United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 20-1004**
	)	**Issued: March 15, 2021**
U.S. POSTAL SERVICE, FOREST PARK POST OFFICE, Forest Park, GA, 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 April 6, 2020 appellant filed a timely appeal from November 22, 2019 and March 9, 2020 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 22, 2019, pursuant to 20 C.F.R. § 10.500(a).

FACTUAL HISTORY

On October 2, 2013 appellant, then a 48-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a left shoulder condition causally related to

[1] 5 U.S.C. § 8101 *et seq.*

factors of his federal employment, including delivering mail.[2] He indicated that he first became aware of the condition on October 1, 2013 and realized its relationship to his federal employment on August 29, 2013. Appellant stopped work on August 29, 2013 and returned on December 2, 2013. OWCP accepted his claim for left shoulder disorder of the bursae and tendons and other affections of the left shoulder region. It paid wage-loss compensation benefits on the supplemental rolls for intermittent periods of disability beginning October 19, 2013. On September 2, 2014 appellant underwent authorized left shoulder arthroscopic surgery and stopped work. OWCP paid him wage-loss compensation benefits and placed him on the periodic rolls, effective July 24, 2016.[3]

Appellant continued to receive medical treatment. In a May 21, 2018 report, Dr. Michael P. Bernot, a Board-certified orthopedic surgeon and sports medicine specialist, indicated that appellant was seen for follow-up of his left shoulder rotator cuff tendinitis. Upon examination of appellant's left shoulder, he observed tenderness on palpation and positive Neer and Hawkins impingement tests. Dr. Bernot diagnosed left shoulder inflammation of the rotator cuff tendon and left shoulder pain. He recommended that appellant return to light-duty work with restrictions of no repetitive overhead lifting, no casing mail, and no mail delivery.

On May 22, 2018 OWCP referred appellant to Dr. Howard Krone, a Board certified orthopedic surgeon, for a second opinion evaluation and requested that he provide an opinion on appellant's ability to work. In a June 11, 2018 report, Dr. Krone described appellant's history of injury and reviewed his medical records, including the statement of accepted facts (SOAF).[4] He noted examination findings of generalized tenderness over both shoulders, primarily over the anterior aspect of the acromion, and positive Neer impingement sign. Dr. Krone completed a work capacity evaluation form (Form OWCP-5c), which indicated that appellant had reached maximum medical improvement and that he could return to work with a heavy strength level.

In a July 16, 2018 work status note, Dr. Bernot reported diagnoses of left shoulder subacromial impingement. He indicated that appellant could work light duty with restrictions of no repetitive overhead lifting, no casing mail, and no mail delivery.

OWCP determined that a conflict in medical evidence existed between Dr. Bernot, appellant's treating physician, and Dr. Krone, OWCP's second opinion examiner, with regard to appellant's ability to work. As such, it referred appellant to Dr. Michael Gruber, a Board certified orthopedic surgeon and orthopedic sports medicine specialist, for an impartial medical examination in order to resolve the conflict of medical evidence. In an October 24, 2018 report,

[2] Appellant has a prior occupational disease claim filed on September 4, 2009 under File No. xxxxxx594, which OWCP accepted for right shoulder impingement syndrome. OWCP paid wage-loss compensation benefits for total disability from February 8 through March 2, 2010. It combined that case with this current case, File No. xxxxxx831, with File No. xxxxxx594 serving as the master file.

[3] On February 17, 2015 OWCP granted appellant a schedule award for 10 percent permanent impairment of the left upper extremity (arm). The award ran for 31.2 weeks from January 13 to August 19, 2015.

[4] The evidence of record contains a May 12, 2016 SOAF, which noted that appellant's current claim was accepted for left shoulder disorder of bursae and tendons and left shoulder impingement syndrome. It also noted that appellant had a previously accepted right shoulder condition under File No. xxxxxx594.

Dr. Gruber reviewed appellant's medical records and the SOAF. He recounted appellant's complaints of bilateral shoulder pain with forward elevation and overhead activities. Upon examination of appellant's bilateral shoulders, Dr. Gruber observed no inflammatory findings and no significant pain upon palpation. Hawkins and Neer impingement testing produced pain bilaterally, more on the left than the right. Dr. Gruber reported that an x-ray scan showed good glenohumeral joint space and a normal acromiohumeral distance. He diagnosed left shoulder pain following surgical decompression and distal claviculectomy. Dr. Gruber opined that appellant would not be able to return to work as a city letter carrier. He indicated that appellant was capable of performing work within the limitations outlined in the January 2015 functional capacity evaluation (FCE) report.[5] Dr. Gruber also completed a Form OWCP-5c, which noted that appellant had permanent restrictions of occasional reaching and no reaching above the shoulder.

In a November 16, 2018 letter, OWCP requested that the employing establishment prepare a written job offer consistent with Dr. Gruber's October 24, 2018 work restrictions.

In a February 5, 2019 memorandum of a telephone call (Form CA-110), E.J., an injury compensation specialist for the employing establishment, informed OWCP that the employing establishment had provided appellant a job offer based on Dr. Gruber's work restrictions, but appellant did not show up. An OWCP claims examiner requested that the employing establishment provide OWCP with a copy of the job offer.

In April 18 and June 18, 2019 CA-110 forms, an OWCP claims examiner informed E.J. that it still had not received a copy of the job offer. E.J. noted that the job offer remained available and would remain available in the future.

In an April 29, 2019 letter, E.J. informed OWCP that it was attaching the job offer for appellant. She indicated that the job offer remained available.

On June 18, 2019 OWCP received an offer of modified assignment dated January 4, 2019. The assignment title was "modified city carrier." The job offer noted that the position was full-time with an annual salary of $62,499.00 and available on January 12, 2019. The duties of the job position required preparing mail for delivery for 30 minutes to one hour, casing mail while on the platform to avoid reaching above the shoulder for one to two hours, and mail delivery for four to five hours. The physical requirements of the modified-duty position included simple grasping and reaching, lifting, pushing, and pulling up to 25 pounds frequently for one to two hours, walking and standing for two hours, and driving for four to five hours.

The evidence of record also contained a copy of PS Form 3811 (Signature Card), which contained appellant's signature and address.

[5] A January 12, 2015 FCE report indicated that appellant's lifting capabilities were at the light/medium physical demand category. The report noted that within the medium category, he was capable of lifting 25 to 35 pounds and within the light category, reaching with the right hand on a frequent basis, and reaching with the left hand/reaching overhead on an occasional basis.

In a July 18, 2019 Form CA-110, the employing establishment confirmed that the job offer dated January 4, 2019 was still available and valid.

On July 18, 2019 OWCP issued appellant a notice of proposed termination. It informed appellant that he had been provided with a "temporary light-duty assignment as a modified city carrier" on January 4, 2019. OWCP noted that it had been advised that he had refused to accept or report to the job assignment provided. It indicated that it had reviewed the "temporary light-duty assignment" and determined that it comported with the work restrictions provided by Dr. Gruber in his October 24, 2018 impartial medical report. OWCP also informed appellant of the provisions of 20 C.F.R. § 10.500(a) and further advised 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. It noted that the actual earnings "in the assignment would meet or exceed the current wages of the job held when injured. Therefore, you would not be entitled to ongoing wage-loss compensation."

In a July 23, 2019 letter, appellant noted his disagreement with the July 18, 2019 notice of proposed termination letter. He alleged that he never received the January 4, 2019 job offer for the modified city carrier position and never declined the job offer. Appellant also asserted that Dr. Gruber had indicated in his October 24, 2018 report that he was unable to work as a city letter carrier.

In an August 22, 2019 Form CA-110, the employing establishment verified that the January 4, 2019 job offer was still available.

By decision dated August 22, 2019, OWCP terminated appellant's wage-loss compensation benefits, effective that date, pursuant to 20 C.F.R. § 10.500(a).

On September 20, 2019 appellant requested reconsideration. He asserted that both his treating physician, Dr. Bernot, and OWCP's impartial medical examiner, Dr. Gruber, had advised him that he could not return to his city letter carrier position due to his bilateral shoulder injuries. Appellant also asserted that he never received a letter from the employing establishment regarding the January 4, 2019 job offer. He noted that the PS Form 3811 signature card had cropped off the date it was delivered. Appellant submitted copies of January 5, 2018 and January 4, 2019 job offers, Dr. Bernot and Dr. Gruber's medical reports, and a city carrier position description.

By decision dated November 22, 2019, OWCP denied modification of the August 22, 2019 decision.

On December 31, 2019 appellant requested reconsideration. He alleged that he had total disability, not temporary disability, since Dr. Gruber indicated that his restrictions were permanent. Appellant also contended that it was impossible for him to perform the duties of the January 4, 2019 modified city carrier job position without repetitively reaching out with his left upper extremity or repetitive reaching above the shoulder. He further asserted that Dr. Gruber failed to consider any medical restrictions due to his accepted right shoulder injury. Appellant submitted a copy of the January 4, 2019 job offer and copies of Dr. Bernot and Dr. Gruber's work restrictions.

In a March 9, 2020 decision, OWCP denied modification of the November 22, 2019 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[6]

OWCP regulations at 20 C.F.R. § 10.500(a) provides 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 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."[7]

When it is determined that an employee is no longer totally disabled from work and is on the periodic rolls, OWCP's procedures provide that the claims examiner should evaluate whether the evidence of record 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.[8] When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.[9]

OWCP's procedures further advise: "If there still would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation

[6] *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[7] 20 C.F.R. § 10.500(a).

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

[9] *Id.*

benefits based upon the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment)."[10]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 22, 2019, pursuant to 20 C.F.R. § 10.500(a).

OWCP terminated appellant's wage-loss compensation on August 22, 2019 pursuant to 20 C.F.R. § 10.500(a). The Board, however, is unable to determine from the current record whether its termination of his benefits is proper under 20 C.F.R. § 10.500(a) since it cannot be established whether he had been offered a temporary or a permanent employment position. OWCP's procedures require that when an employing establishment provides an alternate employment position to a partially disabled employee who cannot perform his or her date-of-injury position, it must be determined whether the offered position is permanent or temporary in nature. If the employment offered to an employee on the periodic rolls is temporary and the employee does not accept the position, section 20 C.F.R. § 10.500(a) applies. However, if the offered employment is permanent in nature and the employee does not accept the position the penalty provisions under 5 U.S.C. § 8106(c) apply.[11]

The evidence of record contains a January 4, 2019 written job offer for a position of "modified city carrier" beginning January 12, 2019. The job offer noted the duties and physical requirements of the modified assignment. The assignment was for full-time work and had an annual salary of $62,499.00. OWCP subsequently issued a proposed termination of wage-loss compensation on July 18, 2019. It noted that appellant had been provided with a "temporary light[-]duty assignment as a modified city carrier" on January 4, 2019. The Board finds, however, that there is no documentation of record supporting that the offered assignment was temporary in nature.[12] The January 4, 2019 job offer did not indicate whether the position was temporary and the employing establishment did not provide a cover letter advising appellant or OWCP whether the modified city carrier position was temporary or permanent.

Appellant began receiving wage-loss compensation on the periodic rolls, effective July 24, 2016, and was still on the periodic rolls at the time of the January 4, 2019 offer of employment. Therefore, to terminate his wage-loss compensation benefits pursuant to 20 C.F.R. § 10.500(a), OWCP had the burden of proof to establish that the offered employment position was temporary in nature. This determination is critical as a permanent job offer would require OWCP to terminate benefits in compliance with the strict provisions of section 8106(c). As it cannot be established

[10] *Id.* at Chapter 2.814.9(c)(8).

[11] *Id.* at Chapter 2.814.4.

[12] *See C.C.*, Docket No. 19-0241 (issued August 12, 2019) (the Board reversed the termination of a claimant's wage-loss compensation benefits under 20 C.F.R. § 10.500 because it was unclear from the record whether the assignment offered to the claimant on the periodic rolls was temporary in nature).

that appellant's job offer was a temporary position, OWCP has not met its burden of proof to terminate wage-loss compensation pursuant to 20 C.F.R. § 10.500(a).[13]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 22, 2019, pursuant to 20 C.F.R. § 10.500(a).

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2020 and November 22, 2019 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: March 15, 2021
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

[13] *See C.W.*, Docket No. 18-1779 (issued May 6, 2019).