

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

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<b>R.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1236</b>
	)	<b>Issued: January 24, 2020</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Norfolk, VA, Employer</b>	)	
	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 16, 2019 appellant, through counsel, filed a timely appeal from an April 3, 2019 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 issuance of the April 3, 2019 merit 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 has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective November 14, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

## **FACTUAL HISTORY**

On August 26, 2012 appellant, a 53-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2012 she sustained a right arm injury as a result of casing mail while in the performance of duty.<sup>4</sup> She stopped work on the date of injury. OWCP assigned the claim File No. xxxxxx795. On November 8, 2012 it accepted the claim for complete right rotator cuff rupture and paid appellant wage-loss compensation on the supplemental rolls commencing January 26, 2013. Appellant thereafter received compensation on the periodic rolls.

Appellant returned to work for two hours per day on June 26, 2013. She stopped work again on July 1, 2013. On July 16, 2013 appellant filed a wage-loss compensation claim (Form CA-7) requesting compensation for leave without pay (LWOP) and night differential for the period July 1 through 12, 2013.<sup>5</sup>

On August 15, 2013 appellant underwent OWCP-authorized right shoulder arthroscopy with extensive glenohumeral debridement, subacromial decompression, distal clavicle excision, and medium to large vertical rotator cuff tear repair.

On May 5, 2017 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether she continued to have residuals and disability related to her accepted August 9, 2012 employment injury.

In a May 27, 2017 report, Dr. Schwartz reviewed appellant's medical records and the SOAF. On physical examination, he reported skin touch pain over the right shoulder acromioclavicular joint and anterior glenohumeral joint, and on the left over the glenohumeral joint, reduced chin and bilateral shoulder range of motion, good radial pulses that were equal bilaterally, deep tendon reflexes that were 2+ and equal in the bilateral biceps, triceps, and brachioradialis, and marked giving way of all motors of the upper extremities bilaterally based on a manual muscle test. Dr. Schwartz diagnosed a history of right shoulder rotator cuff repair and extreme nonphysiologic pain behavior. He noted that these diagnoses were established only by study and not by physical findings. Dr. Schwartz further noted that appellant's subjective complaints did not correspond with objective findings. He advised that the diagnosed conditions were only medically connected to the factors of employment described in the SOAF which had been accepted. Dr. Schwartz explained that there was no physiologic basis for appellant's

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<sup>4</sup> The record reflects that appellant has prior claims. In OWCP File No. xxxxxx759 her claim was accepted for conditions of left shoulder capsulitis, left shoulder impingement, chest wall sprain, and rib sprain. In OWCP File No. xxxxxx749, appellant's claim was accepted for a left ankle sprain.

<sup>5</sup> By decision dated August 30, 2013, OWCP denied appellant's claim for compensation for LWOP and night differential for the period July 1 through 12, 2013, finding that the medical evidence of record failed to establish that she was disabled as a result of her accepted complete right rotator cuff rupture.

complaints or findings on study. He indicated that she had nonphysiologic behavior that was not considered residuals of her accepted condition. Dr. Schwartz further indicated that no further medical treatment was indicated. He opined that, while appellant was unable to perform repetitive motions with her right upper extremity, she was capable of working within her physical limitations.

In a May 27, 2017 work capacity evaluation form (OWCP-5c), Dr. Schwartz indicated that appellant could work eight hours per day with restrictions of reaching up to four hours, pushing, pulling, and lifting up to 10 pounds for three hours per day, and no reaching above the shoulder. He indicated that these restrictions were permanent. Dr. Schwartz responded on the form that there were “multiple other bodily complaints” which needed to be considered in the identification of a position.

On April 24, 2018 the employing establishment offered appellant a full-time position as a modified mail handler, effective May 7, 2018. The position involved prepping flats into automated-compatible trays on an automated flats sorting machine intermittently up to three hours per day, and scanning on a dock (load/unload) up to five hours per day. The physical requirements included holding a two-pound scanner, placing flats weighing no more than 10 pounds onto a conveyor, and cutting straps off flats. In letters dated May 24 and September 5, 2018, the employing establishment advised OWCP that appellant had not responded to the modified job offer. It indicated that the offer complied with the restrictions as provided by Dr. Schwartz.

In a September 6, 2018 letter, OWCP advised appellant of its determination that the modified mail handler position offered by the employing establishment was suitable based on Dr. Schwartz’s evaluation and accompanying restrictions. It informed her that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter. No response was received.

On September 14, 2018 the employing establishment again notified OWCP that appellant had not responded to its modified job offer. It indicated that the offered position remained available.

In an October 5, 2018 letter, OWCP advised appellant that she had 15 days to accept the offered position or her compensation would be terminated. No response was received.

By decision dated November 14, 2018, OWCP terminated appellant’s compensation benefits effective that date because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that Dr. Schwartz’s May 27, 2017 report constituted the weight of the evidence and established that she could perform the duties of the offered modified position.

On November 21, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

In reports dated December 5, 2018 and January 4, 2019, Dr. Beth M. Winke, a Board-certified physiatrist, noted that appellant presented for a follow-up evaluation for left shoulder pain. She provided assessments of adhesive capsulitis of the left shoulder, disorder of the left shoulder, and myalgia, unspecified site. Dr. Winke advised that the left shoulder was stable and unchanged with no new symptoms. She also advised that there was no change to appellant’s medication, and addressed her treatment plan. On January 4 and February 1, 2019 Dr. Winke reported that appellant presented for a follow-up evaluation for right shoulder pain. She provided

assessments of complete rotator cuff tear or rupture of the right shoulder, not specified as traumatic, and myalgia, unspecified site. Dr. Winke advised that the right shoulder was stable and unchanged with no new symptoms. She indicated that appellant's medication and treatment plan were documented in other encounters.

During a February 25, 2019 telephonic hearing, counsel contended that Dr. Schwartz's opinion was not entitled to the weight of the medical evidence on several bases. The record was held open for 30 days for the submission of additional evidence, but none was received.

By decision dated April 3, 2019, an OWCP hearing representative affirmed, as modified, the November 14, 2018 termination decision. He found that Dr. Schwartz's opinion constituted the weight of the medical evidence and established that appellant could perform the duties of the offered modified position. The hearing representative affirmed the termination of her compensation benefits for her refusal to accept an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). He made further findings that the cases be combined and the termination decision be modified and remanded for OWCP to determine whether appellant's prior accepted left ankle, left shoulder, chest, and rib conditions, and subsequently-acquired myalgia disabled her from performing the offered position.<sup>6</sup>

### **LEGAL PRECEDENT**

Under FECA,<sup>7</sup> once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.<sup>8</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>9</sup>

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 showing that such refusal or failure to work was reasonable or justified.<sup>10</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>11</sup>

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

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<sup>6</sup> *Supra* note 4 (OWCP administratively combined her claims with the current file serving as the master file.)

<sup>7</sup> *Supra* note 2.

<sup>8</sup> *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>9</sup> 5 U.S.C. § 8106(c)(2); *see also J.R.*, Docket No. 19-0206 (issued August 14, 2019); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>10</sup> 20 C.F.R. § 10.517(a).

<sup>11</sup> *Id.* at § 10.516.

submit evidence or provide reasons why the position is not suitable.<sup>12</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>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

### 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 November 14, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The Board finds that OWCP failed to establish that appellant was capable of performing the position of a modified mail handler, given her previously accepted work-related medical conditions of left shoulder capsulitis, left shoulder impingement, chest wall sprain, rib sprain, and left ankle sprain under OWCP File Nos. xxxxxx759 and xxxxxx749, and subsequently-acquired medical condition of myalgia.<sup>16</sup> In terminating her compensation benefits, OWCP relied on Dr. Schwartz, an OWCP referral physician, who provided work restrictions on May 27, 2017 based solely on her right shoulder. At the time he issued appellant's work restrictions he explained that were "multiple other bodily complaints" which need to be considered in the identification of a suitable employment position. The issue of whether a claimant is able to perform the duties of the offered employment position is a medical question that must be resolved by probative medical evidence.<sup>17</sup> While OWCP found that Dr. Schwartz'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 is insufficient for OWCP to have met its burden of proof to terminate as he failed to consider all of her conditions in the assignment of the work restrictions.<sup>18</sup>

The Board finds that the evidence of record establishes that OWCP failed to properly consider the entirety of appellant's medical conditions and restrictions before terminating her

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<sup>12</sup> *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

<sup>13</sup> *L.L.*, *supra* note 8; *see also* *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>14</sup> *See* *K.W.*, Docket No. 19-0870 (issued September 18, 2019); *G.M.*, Docket No. 18-1236 (issued June 18, 2019); *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

<sup>15</sup> *K.W.*, *id.*; *M.A.*, *id.*; *S.Y.*, *id.*; *Gayle Harris*, 52 ECAB 319 (2001).

<sup>16</sup> *See supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

wage-loss compensation and entitlement to a schedule award.<sup>19</sup> As a penalty provision, the termination of compensation benefits are narrowly construed.<sup>20</sup> Although OWCP’s hearing representative concluded that further development of the record was required to determine whether “work-related conditions from prior injuries or myalgia” restrict appellant from the offered employment position, the proper and appropriate remedy was to reverse the termination of wage-loss compensation benefits until such time as a physician had resolved this medical issue. 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 a schedule award, effective November 14, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 3, 2019 decision of the Office of Workers’ Compensation Programs is reversed.

Issued: January 24, 2020  
Washington, DC

Christopher J. Godfrey, 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>19</sup> See *K.W.*, *supra* note 14; *K.S.*, Docket No. 19-0082 (issued July 29, 2019); *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

<sup>20</sup> *Supra* note 12.