

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

K.W., Appellant)	
)	
and)	Docket No. 19-0870
)	Issued: September 18, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Townsend, MT, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 18, 2019 appellant, through counsel, filed a timely appeal from a January 16, 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.

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.*

ISSUE

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

FACTUAL HISTORY

On April 27, 2016 appellant, then a 42-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 25, 2016 she experienced left shoulder pain while in the performance of duty. She reportedly tried to catch a tray that was falling from her postal vehicle. Appellant stopped work on April 25, 2016 and received continuation of pay beginning April 26, 2016. On the reverse side of the claim form, the employing establishment indicated that she was in the performance of duty when injured and that she first received medical treatment on April 27, 2016. On May 17, 2016 OWCP accepted appellant's claim for left shoulder strain. It subsequently expanded acceptance of her claim to include left shoulder rotator cuff tear.³

On May 27, 2016 appellant returned to limited duty, but stopped again on June 11, 2016 because the employing establishment could no longer accommodate her work restrictions. OWCP paid wage-loss compensation for temporary total disability beginning June 11, 2016 and placed her on the periodic rolls, effective November 26, 2016.

On February 1, 2017 appellant underwent OWCP-approved left shoulder arthroscopic surgery.⁴

Appellant returned to work in a part-time, modified-duty capacity on February 27, 2017. She continued to undergo medical treatment and physical therapy appointments.

In an August 1, 2017 report, Dr. Ferrell, a Board-certified orthopedic surgeon, indicated that appellant was six months status post left shoulder surgery with gradual improvement in range of motion with physical therapy. He noted that she was recently diagnosed with rheumatoid arthritis and was receiving medical treatment. Examination of appellant's left shoulder revealed 5/5 rotator cuff strength and negative Hawkin's and Neer's tests. Dr. Ferrell diagnosed rheumatoid arthritis and left shoulder pain. He indicated that appellant had reached maximum medical improvement and recommended that she undergo a functional capacity evaluation (FCE). Dr. Ferrell completed a duty status report (Form CA-17) with specified restrictions.

In a September 7, 2017 physical therapy and FCE report, Angie Kolar, a physical therapist, noted appellant's active problems of left shoulder pain and rheumatoid arthritis. She recounted that appellant had performed light-duty work off and on since February 2017 and was unsure of

³ A May 24, 2016 left shoulder magnetic resonance imaging scan revealed a partial-thickness, articular surface tear of the teres minor tendon, mildly prominent fluid in the subacromial subdeltoid bursa, and mild acromioclavicular osteoarthritis.

⁴ A February 1, 2017 operative report indicated that appellant underwent left shoulder arthroscopic debride of a partial rotator cuff tear, arthroscopic distal clavicle resection, arthroscopic debridement of a posterior inferior labral tear, and arthroscopic subacromial decompression by Dr. Michael S. Ferrell, a Board-certified orthopedic surgeon.

her capabilities. Appellant explained that the job involved about five to six hours of standing and walking. Ms. Kolar determined that appellant demonstrated the ability to perform within the medium physical demand category and described appellant's work restrictions.

In a September 19, 2017 work status form, Jaspur Kolar, a certified physician assistant, noted that appellant was released to modified duty with restrictions of lifting/carrying from the floor to waist using both hands of 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly; lifting from waist to shoulder using both hands of 30 pounds occasionally, 15 pounds frequently, and 5 pounds constantly; overhead lifting using both hands of 10 pounds occasionally and 5 pounds frequently; carrying with only left hand of 30 pounds occasionally, 15 pounds frequently, and 5 pounds constantly; and pushing and pulling up to 45 pounds horizontal force occasionally, 20 pounds horizontal force frequently, and 10 pounds horizontal force constantly.

On September 21, 2017 the employing establishment offered appellant a full-time modified-duty position as a rural carrier, effective October 28, 2017. The job position had an annual salary of \$52,798.00 and hours of duty of 7:15 to 15:40. The duties of the position involved sorting and casing mail of assigned rural routes, utilizing all lower shelving units to minimize reaching above the shoulder, sorting and delivering parcels 30 pounds and under with no continuous lifting with the left arm over 5 pounds, pulling down mail into route order into containers less than 30 pounds each with no filling or lifting trays or tubs over 30 pounds, loading mail into personal vehicles with assistance for pushing hamper to vehicle, delivering mail on assigned rural route, and notifying the Postmaster for assistance with packages over 30 pounds or leaving notice for customer to pick up the parcel at the employing establishment. The job description noted that appellant would not reach into the back seat to retrieve mail, but would physically get out of the vehicle and move the mail to the front. The physical requirements of the job involved lifting/carrying 30 pounds intermittently and 5 pounds continuously, simple grasping for 8 hours continuously, driving a vehicle for 6 hours continuously, sitting for 5 to 6 hours continuously, fine manipulation for 2 to 3 hours intermittently, standing for 2 hours continuously, walking for 2 hours intermittently, reaching above the shoulder for 1 to 2 hours intermittently for both arms, twisting for 1 hour intermittently, bending/stooping for .5 hours intermittently, and climbing (steps) for .25 hours intermittently.

By letter dated September 21, 2017, the employing establishment submitted a copy of the modified job offer to Dr. Ferrell and requested that he review the job duties and indicate whether the job was suitable for appellant. Dr. Ferrell responded on October 5, 2017 by checking a box marked "yes" indicating that the enclosed modified-duty position was appropriate under appellant's medical limitations.

On October 24, 2017 OWCP received clarification from Dr. Ferrell that appellant was able to drive. Dr. Ferrell explained that the previous restriction was listed in error. He provided a duty status report (Form CA-17) dated September 19, 2017, which noted a diagnosis of left shoulder injury. Dr. Ferrell provided restrictions of simple grasping for 8 hours, sitting and driving a motor vehicle for 6 hours, standing and walking for 2 hours, fine manipulation for 2 to 3 hours, reaching above the shoulder intermittently for 1 to 2 hours, twisting for 1 hour, climbing steps and bending/stooping for .5 hours, and pushing/pulling for .25 hours. He also enclosed Mr. Kolar's September 19, 2017 medical status form.

On November 3, 2017 appellant accepted the September 21, 2017 modified job offer. In a November 8, 2017 letter, the employing establishment amended her start date to November 11, 2017.

In a December 13, 2017 e-mail, D.C., an OWCP field nurse, advised that appellant had not returned to work. She explained that appellant took several days of leave and called in sick for personal reasons unrelated to her workers' compensation injury.

The employing establishment, on March 5, 2018, confirmed that the November 8, 2017 offered position remained available.

In a letter dated March 5, 2018, OWCP notified appellant that the offered position was suitable and afforded her 30 days to accept the position or provide reasons for her refusal. It advised her that 5 U.S.C. § 8106(c)(2) provided that an employee who refused an offer of suitable work without cause was not entitled to compensation for either disability or a schedule award.

On April 3, 2018 OWCP received appellant's response in a letter dated April 2, 2018. Appellant explained that she still accepted the job offer, but was currently taking time off due to personal reasons.

The employing establishment informed OWCP on April 17, 2018 that appellant remained absent without leave (AWOL) and requested that OWCP issue a 15-day letter.

In an April 18, 2018 letter, K.H., a human resource specialist for the employing establishment, informed OWCP that appellant had not provided documentation to indicate that she was off work for personal reasons. She reported that appellant had been AWOL since November 11, 2017 and had not responded to the correspondence sent to her by the employing establishment.

In a May 10, 2018 letter, OWCP notified appellant that her reasons for refusing the position were not valid and provided her 15 days to accept the position, or her wage-loss compensation and entitlement to a schedule award would be terminated. It advised her that the offered position remained available.

OWCP received a November 17, 2017 report by Dr. Ilias Oikonomopoulos, a rheumatologist. Dr. Oikonomopoulos related that appellant was evaluated for a newly diagnosed seropositive rheumatoid arthritis. He reviewed her history, including her accepted left shoulder rotator cuff injury and described her employment duties as a rural postal worker. Dr. Oikonomopoulos opined that appellant could not perform her current work requirements. He explained that she was unable to perform proper body mechanics with lifting and mobility, which increased her pain. Dr. Oikonomopoulos also noted that cold weather and walking would cause flare-ups and increase pain. He reported that long days of driving, standing, lifting, and walking would increase appellant's symptoms of rheumatoid arthritis. Dr. Oikonomopoulos concluded that she could not return to her regular route or the modified job position as she is the only worker and must perform lifting and standing for long hours without relief.

The employing establishment, on May 31, 2018, confirmed that the job offer was still available and that appellant remained AWOL.

By decision dated May 31, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective June 2, 2018, finding that she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It determined that Dr. Ferrell's September 19, 2017 report constituted the weight of the evidence and established that she could perform the duties of the offered position.

On June 11, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 13, 2018. Counsel argued that OWCP failed to consider all of her medical conditions, specifically rheumatoid arthritis, in determining whether the offered position was suitable.

Effective September 21, 2018 the employing establishment terminated appellant from employment for unacceptable conduct.

In a November 30, 2018 letter, the employing establishment indicated that it was disputing several claims made by appellant during the November 13, 2018 hearing. It noted that she was diagnosed with rheumatoid arthritis at the time of the September 7, 2017 FCE and that it was considered when the physical therapist determined her ability to perform her job. The employing establishment recounted that appellant had not reported for duty and failed to provide documentation to justify her inability to perform the offered position.

OWCP received a November 12, 2017 urgent care note with an illegible signature, which indicated that appellant should be off work from November 13 to 14, 2017.

Appellant also submitted a November 13, 2017 note by Dr. Oikonomopoulos who related that she was being treated in his rheumatology clinic for a chronic medical condition. Dr. Oikonomopoulos recommended that she stay off work from November 13 to 17, 2017.

By decision dated January 16, 2019, an OWCP hearing representative affirmed the May 31, 2018 termination decision. He found that the medical evidence of record was insufficient to establish that appellant was incapable of performing the duties contained in the September 21, 2017 employment offer.

LEGAL PRECEDENT

Under FECA,⁵ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁶ 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.⁷

Section 10.517 of FECA's implementing regulations further provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee,

⁵ *Supra* note 2.

⁶ *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

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.⁸

To justify termination of compensation, OWCP must establish that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁹ 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.¹⁰

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.¹¹ 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.¹² In a suitable work determination, OWCP must consider all preexisting and subsequently-acquired medical conditions, whether work related or not, in evaluating an employee's work capacity.¹³

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 June 2, 2018, for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained left shoulder strain and left shoulder rotator cuff tear due to an April 25, 2016 employment injury. Appellant stopped work and returned to part-time modified duty on February 27, 2017.

On September 21, 2017 the employing establishment offered appellant a new modified-duty position as a rural carrier, effective October 28, 2017. Appellant accepted the job offer on November 3, 2017 and the employing establishment amended her start date to November 11, 2017. On December 13, 2017 OWCP was informed that she had not returned to work and had been

⁸ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, 52 ECAB 406 (2003).

⁹ *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

¹⁰ *L.L.*, *supra* note 6; *see also Joan F. Burke*, 54 ECAB 406 (2003).

¹¹ *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

¹² *M.A.*, Docket No. 18-1671 (issued June 13, 2019).

¹³ *Id.*; *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Gayle Harris*, 52 ECAB 319 (2001).

AWOL since November 11, 2017. It subsequently terminated appellant's wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2).

The Board finds, however, that OWCP failed to establish that appellant was capable of performing the position of a modified rural carrier, given her other medical condition of rheumatoid arthritis.¹⁴ In terminating her compensation benefits, OWCP relied on appellant's treating physician, Dr. Ferrell, who provided work restrictions on September 19, 2017 based solely on her left shoulder. 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.¹⁵ While OWCP found that Dr. Ferrell's opinion contained sufficient medical rationale to support that appellant could perform the physical duties contained in the offered position, the Board finds that his opinion lacks sufficient medical rationale to meet OWCP's burden of proof as he failed to consider all of her conditions.¹⁶

The Board finds that the evidence of record does not substantiate that OWCP properly considered the entirety of appellant's medical conditions before terminating her wage-loss compensation and entitlement to a schedule award.¹⁷ Consequently, the Board finds that OWCP has not met its burden of proof to justify the termination of her compensation benefits pursuant to section 8106(c)(2).

CONCLUSION

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

¹⁴ See *G.M.*, Docket No. 18-1236 (issued June 18, 2019); *S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

¹⁵ *Supra* note 12.

¹⁶ *Supra* note 14.

¹⁷ See *K.S.*, Docket No. 19-0082 (issued July 29, 2019); *D.H.*, Docket No. 17-1014 (issued October 3, 2017); *H.L.*, Docket No. 16-1810 (issued March 16, 2017).

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 18, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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