United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 19-1912**
	)	**Issued: October 19, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Jackson, MS, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 16, 2019 appellant filed a timely appeal from a March 18, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from March 18, 2019, the date of OWCP's last decision was Sunday, September 15, 2019. If the last date to file an appeal falls on a Saturday, Sunday, or Federal holiday, the 180-day period runs until the close of the next business day. 20 C.F.R. § 501.3(f)(2). The appeal in this case, received by the Board on Monday, September 16, 2019, was therefore timely filed.

[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 September 24, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On May 3, 2016 appellant, then a 60-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome causally related to factors of her federal employment, including handling, sorting, and lifting mail as well as cutting sacks and trays. On August 1, 2016 OWCP accepted her claim for bilateral carpal tunnel syndrome.

In notes dated August 9 and 15, 2016, appellant's attending physician, Dr. Daniel Dare, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome, osteoarthritis of the acromioclavicular (AC) joint on the left, osteoarthritis of the glenohumeral joint on the left, and partial thickness rotator cuff tear on the left. On September 6, 2016 appellant underwent a right carpal tunnel surgical release. On October 17, 2016 Dr. Dare noted that appellant had undergone a left carpal tunnel release in 2009. On October 16, 2017 he performed a repeat left carpal tunnel surgical release.

On February 8, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Byron Thomas Jeffcoat, an orthopedic surgeon, for a second opinion evaluation. The SOAF did not include appellant's left shoulder conditions.

On February 26, 2018, in response to OWCP's question of when appellant could return to work, Dr. Dare reported that he had not examined appellant since November 27, 2017. On March 12, 2018 he examined appellant and noted that she reported good range of motion of her wrists, but some pain in her right hand and some numbness in her left hand in the ulnar nerve distribution. Dr. Dare continued to diagnose osteoarthritis of the left AC joint and left glenohumeral joint as well as partial thickness rotator cuff tear on the left. He released appellant from his care. Dr. Dare opined that she had five percent permanent impairment of each of her upper extremities. He completed a work capacity evaluation (Form OWCP-5c) and indicated that appellant could perform repetitive movements of her wrists for four hours a day. Dr. Dare further restricted her pushing and pulling to 50 pounds and her lifting to 30 pounds. He indicated that she could perform sedentary, light, or medium level work.

In his March 14, 2018 report, Dr. Jeffcoat described appellant's history of injury and medical history and noted that her hand movement and pain was improved following her surgeries. On physical examination he noted that appellant had numbness in her left fourth and fifth digits. On the right, appellant described her right thumb, index, and fifth fingers as "different," but without numbness. Dr. Jeffcoat found that this was not a normal nerve dermatome. He found negative Phalen's test and Tinel's sign bilaterally. Dr. Jeffcoat also reported no wrist atrophy. He diagnosed bilateral carpal tunnel syndrome and noted that appellant's condition had resolved secondary to her three carpal tunnel releases. Dr. Jeffcoat found that she had reached maximum medical improvement (MMI). He opined that appellant could return to her date-of-injury position

as a mail handler, but questioned whether the 70-pound lifting requirement was appropriate for appellant. Dr. Jeffcoat also indicated that her duties may be varied and not necessarily totally repetitive in nature. He completed a Form OWCP-5c and limited the repetitive movements of appellant's wrist to four hours a day, limited her lifting to 50 pounds and 20 pounds frequently for four hours a day. Dr. Jeffcoat also indicated that she was limited in squatting.

On April 4, 2018 Dr. Jeffcoat completed a supplemental report and indicated that he limited squatting in error on his March 14, 2018 Form OWCP-5. He further reviewed Dr. Dare's work restrictions and agreed with his comments. Dr. Jeffcoat provided a corrected Form OWCP-5c limiting repetitive movements of the wrists to four hours a day. He also limited pushing to 45 pounds, pulling to 30 pounds, and lifting to 20 pounds. Dr. Jeffcoat explained that he was limiting repetitive movements of the wrists as appellant had undergone three carpal tunnel releases.

On May 22, 2018 the employing establishment offered appellant a full-time modified-duty mail handler position, which required her to work flats in the automated flat sorting machine (AFSM) 100 operation for four hours a day. The physical requirements included repetitive movements of the wrists up to four hours a day, pushing up to 45 pounds for eight hours a day, pulling up to 30 pounds for eight hours a day, and lifting up to 20 pounds for eight hours a day. On May 31, 2018 appellant refused this position citing medical limitations, restrictions, and conditions, as well as due to repetitive and heavy workloads.

Appellant retired from federal service, effective June 30, 2018.

In a July 19, 2018 letter, OWCP informed appellant that the offered modified mail handler position was suitable work and comported with the physical restrictions of Dr. Dare. It noted that the position was still available and afforded her 30 days to accept the position and report to duty. OWCP further noted that, if appellant failed to accept the position, she had 30 days to provide a written explanation. It further noted that retirement was not a valid reason for refusing a suitable work position. OWCP advised appellant that at the end of the 30-day period, if her reasons for refusing the suitable work position were not considered justified, her right to wage-loss compensation and schedule award benefits would be terminated.

On August 23, 2018 appellant requested additional time to submit medical evidence supporting her refusal of the suitable work position. She provided an August 16, 2018 letter from Dr. Dare's office indicating that he was out of the office until September 5, 2018.

By decision dated September 24, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, in accordance with 5 U.S.C. § 8106(c)(2) due to her refusal of suitable work. It noted that it had not received a response to the 30-day notice, that appellant did not accept the position, and that she did not return to work within the 30 days allotted.

On October 12, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. OWCP subsequently received additional evidence including an October 11, 2018 letter, wherein appellant noted that she did not report to work in the modified mail handler position as she chose to retire instead. Appellant confirmed that she had

retired on June 30, 2018. She alleged that she was advised that she would receive a schedule award from OWCP.

In a September 24, 2018 report, Dr. Dare found that appellant could not return to her date-of-injury position, but that she could return to work eight hours a day with restrictions. Those restrictions included: four hours of repetitive motion of the wrists, and eight hours of pushing, pulling, and lifting with a 50-pound weight restriction. Dr. Dare found that appellant could perform sedentary, light, and medium-duty work, but not heavy work. He found that she had reached MMI and found that she had five percent permanent impairment of each of her upper extremities.

On October 31, 2018 appellant filed a schedule award claim (Form CA-7).

On November 14, 2018 OWCP proposed to terminate appellant's medical benefits as a result of her accepted bilateral carpal tunnel syndrome. It afforded her 30 days to submit additional evidence or argument in writing if she disagreed with the proposed termination.

In a November 14, 2018 letter, OWCP informed appellant that she was not entitled to a schedule award due to the September 24, 2018 decision terminating her wage-loss compensation and schedule award benefits due to her refusal of a suitable work position.

During the February 13, 2019 oral hearing, appellant testified that the offered modified position was repetitious and that she feared that her accepted condition would be aggravated by her work. She asserted that she would have been required to push 340-pound containers of mail. In conclusion, appellant asserted that she chose to retire because she believed that the offered position exceeded her doctor's restrictions.

By decision dated March 18, 2019, OWCP's hearing representative affirmed the September 24, 2018 termination decision, finding that the offered position constituted suitable work, that the reasons appellant offered for refusing the position were not acceptable, and that OWCP followed proper procedures in terminating appellant's wage-loss compensation and entitlement to schedule award benefits.

LEGAL PRECEDENT

Section 8106(c)(2) provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] To justify such a termination, OWCP must show that the work offered was suitable.[5]

[3] 5 U.S.C. § 8106(c)(2); *S.B.*, Docket No. 17-1797 (issued April 11, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

[4] *S.B., id.*; *Henry P. Gilmore*, 46 ECAB 709 (1995).

[5] *S.B., id.; John E. Lemker*, 45 ECAB 258 (1993).

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow him or her an opportunity to provide reasons for refusing the offered position.[6] If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford him or her a final opportunity to accept the position.[7]

Section 10.516 of FECA's implementing regulations provides that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability.[8] If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.[9] After providing the 30- and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.[10]

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.[11] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[12]

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 24, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome due to factors of her federal employment. Appellant's attending physician, Dr. Dare, also diagnosed left shoulder conditions including osteoarthritis of the AC and glenohumeral joints as well as partial rotator cuff tear.

[6] *S.B., id.*; *Maggie L. Moore,* 42 ECAB 484 (1991); *reaff'd on recon.,* 43 ECAB 818 (1992).

[7] *Id.*

[8] 20 C.F.R. § 10.516; *S.B., id.*; *C.C.*, Docket No. 15-1778 (issued August 16, 2016).

[9] *Id.*

[10] *Id.* at § 10.517.

[11] *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Gloria J. Godfrey,* 52 ECAB 486 (2001); *Robert Dickerson,* 46 ECAB 1002 (1995).

[12] *M.E.*, Docket No. 18-0808 (issued December 7, 2018); *Mary E. Woodward,* 57 ECAB 211 (2005).

The employing establishment offered appellant a modified-duty position consistent with Dr. Dare's March 12, 2018 report on May 22, 2018. It is unclear from the record whether Dr. Dare included restrictions for appellant's left shoulder conditions or only listed restrictions due to her accepted bilateral carpal tunnel syndrome. OWCP did not include the left shoulder conditions in the SOAF referred to Dr. Jeffcoat, the second opinion physician. Therefore, there is no evidence that the physicians who examined appellant considered her additional left shoulder conditions when formulating her work restrictions, or that OWCP considered these conditions in finding that the offered position was suitable work. As the medical opinion evidence failed to consider her left shoulder conditions, these reports are insufficient for OWCP to base its suitability determination.[13]

As previously noted, the Board has held that all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[14] The Board finds that OWCP failed to consider whether appellant's previously diagnosed left shoulder conditions affected her ability to perform the duties of the modified mail handler position.

The Board has held that for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.[15] As a penalty provision, section 8106(c)(2) must be narrowly construed.[16] In this case, the medical evidence was deficient in that it did not consider appellant's left shoulder conditions. 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. The Board thus finds that OWCP has not met its burden of proof and thus improperly terminated her wage-loss compensation and entitlement to a schedule award under 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 September 24, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

[13] *A.F.*, Docket No. 19-0453 (issued July 6, 2020).

[14] *Id.; supra* note 12; *S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

[15] *A.F., id.*; *S.Y., id.*; *Annette Quimby*, 49 ECAB 304 (1998).

[16] *A.F., id.*; *S.Y., id.*; *Stephen A. Pasquale*, 57 ECAB 396 (2006).

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 19, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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