

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

K.Y., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Kearny, NJ,
Employer**

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**Docket No. 19-1079
Issued: November 14, 2019**

Appearances:

Michael D. Overman, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 16, 2019 appellant, through counsel, filed a timely appeal from a January 29, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 January 29, 2019 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 wage-loss compensation and entitlement to a schedule award effective September 6, 2017 because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On February 5, 2016 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her hands, arms, shoulders, and back when she slipped on ice in the employing establishment parking lot while in the performance of duty. She stopped work on February 5, 2016. OWCP accepted the claim for right upper arm contusion, and subsequently expanded acceptance of the claim to include right shoulder labrum lesion, left shoulder labral tear, lumbar radiculopathy, and bilateral shoulder rotator cuff tendinitis. It authorized left shoulder arthroscopic surgery and rotator cuff repair, which was performed on September 1, 2016. OWCP paid appellant wage-loss compensation on the supplemental rolls as of March 22, 2016 and on the periodic rolls as of June 26, 2016.

Appellant continued to seek treatment with Dr. Richard A. Boiardo, a Board-certified orthopedic surgeon. In a December 2, 2016 report, Dr. Boiardo noted that she had undergone successful left shoulder arthroscopy, but she now had an exacerbation of right lower extremity discomfort and sciatica. He indicated that appellant would continue with therapy for her right lower extremity, sciatica and left shoulder conditions. On January 6, 2017 Dr. Boiardo reported that appellant's left shoulder had improved, but she now had right shoulder pain. Physical examination findings indicated restricted cervical range of motion. Dr. Boiardo concluded that appellant was unable to return to work.

On January 31, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Timothy J. Henderson, a Board-certified orthopedic surgeon, for a report of the status of her accepted employment injuries and her work capacity.

In a report dated February 16, 2017, Dr. Henderson, based upon a review of the medical evidence, statement of accepted facts (SOAF), and appellant's physical examination, opined that she was capable of returning to work with restrictions. He noted that OWCP had accepted the conditions of right arm contusion, right labral shoulder lesion, left labral shoulder tear, lumbar radiculopathy, and bilateral rotator cuff tendinosis. A review of a March 1, 2016 magnetic resonance imaging (MRI) scan revealed multilevel disc degenerative changes, most pronounced in the lower lumbar spine causing various degrees of neural foraminal narrowing without significant central stenosis. Dr. Henderson also reviewed a March 1, 2016 right shoulder MRI scan which revealed mild tendinosis of the supraspinatus and subscapularis tendons and fluid in the subacromial/subdeltoid bursa. Review of an April 11, 2016 MRI scan of the left shoulder revealed mild tendinitis of the distal supraspinatus tendon, moderate acromioclavicular joint osteoarthritis, and complex anterior labrum tear. Dr. Henderson observed that it was difficult to assess tenderness over the greater tuberosity in appellant's shoulders due to her exhibiting hypersensitivity. Physical examination of appellant's shoulders revealed objective findings regarding her left shoulder. Dr. Henderson opined that she had reached maximum medical improvement with respect to her right shoulder. He further opined that appellant exhibited signs of left shoulder hypersensitivity and possible complex regional pain syndrome.

With respect to appellant's work capacity, Dr. Henderson found that she was disabled from performing her usual duties due to her left shoulder condition, but was capable of returning to work with restrictions including no lifting more than 10 pounds. He opined that appellant's disability was due to her left shoulder labral tear, subsequent surgery, and likely postoperative capsulitis, not complex regional pain syndrome. Dr. Henderson concluded that the work restrictions were temporary and he anticipated full recovery within 12 months after surgery. In an attached work capacity evaluation form (Form OWCP-5c), he indicated that appellant was capable of performing sedentary work with restrictions of walking and standing limited to two hours, and lifting, pushing, and pulling limited to 10 pounds.

In progress notes dated March 24, 2017, Dr. Boiardo noted that appellant sustained injuries to both wrists and her left shoulder due to the accepted February 5, 2016 employment injury. He provided appellant's physical examination findings and diagnosed post-traumatic bilateral carpal tunnel syndrome.

On April 11, 2017 the employing establishment offered appellant a modified mail processing clerk position based on the temporary work restrictions provided by Dr. Henderson. The physical requirements of this 8-hour workday position included lifting, pushing, and pulling up to 6 hours each task as well as standing and walking for 30 minutes to 1 hour each task. Weight restrictions were not indicated.

Appellant rejected the job offer on April 21, 2017. She related that she was waiting for authorization of another surgical procedure. Appellant also indicated that she could not lift more than five pounds, and that she could not sit or stand for extended periods of time. A copy of the modified job offer indicated that she refused the offer based upon Dr. Boiardo's opinion that she was unable to perform the duties of the position because she could not lift more than five pounds and sit/stand for long periods of time.

In an April 27, 2017 report, Dr. Dong W. Cho, a Board-certified physiatrist, noted appellant's medical history. He related that her physical examination findings included limited bilateral shoulder range of motion, and positive wrist Tinel's sign. Dr. Cho conducted an electromyography/nerve conduction velocity (EMG/NCV) study which revealed tardy elbow ulnar nerve entrapment neuropathy or cubital tunnel syndrome.

In a June 26, 2017 letter, OWCP advised appellant of its determination that the modified mail processing clerk position offered by the employing establishment constituted suitable work. It informed her that the weight of the medical opinion evidence rested with the February 16, 2017 report of Dr. Henderson. OWCP advised appellant that her wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the modified mail processing clerk position or provide good cause for not doing so within 30 days.

In a July 3, 2017 report, Dr. Boiardo diagnosed left ulnar nerve entrapment with no evidence of carpal tunnel syndrome, which he opined was a direct result of appellant's accepted February 5, 2016 employment injury.

In a July 28, 2017 letter, OWCP advised appellant that her reasons for refusing to accept the modified mail processing clerk position were unjustified. It discussed the evidence she had submitted, but found that this evidence did not provide a valid reason for refusing to accept the position. OWCP advised appellant that her wage-loss compensation and entitlement to a schedule

award would be terminated if she did not accept the position within 15 days of the date of the letter. Appellant did not accept the modified mail processing clerk within the allotted period.

In an August 4, 2017 note, Dr. Boiardo referenced his July 3, 2017 report and opined that appellant currently was disabled from work due to hand weakness, as well as elbow and shoulder restrictions. In a narrative report of the same date, he related that appellant complained of persistent left elbow medial aspect discomfort and numbness and tingling of the hand ulnar distribution following the accepted February 5, 2016 employment injury. Examination findings included restricted left elbow and hand range of motion, positive ulnar groove Tinel's, restricted low back range of motion, and low back pain.

On August 25, 2017 the employing establishment advised OWCP that the modified mail processing clerk position was a permanent position and remained available to appellant.

By decision dated September 6, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective that day because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It determined that the weight of medical evidence rested with the February 16, 2017 report of Dr. Henderson. OWCP found that appellant had not submitted rationalized medical evidence establishing that she was unable to perform the duties of the modified mail processing clerk position.

On September 21, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

On October 16, 2017 OWCP received progress notes dated September 5 and 15, 2017 from Dr. Boiardo diagnosing left elbow ulnar nerve entrapment and left shoulder flare-up. Examination findings and test results were noted. Dr. Boiardo, in an October 24, 2017 progress note, diagnosed left elbow nerve entrapment based on an EMG. He also noted that appellant presented with left elbow pain and restricted range of motion. On December 1, 2017 OWCP received progress notes dated September 29, 2017 from Dr. Boiardo, which were repetitive of prior reports.

On February 28, 2018 a hearing was held before an OWCP hearing representative. Following the hearing, OWCP received progress notes dated November 28, 2017 from Dr. Boiardo, which were unchanged from prior reports.

By decision dated May 14, 2018, OWCP's hearing representative affirmed the September 6, 2017 decision. She found that the weight of the medical opinion evidence, with respect to appellant's ability to work, continued to rest with Dr. Henderson's February 16, 2017 report.

On October 31, 2018 appellant, through counsel, requested reconsideration. In support of this request for reconsideration, OWCP received February 9 and October 19, 2018 reports from Dr. Boiardo. In the February 9, 2018 note, Dr. Boiardo reported that appellant was unable to perform the tasks of the modified job offer because the tier weight of the equipment was 10 pounds and she could not lift, push, or pull more than 5 pounds. He also reported that appellant was unable to stand or lean for more than two hours. In his October 19, 2018 report, Dr. Boiardo explained that appellant had five-pound lifting, pushing, and pulling restrictions based upon her cubital tunnel syndrome of the left elbow, which was confirmed by EMG examination on April 27, 2017 by Dr. Cho.

By decision dated January 29, 2019, OWCP denied modification of the May 14, 2018 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.⁴ 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.⁵ 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 was not suitable.⁶ Section 8106(c) will be narrowly construed as it serves as a penalty provision.⁷

Pursuant 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.⁸ Section 10.516 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 establishing that such refusal or failure to work was reasonable or justified.⁹

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective September 6, 2017.

OWCP's procedures require that a suitable work offer contain a description of the duties to be performed and the specific physical requirements of the position.¹⁰ The April 11, 2017 modified job offer did not adequately describe the specific physical requirements of the position, including the requirements as to the weight of lifting, pushing, and pulling. The April 11, 2017 job offer was based upon the restrictions provided by Dr. Henderson, OWCP's second opinion physician. In his February 16, 2017 report, Dr. Henderson noted that while appellant's right shoulder condition had resolved, she could not perform the duties of her date-of injury position due to her left shoulder condition. He further explained that appellant could return to work with a 10-pound lifting restriction, which was necessitated by her left shoulder condition.

⁴ *J.R.*, Docket No. 19-0206 (issued August 14, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

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

⁶ *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *Supra* note 5; *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.516. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

⁹ *P.C.*, Docket No. 18-0956 (issued February 8, 2019).

¹⁰ *Supra* note 8.

The Board has held that the issue of whether a claimant is able to perform the duties of an offered employment position is a medical question that must be resolved by probative medical evidence.¹¹ Dr. Henderson did not address whether appellant's accepted lumbar radiculopathy condition necessitated restrictions, and after appellant's treating physicians, Dr. Cho and Dr. Boiardo related that EMG/NCV studies revealed left ulnar nerve entrapment, OWCP did not seek a supplemental report from Dr. Henderson to determine whether this diagnosed condition caused further physical restrictions. Therefore, the Board finds that the medical evidence is insufficient to establish that appellant was able to perform the duties of the offered employment position. The Board further finds that the job offer did not include the position description, nor did it accurately set forth the physical requirements of the position, including the lifting/pushing/pulling weight requirement.

As OWCP did not secure a medical report that reviewed an adequately detailed job offer or provided a reasoned opinion as to the job's suitability for appellant considering all currently disabling conditions, the Board finds that OWCP has not met its burden of proof to establish that the offered position was suitable.¹²

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective September 6, 2017.

¹¹ *F.B.*, Docket No. 17-0216 (issued February 13, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

¹² *See S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 14, 2019
Washington, DC

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

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

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