

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

T.M., Appellant	)	
	)	
and	)	<b>Docket No. 18-1368</b>
	)	<b>Issued: February 21, 2019</b>
DEPARTMENT OF THE TREASURY,	)	
INTERNAL REVENUE SERVICE, Buffalo, NY,	)	
Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Thomas S. Harkins, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 2, 2018 appellant, through counsel, filed a timely appeal from a January 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the January 26, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "the Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective March 15, 2013 for refusal of suitable work pursuant to 5 U.S.C. § 8106(c).

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 17, 2011 appellant, then a 32-year-old secretary, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 2011 she sustained a left shoulder injury while lifting a box of copy paper onto a cart. She stopped work on November 15, 2011. On December 7, 2011 OWCP accepted appellant's claim for a left sprain of shoulder and rotator cuff. It commenced payment of wage-loss compensation and medical benefits on the supplemental rolls as of January 26, 2012.

Dr. Donald P. Douglas, a Board-certified orthopedic surgeon, performed arthroscopic debridement of the left shoulder on May 22, 2012. Appellant did not return to work following the surgery.

Dr. Douglas treated appellant in follow-up, noting continued left upper extremity pain. He advised that she was totally disabled. On October 17, 2012 Dr. Douglas noted no change in appellant's reported symptoms of shoulder and neck pain. He related that she had been seen by a neurologist who felt there was a cervical component. On December 20, 2012 Dr. Douglas advised that appellant had mild improvement in her overall pain and continued to be totally disabled.

OWCP referred appellant, a set of questions, and a statement of accepted facts to Dr. Robert M. Ungerer, a Board-certified orthopedic surgeon, for a second opinion evaluation.<sup>5</sup> In a December 19, 2012 report, Dr. Ungerer noted his previous examination in February 2012, noted the history of injury, the May 22, 2012 surgery, and his review of the statement of accepted facts and medical record. He reported appellant's complaint of intense left upper extremity pain, that she was unable to reach above her head, and that her left arm would become cold, sweaty, and then numb, and that this had affected daily activities such as lifting, dressing, washing her back, noting that she performed all activities of daily living using her right hand. Dr. Ungerer noted appellant's physical examination findings in detail. He diagnosed strain, partial tear of subscapularis tendon, left shoulder, and post-traumatic adhesive capsulitis, left shoulder. Dr. Ungerer recommended a rigorous physical therapy and a home exercise program to improve motion and strength, and a multispecialty pain management program. He opined that appellant could not perform her regular duties as a secretary because she could not lift her left arm above shoulder height, but that she could perform modified duty. Dr. Ungerer advised that she could work eight hours a day, five

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<sup>4</sup> Docket No. 16-1467 (issued October 4, 2017); Docket No. 17-0464 (issued October 4, 2017).

<sup>5</sup> Dr. Ungerer had previously seen appellant for a second opinion evaluation on February 15 2012. At that time he diagnosed a partial tear of the left shoulder subscapularis tendon. Dr. Ungerer advised that she could not perform full duty at that time due to the employment injury, but expected full recovery within three months.

days a week, with no reaching above shoulder height with the left arm. Left arm lifting, pushing, and pulling were restricted to one pound for 15 minutes each hour.

On January 15, 2013 the employing establishment offered appellant a secretary (automation) position, based on the restrictions provided by Dr. Ungerer, for eight hours daily, five days a week. The duties and responsibilities included that she was to receive and screen telephone calls and visitors, receive and control and suspense items, maintain various office equipment, compose and distribute email messages, prepare correspondence and reports, organize and maintain records. The job offer, to begin on February 11, 2013, advised that appellant would not be required to perform the physical aspects of the position which would be in conflict with the provided medical restrictions to her left arm. These were no reaching above the shoulder or keyboarding with the left arm, and lifting, pushing, and pulling with the left arm were limited to one pound for 15 minutes each hour.

By letter dated January 15, 2013, 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.

Appellant refused the offered position on January 28, 2013, indicating that she was disabled due to the employment injury. On February 1, 2013 she disagreed with the proposed termination. Appellant described her treatment and complaints of severe muscle pain and nerve pain, muscle spasms, left arm and shoulder swelling, numbness and stiffness, migraine headaches, trouble sleeping, needing help with activities of daily living, and forgetfulness.

OWCP ascertained that the position was still available, and by letter dated February 19, 2013, it advised appellant that her reasons for refusing the offered position were not valid. It gave her an additional 15 days to accept.

In medical reports dated February 25, 2013, Dr. Douglas noted that appellant continued to have left shoulder pain and limited motion. He advised that appellant was totally disabled.

Appellant did not accept the offered position.

By decision dated March 18, 2013, OWCP terminated appellant's wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective March 15, 2013. It noted that Dr. Douglas offered no medically rationalized opinion as to why appellant remained totally disabled and that he did not reference the January 15, 2013 limited-duty job offer.

Appellant requested reconsideration on October 24, 2013. She submitted additional reports from Dr. Douglas dated April 8 to October 16, 2013 in which he indicated that there had been no significant improvement in her left shoulder condition. Dr. Douglas diagnosed chronic left shoulder pain and adhesive capsulitis. He advised that appellant's ongoing left shoulder symptoms, as well as her ongoing neurologic investigation and treatment, rendered her totally disabled. On June 10, 2013 Dr. Douglas requested authorization for additional surgery.

In a merit decision dated December 17, 2013, OWCP denied modification of the March 18, 2013 decision.

In a February 21, 2014 report, Dr. Minsoo Kang, a Board-certified neurologist, noted seeing appellant for neurological evaluation. He reported that she had continued left upper extremity pain. Following physical examination, Dr. Kang diagnosed pain in limb, myofascial pain, paresthesia, and shoulder pain. He recommended a bone scan.

Based on the opinion of its medical adviser, OWCP authorized additional surgery. On April 29, 2014 Dr. Douglas performed arthroscopic manipulation of left shoulder for adhesive capsulitis. In a follow-up report dated June 18, 2014, he advised that appellant was totally disabled.

On July 31, 2014 OWCP accepted appellant's claim for a recurrence of disability (Form CA-2a) that occurred on April 29, 2014. It paid her wage-loss compensation beginning that day.<sup>6</sup>

On December 5, 2014 counsel submitted a request for reconsideration of the December 13, 2013 decision that denied modification of the March 18, 2013 suitable work determination. He asserted that the diagnoses of arthrofibrosis/scarring of the left shoulder and impingement with subacromial bursitis should be accepted, that the position offered appellant was not suitable based on the medical evidence, and, in the least, a conflict in medical evidence had been created regarding whether appellant could perform the duties of the offered position.

Counsel also submitted a February 21, 2014 report in which Dr. Douglas indicated that, despite injections and physical therapy, appellant remained disabled with extremely limited function of the left shoulder. He noted that appellant provided a list of required activities of both her regular and the modified description and, given her current symptomatology, he did not believe she could perform these requirements. OWCP continued to receive follow-up reports from Dr. Douglas documenting her current condition.

In May 2015 OWCP referred appellant to Dr. Donald Paarlberg, a Board-certified orthopedist, for a second opinion evaluation. In a June 16, 2015 report, Dr. Paarlberg noted the history of injury, appellant's complaint of worsening left shoulder pain and left upper extremity numbness and tingling, worse with activity and motion, and his review of the statement of accepted

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<sup>6</sup> Following inquiries by the employing establishment in August and September 2014 and January 2015, by decision dated February 9, 2015, OWCP found that appellant was not entitled to wage-loss compensation for the period December 1, 2014 and continuing. It noted that the March 18, 2013 termination decision remained in effect and that it had erroneously paid monetary compensation for the period April 29 through November 28, 2014. On December 8, 2015 OWCP issued a notice of proposed rescission of acceptance of the recurrence of disability for which appellant was paid compensation for the period April 29 through November 28, 2014. It found that the July 31, 2014 decision had been issued in error because her entitlement to wage-loss and schedule award benefits had been terminated by decision dated March 18, 2013, based on her refusal to accept suitable employment. OWCP finalized the rescission on January 20, 2016. In a separate January 20, 2016 decision, it denied appellant's claim for a recurrence of disability beginning April 29, 2014 and continuing through November 28, 2014. Appellant, through counsel, filed an appeal with the Board from both January 20, 2016 decisions. In separate October 4, 2017 decisions, the Board set aside both of OWCP's January 20, 2016 merit decisions. The Board noted that the record contained a timely request for reconsideration of OWCP's December 17, 2013 decision that denied modification of its March 18, 2013 decision in which appellant's entitled to wage-loss and schedule award compensation was terminated in accordance with section 8106(c) of FECA because she failed to accept suitable employment. The Board noted that the basis for each OWCP decision issued by OWCP subsequent to its acceptance of the April 29, 2014 recurrence of disability flowed from the March 18, 2013 decision. The Board remanded the case to OWCP to issue an appropriate decision on the December 5, 2014 reconsideration request before addressing rescission, recurrence of disability, or an overpayment of compensation.

facts and medical record. He noted fairly restricted left shoulder range of motion on physical examination. Dr. Paarlberg advised that the accepted left rotator cuff sprain had not resolved because she had pain and was unable to move the left shoulder well. He reported that she had been diagnosed with reflex sympathetic dystrophy (RSD) and was unable to return to her date of injury job, but could return to four hours of sedentary work daily with no use of her left arm, noting that the RSD would not allow her to utilize her left arm. Dr. Paarlberg did not address appellant's ability to perform the suitable work position as of March 15, 2013.

Dr. Douglas continued to submit reports in which he reiterated his prior findings and conclusions. On October 15, 2015 he requested authorization for additional arthroscopy with lysis of adhesions of the left shoulder.

On August 24, 2015 appellant began pain management with Dr. Pratibha Bansal, a Board-certified anesthesiologist. Dr. Bansal opined that appellant was disabled due to pain.

On January 18, 2016 Dr. Douglas noted that appellant did not wish to proceed with additional surgery. He continued to diagnose left shoulder arthrofibrosis and advise that she was totally disabled. In reports dated August 24, 2016 to January 4, 2017, Dr. Douglas reiterated his findings and conclusions. On May 22, 2017 he reported that appellant was partially disabled with 70 percent impairment. In reports dated October 2, 2017 and January 17, 2018, Dr. Douglas reiterated his diagnoses of arthrofibrosis of the left shoulder and RSD of the left upper extremity. He advised that appellant was partially disabled with 75 percent impairment.

By decision dated January 26, 2018, OWCP denied modification of its prior decisions with regard to whether it properly terminated appellant's monetary compensation on March 15, 2013 because she rejected an offer of suitable work. It found the opinions of appellant's physicians did not contain sufficient rationale to support that she was unable to perform the modified position and concluded that the weight of the medical evidence rested with the opinion of Dr. Ungerer.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's compensation benefits.<sup>7</sup> Section 8106(c)(2) of FECA 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.<sup>8</sup> To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.<sup>9</sup> 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.<sup>10</sup>

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<sup>7</sup> *M.J.*, Docket No. 18-0799 (issued December 3, 2018).

<sup>8</sup> 5 U.S.C. § 8106(c)(2); *D.L.*, Docket No. 18-0862 (issued October 12, 2018).

<sup>9</sup> *M.H.*, Docket No. 17-0210 (issued July 3, 2013).

<sup>10</sup> *Id.*

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured, has the burden of proof to establish that such refusal or failure to work was reasonable or justified.<sup>11</sup> 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.<sup>12</sup>

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, and establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.<sup>13</sup> 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.<sup>14</sup> In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.<sup>15</sup>

### ANALYSIS

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective March 15, 2013, pursuant to 5 U.S.C. § 8106(c)(2), due to her refusal of an offer of suitable work.

The Board finds that the evidence of record establishes that appellant was capable of performing the position of secretary (automation) offered by the employing establishment as of March 15, 2013. The offered position involved secretarial duties and advised that appellant would not be required to perform the physical aspects of the position which would be in conflict with the provided medical restrictions to her left arm. These, which were in conformance with restrictions provided by Dr. Ungerer, an OWCP referral physician, were no reaching above the shoulder or key boarding with the left arm. Lifting, pushing, and pulling with the left arm were limited to one pound for 15 minutes each hour.

The Board finds that, with respect to appellant's physical ability to work, OWCP properly relied on the opinion of Dr. Ungerer when it made its determination that the secretarial position offered by the employing establishment was suitable. The weight of the medical evidence regarding her ability to work is represented by the thorough, well-rationalized opinion of Dr. Ungerer. His December 19, 2012 report shows that appellant was capable of working.

In his December 29, 2012 report, Dr. Ungerer noted his review of the record and detailed his findings on physical examination. He diagnosed strain, partial tear of subscapularis tendon, left shoulder, and post-traumatic adhesive capsulitis, left shoulder. Dr. Ungerer opined that appellant could not perform regular duties as a secretary because she could not lift her left arm

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<sup>11</sup> 20 C.F.R. § 10.517(a).

<sup>12</sup> *Id.* at § 10.516.

<sup>13</sup> *See M.J.*, *supra* note 7.

<sup>14</sup> *M.H.*, *supra* note 9.

<sup>15</sup> *See M.J.*, *supra* note 7.

above shoulder height, but that she could perform modified duty and advised that she could work eight hours a day, five days a week, with no reaching above shoulder height with the left arm. Left arm lifting, pushing, and pulling were restricted to one pound for 15 minutes each hour.

The Board finds that the opinion of Dr. Ungerer has reliability, probative value, and convincing quality with respect to its conclusions. Dr. Ungerer provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>16</sup> He provided medical rationale for his opinion by explaining that, although appellant's medical condition prevented her from performing her regular secretarial work, the objective findings established that she could perform full-time restricted duty, such as the position offered by the employing establishment.<sup>17</sup>

The Board, therefore, finds that OWCP has established that the position of secretary (automation) offered by the employing establishment in February 2013 was suitable. As noted above, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered has the burden of proof to establish that such refusal to work was justified.<sup>18</sup>

The Board has reviewed the evidence and argument submitted by appellant in support of her refusal of the position of secretary (automation) and finds that it is insufficient to justify her refusal of the position. In support of her claim, appellant submitted numerous reports from Dr. Douglas. In reports contemporaneous with the March 15, 2013 suitable work termination, Dr. Douglas was consistent in his opinion that appellant was totally disabled. On February 25, 2013 he advised that she continued to have left shoulder pain and limited motion and was totally disabled. In reports dated April 8 to October 16, 2013, Dr. Douglas indicated that there had been no significant improvement in appellant's left shoulder condition, diagnosed chronic left shoulder pain and adhesive capsulitis, and advised that she was totally disabled. However, he did not provide an explanation regarding why he found her totally disabled from work. Dr. Douglas did not indicate in any of his reports, either contemporaneous with appellant's refusal of the modified position or in subsequent reports, that he had reviewed the job offer with its left upper extremity restrictions. A medical opinion is of limited probative value on a given medical issue the opinion is unsupported by medical rationale.<sup>19</sup>

While appellant submitted a number of medical reports in subsequent years from various physicians, none commented on her condition as of March 15, 2013 or whether she could perform the modified job duties at that time. They are, therefore, not relevant on the issue of whether OWCP properly terminated her monetary compensation pursuant to section 8106(c). The fact that appellant was later diagnosed with RSD, as reported by Dr. Paarlberg, an OWCP referral physician, in June 2015 is also not relevant to her condition in 2013.

The Board finds that OWCP complied with its procedural requirement prior to terminating appellant's compensation, including providing her with an opportunity to accept the position of

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<sup>16</sup> See *M.H.*, *supra* note 9; *Melvina Jackson*, 38 ECAB 443 (1987).

<sup>17</sup> The Board notes that the specific work restrictions recommended by Dr. Ungerer would allow appellant to perform the duties of the offered secretarial position.

<sup>18</sup> 20 C.F.R. § 10.517(a); see *M.J.*, *supra* note 7.

<sup>19</sup> See *H.B.*, Docket No. 18-0781 (issued September 5, 2018).

secretary (automation) offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid.<sup>20</sup>

For these reasons, the Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective March 15, 2013, because she refused the January 15, 2013 offer of suitable work.<sup>21</sup>

On appeal counsel contends that the medical evidence establishes that appellant could not perform the position offered in January 2015. As stated above, the medical and factual evidence of record established that the offered modified secretary (automation) position was suitable work at that time, and appellant presented no valid reason for refusing the job.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective March 15, 2013, pursuant to 5 U.S.C. § 8106(c)(2), due to her refusal of an offer of suitable employment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 2019  
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

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<sup>20</sup> See *M.J.*, *supra* note 7; see generally *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>21</sup> See *M.H.*, *supra* note 9.