

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

_____)	
J.C., Appellant)	
)	
and)	Docket No. 19-0751
)	Issued: September 3, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Cary, NC, Employer)	
_____)	

Appearances:
Erik B. Blowers, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 21, 2019 appellant, through counsel, filed a timely appeal from an October 11, 2018 merit decision and November 6 and December 17, 2018 nonmerit decisions 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 December 17, 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.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective October 12, 2018, pursuant to 20 C.F.R. § 10.500(a) because he refused a temporary, limited-duty assignment; and (2) whether OWCP properly denied appellant's October 18 and December 3, 2018 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 21, 2016 appellant, then a 60-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 9, 2016 he strained his right shoulder when he picked up a package weighing approximately 20 pounds while in the performance of duty. He stopped work on April 14, 2016 and returned to limited duty on April 19, 2016. Appellant stopped work again on July 9, 2016. On August 11, 2016 OWCP accepted his claim for right shoulder and arm strain. It also authorized an October 18, 2016 right shoulder arthroscopic procedure. OWCP subsequently expanded acceptance of appellant's claim to include right shoulder adhesive capsulitis. It paid wage-loss compensation for temporary total disability beginning July 9, 2016, and placed him on the periodic rolls, effective November 12, 2017.

On April 11, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. William A. Somers, a Board-certified orthopedic surgeon, for a second opinion examination to determine the status of his April 9, 2016 employment injury and the extent of his disability. In a May 8, 2018 report, Dr. Somers indicated that he reviewed appellant's history, including a SOAF, and the medical record. He related appellant's complaints of pain about the anterior shoulder at the tenodesis site, primarily with activity. Upon examination of appellant's right shoulder, Dr. Somers observed tenderness in the region of the biceps tenodesis and no tenderness in the distal clavicle, anterior glenohumeral joint, lateral rotator cuff region, or posterior glenohumeral joint. He noted range of motion findings and reported discomfort at the tenodesis site of the right biceps and some atrophy of the proximal biceps. Dr. Somers diagnosed partial tear of the right rotator cuff, right biceps injury to the long head, rotator cuff tendinosis, right acromioclavicular degenerative joint disease, right glenohumeral degenerative joint disease, and right shoulder adhesive capsulitis.

Dr. Somers reported that appellant's work-related injury had not resolved, but that his prognosis was fairly good with proper treatment. He explained that appellant was not able to return to full duty as a rural carrier due to restrictions with his right arm. Dr. Somers noted: "he would be unable to do his casing and unable to carry the amount of weight required for certain packages." He completed a work capacity evaluation form (OWCP-5c), which noted restrictions of occasional reaching above the shoulder, occasional pushing and pulling with the right arm up to 20 pounds, occasional lifting with the right arm up to 10 pounds, and no climbing with the right arm. Dr. Somers also required 15-minute breaks every 2 hours. He indicated that the work restrictions were for the right arm only.

On May 29, 2018 the employing establishment provided appellant a written job offer as a full-time modified rural carrier beginning May 29, 2018. The position was full time with an annual salary of \$76,666.00. The duties of the modified assignment were casing mail for route for two hours, delivering priority and Express Mail for six hours, and authorized vehicle utilization system

(AVUS), update edit books, and prepare 3849's for an indefinite period of time. The physical requirements of the position included: lifting no greater than 10 pounds for the right arm only for 2 hours and 40 minutes, occasional reaching above the shoulder of the right arm for 2 hours and 40 minutes, and pushing/pulling no greater than 20 pounds with the right arm for 2 hours and 40 minutes.

On June 12, 2018 appellant refused the May 29, 2018 modified job offer due to medical limitations.

In a letter dated June 20, 2018, OWCP requested that the employing establishment clarify whether the job offer submitted was temporary or permanent.

By letter dated June 26, 2018, S.R., an employing establishment injury compensation specialist, confirmed that the job offer was temporary.

On August 13, 2018 OWCP verified with the employing establishment that the modified rural carrier position was still available.

On August 14, 2018 OWCP issued appellant a notice of proposed termination of his compensation for wage loss in accordance with 20 C.F.R. § 10.500(a) based upon his refusal to accept the May 29, 2018 temporary light-duty assignment. It noted that it had been advised that he had refused to accept the job assignment offered by the employing establishment on May 29, 2018. OWCP informed appellant that the modified job offer was within the work restrictions provided by Dr. Somers in his May 8, 2018 second opinion report. It also informed appellant of the provisions of 20 C.F.R. § 10.500(a) and further advised him that his entitlement to wage-loss compensation would be terminated under this provision if he did not accept the offered temporary assignment or provide a written explanation with justification for his refusal within 30 days.

In a letter dated September 12, 2018, appellant, through counsel, asserted that appellant's refusal of the modified job offer was justified. She cited to Federal (FECA) Procedure Manual, Chapter 2.814.3 and explained that OWCP must consider all medical conditions, including preexisting conditions and those that arose afterwards, when determining whether an offer of employment is suitable. Counsel asserted that medical reports submitted would establish that appellant suffered from several conditions and disorders, which affected his ability to work.

OWCP received a July 3, 2018 report by Dr. Steve T. Kirk, a Board-certified neurologist, who related that he had treated appellant since April 2015 for his history of anxiety, depression, attention deficit, hyperactivity disorder, refractory insomnia, refractory rapid-eye movement behavior disorder, and periodic limb movement disorder. Dr. Kirk indicated that the medications prescribed to appellant caused extreme grogginess and rendered him unable to drive, function, and focus.

Appellant also submitted a September 9, 2018 report by Dr. Chad Cox, a Board-certified internist, who indicated that he had conducted an extensive review of appellant's chart and specialist notes. Dr. Cox opined that appellant would not be able to perform work of any kind because he had "too many medical conditions with too many symptoms." He noted that appellant suffered from the following disorders: benign prostatic hyperplasia, chronic constipation and gastroesophageal reflux disease, degenerative joint disease of multiple joints including neck and

low back, right inguinal hernia, mood disorders, sleep disorders, and other chronic neurocognitive symptoms.

By decision dated October 11, 2018, OWCP terminated appellant's wage-loss compensation, effective October 12, 2018, pursuant to 20 C.F.R. § 10.500(a).

On October 18, 2018 appellant, through counsel, requested reconsideration. Appellant resubmitted Dr. Kirk's July 3, 2018 and Dr. Cox's September 9, 2018 medical reports.

By decision dated November 6, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a). It found that his reconsideration request neither raised substantive legal questions nor included new and relevance evidence sufficient to warrant further merit review.

On December 3, 2018 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a November 16, 2018 report, Dr. Somers clarified that the May 8, 2018 OWCP-5c form allowed for reaching above the shoulder for an occasional period of time, not to exceed 2 hours and 40 minutes. He noted that the limited-duty job offer only required two hours of casing. Dr. Somers further explained, however, that appellant's job as a rural carrier required "hand/arm elevation above chest high in order to deliver his mail. Therefore, the combination of casing and delivery would exceed this time limit for hand above shoulder height allowed." Dr. Somers reported that appellant could case for 2 hours and deliver for 40 minutes or he could do no casing and do his regular delivery. He indicated that the combined time for casing, delivery time, and lifting/carrying could not exceed 2 hours and 40 minutes.

By decision dated December 17, 2018, OWCP denied further merit review of appellant's claim under 5 U.S.C. § 8128(a). It found that his reconsideration request neither raised substantive legal questions nor included new and relevance evidence sufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

OWCP's regulations at section 10.500(a) provide in relevant part:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents [him or her] from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with

OWCP procedures, a temporary light-duty assignment within the employee's work restrictions."⁴

When it is determined that an appellant is no longer totally disabled from work and is on the periodic rolls, OWCP procedures provide that the claims examiner should evaluate whether the evidence establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.⁵ When the light-duty assignment either ends or is no longer available, the claimant shall be returned to the periodic rolls if the medical evidence supports continued disability.⁶

OWCP's procedures further advise, "If there would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based on the temporary actual earnings wage-earning capacity calculation (just as if he/she had accepted the light-duty assignment)."⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective October 12, 2018, pursuant to 20 C.F.R. § 10.500(a), for refusing a temporary limited-duty position.

OWCP found that the modified rural carrier position offered to appellant on May 29, 2018 was within appellant's work restrictions as provided by Dr. Somers, the second opinion physician, in his May 8, 2018 report. However, the Board finds that the employment duties and physical requirements of the modified carrier position, as set forth by the employing establishment, did not comply with Dr. Somers' recommended work restrictions. In his May 8, 2018 report, Dr. Somers advised that appellant was unable to return to full duty as a rural carrier because he would be "unable to do his casing" and carry the required weight. He also provided work restrictions of occasional lifting with the right arm up to 10 pounds and occasional pushing and pulling with the right arm up to 20 pounds. The modified rural carrier position offered to appellant on May 29, 2018 required casing mail for two hours and delivering mail for six hours. Therefore, the Board finds that the modified carrier requirements did not comply with Dr. Somers' work restrictions, which allowed for no casing. As the duties of the temporary light-duty assignment exceeded appellant's work restrictions as specified by Dr. Somers, the Board finds that OWCP has failed to establish that appellant was capable of performing the May 29, 2018 job position.⁸ Thus, OWCP

⁴ 20 C.F.R. § 10.500(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9c(1)(b) (June 2013).

⁶ *Id.* at Chapter 2.814.9c(1)(d).

⁷ *Id.* at Chapter 2.814.9c(8).

⁸ *See S.W.*, Docket No. 18-0857 (issued November 26, 2018); *see also S.S.*, Docket No. 17-0557 (issued December 21, 2017).

has not met its burden of proof to terminate wage-loss compensation pursuant to section 10.500(a).⁹

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's entitlement to wage-loss compensation, effective October 12, 2018, pursuant to 20 C.F.R. § 10.500(a) because she refused a temporary, limited-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 3, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

⁹ In light of the Board's disposition of the merits of this case, the issue of whether OWCP properly denied appellant's requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) is moot.