United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 18-1236**
	)	**Issued: June 18, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Huntington Station, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 1, 2018 appellant, through counsel, timely appealed from a May 2, 2018 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.[3]

[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.*

[3] The Board notes that, following the May 2, 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 evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective May 3, 2018, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 4, 2015 appellant, then a 62-year-old letter/mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained injury due to his federal employment duties. He indicated that he went to work on November 12, 2015, and presented a note to his supervisor which indicated that he could not lift or carry heavy items after first becoming aware of his condition on November 11, 2015. Appellant stopped work on November 12, 2015. In a separate statement dated December 1, 2015, he alleged that he had neck pain and pain in the left shoulder, rotator cuff syndrome in the left shoulder, cervicalgia and herniated discs of the cervical spine due to his federal employment duties.

In a November 11, 2015 report, Dr. David Weissberg, a Board-certified orthopedic surgeon, noted that appellant had complaints of left shoulder pain. He advised that appellant repeatedly reached back in his mail truck to get mail and reached into boxes. Dr. Weissberg noted that by the end of the day, appellant had excruciating pain. He diagnosed rotator cuff syndrome and cervicalgia. Dr. Weissberg indicated that appellant could work light duties, with limited use of his upper extremities, and avoiding repetitive motions.

Dr. Weissberg performed an arthroscopy of the left shoulder, synovectomy, chondroplasty of the glenohumeral joint, arthroscopic subacromial decompression with acromioplasty, and partial distal claviculectomy on November 23, 2015.

In a December 15, 2015 report, Dr. Paul R. Alongi, a Board-certified orthopedic surgeon, noted that appellant was under his care for lumbar spondylosis, low back pain, spinal stenosis, lumbar region, and radiculopathy, lumbar region. He indicated that appellant was unable to work from December 15, 2015, until further notice.

On June 15, 2016 OWCP accepted appellant's claim for impingement syndrome of the left shoulder and bicipital tendinitis of the left shoulder.[4] Appellant received wage-loss compensation and medical benefits, and was placed on the periodic rolls.

The record reflects that appellant had preexisting medical conditions which included: right knee medial and lateral meniscus arthritis with arthroscopic surgery on February 6, 2012; degenerative cervical disc disease; cervical radiculitis; left fifth trigger finger; lumbar spinal stenosis at L1-2, L2-3, L3-4, and L4-5; and large lumbar disc bulges.

In a December 6, 2016 treatment note, Dr. Weissberg diagnosed sprain of unspecified rotator cuff capsule, and other cervical disc displacement. He indicated that appellant was 100 percent disabled and unable to work.

[4] The claim was initially denied by decision dated February 9, 2016, but vacated by decision dated June 15, 2016.

On December 6, 2016 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion evaluation with Dr. Leon Sultan, a Board-certified orthopedic surgeon. It requested that he assess appellant's current condition and work capacity, and provide restrictions, if any, due to the work-related conditions as well as preexisting conditions

In a December 27, 2016 report, Dr. Sultan provided findings based upon a review of the medical evidence, the SOAF, and an examination of appellant. He determined that appellant was not capable of performing his regular employment duties for at least another six months. However, Dr. Sultan indicated that appellant was capable of sedentary work for eight hours per day or light duty with the avoidance of lifting or carrying more than 20 pounds at a time using both hands, and avoidance of overhead work activity in regard to his left shoulder. He also noted that appellant required additional orthopedic attention to follow his progress in regard to his physical therapy to his left shoulder. Dr. Sultan also indicated that appellant did not require a functional capacity evaluation or a work-hardening program.

In a January 5, 2017 treatment note, Dr. Weissberg repeated his diagnoses and indicated that appellant was 100 percent disabled and unable to work.

In a letter dated January 13, 2017, addressed to the employing establishment, OWCP requested that they provide appellant with a job offer within the restrictions set forth by Dr. Sultan in his December 27, 2016 report.

In a January 26, 2017 treatment note, Dr. Weissberg repeated his diagnosis and indicated that appellant was 100 percent disabled and unable to work.

On January 30, 2017 the employing establishment offered appellant a job as a modified city carrier which was based on the work restrictions of Dr. Sultan. The duties of the position required appellant to case, sort, and deliver mail. The physical requirements of the position included casing and sorting for one to eight hours; delivering mail weighing up to 20 pounds, for one to eight hours; and lifting, pushing, and pulling up to 35 pounds, for one to eight hours. Appellant refused the offer on February 1, 2017.

On February 7, 2017 OWCP confirmed that the job offer remained available and notified appellant that he had 30 days to accept the offered position or provide his reasons for refusal. It informed him that failure to accept suitable work would result in the loss of wage-loss compensation benefits and entitlement to a schedule award.

In a letter dated March 2, 2017, counsel indicated that appellant was unable to perform the modified job offer. He explained that the offered position was not sedentary and failed to comply with the restrictions of OWCP's referral physician, Dr. Sultan.

In a letter dated March 7, 2017, OWCP explained that additional evidence was needed to support that appellant was unable to perform the offered suitable employment position.

On March 7, 2017 OWCP received a letter from counsel noting that additional evidence from Dr. Weissberg and Dr. Alongi supported that appellant remained unable to perform the modified job offer.

In a February 28, 2017 report, Dr. Alongi explained the letter carrier duties and noted that appellant suffered an injury to his left shoulder at work. He noted that appellant had surgery to the left shoulder and that three days after the shoulder surgery, appellant developed worsening and severe lower back pain which radiated to his buttocks and down both legs. Dr. Alongi diagnosed low back pain, lumbar spondylosis, lumbar canal stenosis, and lumbar radiculopathy and explained that appellant would require ongoing treatment and possibly surgery. He opined that appellant continued to be disabled from work.

In a March 1, 2017 report, Dr. Weissberg explained that along with his shoulder injury, which was permanent and prevented him from returning to work as a letter carrier, appellant also had a lumbar spine condition and developed a severe pain syndrome in his lower extremities following shoulder surgery. He noted that he disagreed with Dr. Sultan's findings that appellant could perform restricted duties. Dr. Weissberg reviewed Dr. Sultan's findings and opined that appellant would never be able to return to work as a letter carrier "in any capacity whatsoever." He explained that appellant's medical conditions over the years included problems with his lower and upper extremities, and upper and lower spinal regions. Dr. Weissberg opined within "a reasonable degree of medical certainty that the patient is unable to return to work as a postman, and should go on permanent disability status." He explained that he was not arguing that appellant would be unable to work in a sedentary position, but that "with a reasonable degree of medical certainty that [appellant] is unable to perform his work as a letter carrier." Dr. Weissberg continued to treat appellant and opined that he was 100 percent disabled due to bilateral shoulder pain. He completed a duty status report (Form CA-17) on July 18, 2017, and diagnosed bilateral shoulder tears. Dr. Weissberg indicated that appellant had clinical findings of "pain" and opined that he was unable to work.

In a letter dated April 28, 2017, addressed to the employing establishment, OWCP explained that the modified job offer was not suitable because it did not take into consideration all of appellant's conditions, whether work related or not. As such, it explained that the job offer did not comply with Dr. Sultan's restrictions. OWCP noted that Dr. Alongi indicated that appellant suffered from a lumbar spine condition, which also must be considered, as he must be taken as a whole person when considering an offer of employment.

On June 27, 2017 OWCP prepared an updated SOAF which noted the accepted and preexisting or subsequently acquired conditions. In a letter dated July 26, 2017, it referred appellant, the SOAF, and a list of questions for a second opinion evaluation with Dr. David Benatar, a Board-certified orthopedic surgeon. OWCP requested that he assess appellant's ongoing disability and need for continuing treatment and his taking in to consideration all of his conditions, his capacity for work.[5] In a report dated September 1, 2017, Dr. Benatar responded to the questions from OWCP. He indicated the objective findings "are very obvious." With regard to the left shoulder, Dr. Benatar noted appellant's prior surgery. With regard to the lumbar spine, he noted two magnetic resonance imaging (MRI) scans showed spinal stenosis. Dr. Benatar

[5] In a July 27, 2017 e-mail to the medical consultant responsible for scheduling the second opinion examination, OWCP asked that the second opinion physician address a possible lumbar spine condition. It inquired into whether Dr. Benatar would be able to address the questions regarding the spine. OWCP explained that, if he were unable to do so, then another examination needed to be scheduled, so that the shoulder and lumbar spine conditions were addressed. In a July 31, 2017 response, the medical consultant confirmed that Dr. Benatar was a spinal specialist and able to address the updated questions.

diagnosed the lumbar spine relates to disc degeneration and the left shoulder also appeared "in the vast majority to be degenerative." He stated the left shoulder was causally connected to a work injury based on it being an accepted condition and "the resultant surgical procedure."

With regard to the lumbar spine, Dr. Benatar indicated that he could not relate the lumbar complaints to the event of November 11, 2015. He noted the September 2, 2015 MRI scan predated the work event by two months. Furthermore, Dr. Benatar noted that Dr. Alongi's narrative indicated that appellant's lumbar spine issues went back 10 years to 2005. He indicated that, "[i]f that is the circumstance, clearly it is not repetitive trauma." Dr. Benatar also noted the September 2, 2015 MRI scan "shows stenosis most severe at L3-4" and "based on this, I cannot at this time establish a causal relationship to the lumbar spine." He indicated that "further records would be needed to establish causal relationship to the lumbar spine."

Dr. Benatar noted that the work-related shoulder condition had not resolved, and "can never fully resolve." Therefore, he advised that appellant could not return to full duty as a letter carrier, but could return to a light-duty position. Dr. Benatar recommended that appellant not engage in significant over-the-shoulder lifting or carrying of 10 pounds or less; below the shoulder lifting of more than 20 pounds; carrying for no more than 50 feet; and no climbing or on unprotected heights. He also prescribed protective limitations for the lumbar spine. Dr. Benatar indicated that staying in one position too long should be avoided. He also noted that lifting and carrying was already protected by the left shoulder limitations.

In an attached work capacity evaluation form (OWCP-5c), Dr. Benatar indicated that appellant had permanent work restrictions, but was capable of working a sedentary position with significant restrictions including sitting, walking, standing, and reaching for no more than 4 to 6 hours; no more than 30 minutes of reaching above the shoulders; no more than 15 minutes of bending and stooping; pushing, pulling and lifting of no more than 30 minutes to 1 hour; and no climbing. He also indicated that appellant had lumbar stenosis and radiculopathy.

On January 26, 2018 the employing establishment offered appellant a job as a modified city carrier, which was based upon the work restrictions provided by Dr. Benatar. The duties of the position required appellant to case and sort mail for one to two hours and deliver mail weighing up to 20 pounds with no climbing and no steps. The position included that appellant deliver to neighborhood delivery collection box units (NDCBU) and wall units and engage in curbside and park and loop delivery. The physical requirements for the position were listed as lifting, pushing, and pulling up to 20 pounds for up to an hour; sitting, walking, and standing for 45 to 60 minutes continuously from 1 to 6 hours; reaching above the shoulder for no more than 30 minutes; and no climbing. The job offer also included a provision that it was for up to five hours a day, providing there was work available within the said restrictions.

Appellant refused the offered position on January 30, 2018. He explained that he was "medically unable to accept as a result of continuing work related disability."

In a letter dated January 31, 2018, counsel disputed the employment position was suitable. He argued that the job duties exceeded those set forth by Dr. Benatar. Counsel further argued that the position was not a valid position as the job offer indicated that it was for up to five hours a day, providing there was work available within the said restrictions.

In a letter dated February 6, 2018, the employing establishment confirmed that, at the most, they would be able to offer appellant up to five hours a day.

In a letter dated February 9, 2018, the employing establishment requested that OWCP obtain clarification with regard to the modified job offer, which remained available to appellant. It was noted that the most that appellant would have to climb would be to "step up onto a curb."

In a letter dated February 9, 2018, OWCP requested that Dr. Benatar clarify the assigned work restrictions. It requested specific clarification with regard to his restriction for climbing. OWCP also provided Dr. Benatar with a copy of the modified city carrier position and requested his opinion with regard to whether appellant was capable of performing the modified position.[6]

In a February 23, 2018 clarification report, Dr. Benatar noted that he had not reexamined appellant since his examination on September 1, 2017. Regarding climbing, he explained that appellant was unable to go up on a ladder or scaffold at unprotected heights. Dr. Benatar explained that appellant was able to get out of a car and he was able to go up and down steps. He also indicated that climbing steep hills was prohibited. Regarding the modified job offer, Dr. Benatar explained that it seemed to be within appellant's limitations, but that he was "not an expert at job evaluations." He noted the position appeared to be reasonable. Dr. Benatar also noted that this was based solely upon the left shoulder, not the other noted conditions. He completed an OWCP-5c form, which was similar to his September 1, 2017 form and added that steps were "o.k."

In a letter dated February 28, 2018, OWCP advised appellant that it found the modified city carry position offered on January 26, 2018, to be suitable as it was in accordance with the medical restrictions as provided by Dr. Benatar. It noted that the offered position remained available and afforded him 30 days to accept the offered position or provide his reasons for refusal. OWCP further advised appellant that, if he refused a suitable work position, he would forfeit any further compensation for wage loss or entitlement to a schedule award.

In a letter dated March 9, 2018, counsel responded and indicated that appellant was unable to perform the duties of the offered position. He questioned the report of Dr. Benatar. Counsel noted that Dr. Benatar had not reexamined appellant, that he only provided orthopedic limitations, and indicated that he was not an expert with regard to job evaluations. He also argued that Dr. Benatar clearly limited carrying to a maximum of 20 pounds and for no more than 50 feet. Counsel argued that this was inconsistent with appellant's modified carrier duties. He asserted that the modified carrier position required that appellant case mail for up to two hours and lift up to 20 pounds for up to one hour, which was inconsistent with appellant's restrictions. Counsel also asserted that the job was not a firm offer, as it was only available for up to five hours a day, and provided there was work within appellant's restrictions.

In a letter dated April 13, 2018, OWCP advised appellant that he had 15 days to accept the position or his compensation would be terminated. It noted that they had received notice that his refusal to accept the job offer continued. OWCP explained that they had reviewed his stated reasons for refusal of the position and that they did not consider them valid. It further explained that they had not received medical evidence from the treating physician establishing that the

[6] The letter to Dr. Benatar contained the name of another individual, which appears to be a scrivener's error.

modified carrier position was unsuitable. OWCP afforded appellant an additional 15 days to accept the job offer. It explained that, if appellant did not accept and report to the position during the allotted period, his entitlement to wage-loss compensation and schedule award benefits would be terminated.

In a memorandum of telephone call dated April 27, 2018, OWCP confirmed that the job was still available and that appellant had not returned to work.

By decision dated May 2, 2018, OWCP found that appellant had refused suitable work. It terminated his wage loss and schedule award effective May 3, 2018 pursuant to 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[7] After it has determined that an employee has a disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[8] Section 8106(c) of FECA[9] 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.

Section 10.517 of the applicable regulations[10] further 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 proof to show 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.

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]

[7] *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[8] *G.R.*, Docket No. 16-0455 (issued December 13, 2016).

[9] 5 U.S.C. § 8106(c)(2).

[10] 20 C.F.R. § 10.517(a).

[11] *L.L.*, *supra* note 7; *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[12] *L.L.*, *supra* note 7.

According to OWCP's procedures, 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.[13] Its regulations provide factors to be considered in determining what constitutes suitable work for a particular disabled employee, including 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.[14] 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. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.[15]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation benefits, effective May 3, 2018, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained impingement syndrome of the left shoulder and bicipital tendinitis of the left shoulder. It also authorized arthroscopic surgery of the left shoulder to include synovectomy, chondroplasty of the glenohumeral joint, arthroscopic subacromial decompression with acromioplasty, and partial distal claviculectomy, which occurred on November 23, 2015.

The Board finds that OWCP failed to establish that appellant was capable of performing the position of a modified city carrier, given his other medical conditions including: right knee medial and lateral meniscus arthritis which had required arthroscopic surgery on February 6, 2012; degenerative cervical disc disease; cervical radiculitis; left fifth trigger finger; lumbar spinal stenosis at L1-2, L2-3, L3-4 and L4-5; and large lumbar disc bulges.[16]

In terminating benefit entitlement OWCP relied on the second opinion report of Dr. Benatar, who provided work restrictions solely based on appellant's accepted left shoulder conditions. He opined that those conditions had resolved.

Dr. Benatar addressed appellant's lumbar conditions and suggested that the lumbar condition was preexisting. He found complaints consistent with radiculopathy. While he advised that the restrictions for the shoulder would also protect appellant with regard to the lumbar spine, as he had provided lifting and carrying restrictions, the Board finds that it is unclear how Dr. Benatar could form this conclusion without the records pertaining to appellant's lumbar spine

[13] *L.L., supra* note 7; *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[14] *L.L., supra* note 7; *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[15] *Id.*

[16] *See S.Y.*, Docket No. 17-1032 (issued November 21, 2017); *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

conditions. The Board also finds that appellant also had preexisting knee conditions and they were not addressed.

The issue of whether a claimant is able to perform the duties of the offered employment position is a medical one and must be resolved by probative medical evidence.[17] While OWCP found that Dr. Benatar's opinion contained sufficient medical rationale to support that appellant could perform the physical duties contained in the offered position,[18] the Board finds his opinion lacks sufficient rationale to meet OWCP's burden of proof. 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 existing and relevant conditions.[19] The medical evidence of record, therefore, fails to establish that the offered position was suitable.

As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.[20] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations and capabilities. Consequently, OWCP has not met its burden of proof to justify the termination of his compensation benefits and entitlement to a schedule award.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award compensation benefits, effective May 3, 2018, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

[17] *F.B.*, Docket No. 17-0216 (issued February 13, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

[18] *F.B., id.; Maurissa Mack*, 50 ECAB 498 (1999).

[19] *See S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

[20] *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 18, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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