured obvious atrophy at the infraspinatus posteriorly and the anterior surgical site.⁷ He opined that appellant could do some keyboarding, but was significantly limited in her use of the right arm. Dr. Kane recommended a functional capacity evaluation (FCE) if OWCP "remains refractory to my recommendations for activity restrictions that preclude RTW [return to work] in the jobs I have reviewed." He diagnosed cervical strain, right shoulder and arm strain, and right shoulder joint derangement. Dr. Kane advised that his opinion was based on "objective findings that substantiate [appellant's] work restrictions/limitations...."

On June 27, 2016 appellant requested that OWCP provide her an additional 45 days to begin work in Texas as she required time to pack and attend physician's appointments. She noted

⁶ In a decision dated June 15, 2016, OWCP denied authorization for physical therapy, occupational therapy, and massage therapy as the weight of the evidence did not establish that it was medically necessary to treat the accepted work injury.

⁷ Dr. Kane provided similar reports dated June 28 and August 23, 2016.

that Dr. Kane had requested an FCE. Appellant questioned whether she would receive compensation for the four hours per day she was not working.

In a decision dated July 1, 2016, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation effective July 1, 2016 under section 8106(c)(2) as she refused an offer of suitable work. It found that Dr. Kane's March 16, 2016 report constituted the weight of the evidence and established that she could perform the offered position. OWCP determined that his June 21, 2016 report did not contain current findings on examination or address her work abilities. It noted that appellant had not requested an extension of time to report to the job from the employing establishment.

On September 14, 2016 OWCP expanded acceptance of appellant's claim to include other specified joint disorders of the right shoulder.

Dr. Susan Schmitt, a Board-certified physiatrist, evaluated appellant on September 9, 2016 at the request of Dr. Kane. She discussed her history of the right shoulder pain and resulting surgeries. Dr. Schmitt provided findings on examination and diagnosed right shoulder pain and instability status post seven surgeries, subscapularis insufficiency, x-ray evidence of fibrous union of iliac crest glenoid augmentation, and significantly limited function of the right arm with permanently reduced motion. She found atrophy of the deltoid and weakness of the right subscapularis with "profound loss of range of motion that appears permanent and greatly limits functional use of the right upper extremity for even small motions except for limited tasks like grasping keys, pens, and paper." Dr. Schmitt determined that appellant could drive 25 to 30 minutes and deferred to Dr. Kane for her work ability as she did not have an FCE to review.

Appellant, on October 13, 2016, requested reconsideration.

In a November 15, 2016 progress report, Dr. Kane discussed appellant's complaints of shoulder pain while cooking. He diagnosed cervical strain and right shoulder and arm strain with joint derangement. Appellant could perform some keyboarding, but Dr. Kane found that she could not work in the jobs that he had reviewed. Dr. Kane further noted that orthopedists had found that she could not work more than four hours per day or drive over 30 minutes.

By decision dated December 8, 2016, OWCP denied modification of its July 1, 2016 decision.

Dr. Kane, in a January 16, 2017 progress report, advised that appellant had undergone seven shoulder surgeries, the last a "salvage" procedure. He found that she required help with activities of daily living. Dr. Kane related:

"[Appellant] can hardly use the right arm at all for work tasks, due to [the] risk of reinjury with any movement due to ligamentous laxity sufficient to dislocate while cooking recently, exacerbating her pain for several weeks.

"For these reasons, I consider her substantially disabled, and unable to resume gainful employment with the [employing establishment]."

On January 19, 2017 appellant again requested reconsideration. She asserted that if she moved back to Texas she would return to the home she still owned, which was over 100 minutes from the offered position. Appellant noted that she could only drive 30 minutes. She submitted proof of home ownership in Texas.

In a January 31, 2017 work capacity evaluation, Dr. Kane diagnosed cervical strain, right shoulder and arm strain, and right shoulder joint derangement. He found that she was totally disabled and listed work restrictions of no reaching, repetitive movements of the right wrists or elbows, and no pushing, pulling, lifting, or operating a motor vehicle.

By decision dated April 18, 2017, OWCP denied modification of its December 8, 2016 decision. It found that the job offer was within 50 miles of her residence at the time of injury and thus the distance was not a reason to decline the position. OWCP determined that the contemporaneous medical evidence did not show that appellant was unable to perform the duties of the offered position.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁸ Section 8106(c)(2) of FECA⁹ provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.¹⁰ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.¹¹ Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.¹²

Section 10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.¹³ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.¹⁴

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability

⁸ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁹ 5 U.S.C. § 8106(c)(2).

¹⁰ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

¹¹ *Ronald M. Jones*, 52 ECAB 190 (2000).

¹² *Joan F. Burke*, 54 ECAB 406 (2003).

¹³ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 11.

¹⁴ *Id.* at § 10.516.

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.¹⁵ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.¹⁶

OWCP's procedures provide that if the "claimant submits evidence and/or reasons for refusing the offered position, the CE [claims examiner] must carefully evaluate the claimant's response and determine whether the claimant's reasons for refusing the job are valid."¹⁷ Regarding acceptable reasons for refusing the position, including medical evidence of inability to do the work, its procedures provide: OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹⁸

ANALYSIS

The Board finds that OWCP failed to meet its burden to prove to establish that the sales retention team member position was suitable. OWCP accepted that appellant sustained right shoulder and upper arm strain, strain of the AC shoulder joint, other joint derangement of the right shoulder, and cervical strain causally related to factors of her federal employment. It paid her wage-loss compensation for total disability beginning September 17, 2010. Appellant underwent multiple shoulder surgeries, including an October 23, 2015 revision of an anterior posterior capsulorrhaphy for recurrent multidirectional instability and a limited debridement of the glenohumeral joint.

On January 25 and March 3, 2016 appellant's attending physician, Dr. Kane, generally indicated that a "job analysis [was] approved with conditions." In a March 16, 2016 work capacity evaluation, he opined that she could work four hours per day reaching for one hour per day, twisting, bending, squatting, and stooping for four hours per day, performing repetitive movements of the wrist and elbows for four hours per day, and pushing, pulling, and lifting up to 10 pounds for four hours per day. Dr. Kane further found that appellant could drive to and from work for a half hour per day and operate a motor vehicle while at work for three hours per day. Based on these restrictions, on April 29, 2016 the employing establishment offered her a position as a sales retention team member for four hours per day.

OWCP, on May 10, 2016, found that the offered position was within the restrictions set forth by Dr. Kane on March 16, 2016. It provided appellant 30 days to either accept the position or provide reasons for her refusal. In response, appellant submitted a May 27, 2016 report from Dr. Kane finding that she was unable to perform the duties of the offered position. Dr. Kane measured range of motion of the right shoulder and noted appellant's history of seven shoulder surgeries. In a May 31, 2016 work capacity evaluation, he determined that she was totally disabled

¹⁵ See *Linda Hilton*, 52 ECAB 476 (2001).

¹⁶ *Id.*

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5 (June 2013).

¹⁸ *Id.* at Chapter 8.814.5(a)(4) (June 2013).

from employment. On June 21, 2016 Dr. Kane found atrophy at the posterior infraspinatus tendon and the anterior surgical site. He indicated that appellant could perform some keyboarding but was limited in the use of her right arm. Dr. Kane recommended an FCE if OWCP failed to accept his finding that her restrictions prevented her return to work in the positions that he had reviewed. He advised that he based his opinion regarding appellant's work restrictions on objective findings.

OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective July 1, 2016 based on Dr. Kane's March 16, 2016 work capacity evaluation. It found that the physician failed to base his June 21, 2016 opinion on examination findings or address her ability to work. Dr. Kane, however, provided examination findings of shoulder atrophy and specifically indicated that he based his opinion regarding work restrictions on objective findings. He opined that appellant was unable to perform the duties of the job offers that he had reviewed. In *J.R.*,¹⁹ the Board reversed OWCP's termination of a claimant's compensation when it based the termination on a prior report of an attending physician that expressed an opinion that he no longer held and failed to address the subsequent medical opinion that indicated that appellant could not work

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.²⁰ As a penalty provision, section 8106(c)(2) must be narrowly construed.²¹ In this case, the medical evidence from appellant's treating physician, Dr. Kane, often changed and was unclear on the issue of appellant's work abilities. The decision below did not reference any of the subsequent vacillatory opinions of Dr. Kane where he opined in some instances that appellant was temporarily disabled and not able to perform the offered job. OWCP did not secure a medical report that reviewed the job offered and provided a clear, reasoned opinion as to its suitability. Consequently, it has not meet its burden of proof.²²

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective July 1, 2016 as she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

¹⁹ Docket No. 15-0045 (issued September 22, 2016).

²⁰ *Annette Quimby*, 49 ECAB 304 (1998).

²¹ *See Stephen A. Pasquale*, 57 ECAB 396 (2006).

²² *See D.G.*, Docket No. 16-1492 (issued January 3, 2017).

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 9, 2018
Washington, DC

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

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

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