United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
	)	**Docket No. 21-0521**
and	)	**Issued: October 13, 2021**
U.S. POSTAL SERVICE, CAROLINA FOREST POST OFFICE, Myrtle Beach, SC, Employer	)	

Appearances:
Paul H. Felser, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 18, 2021 appellant filed a timely appeal from a September 18, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[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 issuance of the September 18, 2020 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, effective March 3, 2020, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

FACTUAL HISTORY

On September 12, 2015 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 11, 2015 she injured her right arm and shoulder when she removed boxes out of the back of her truck and tripped and fell over other boxes. She stopped work on September 12, 2015 and returned to modified-duty work on October 28, 2015. OWCP accepted the claim for traumatic right shoulder arthropathy (complete rotator cuff tear). Appellant underwent authorized right shoulder arthroscopy on January 22, 2016; right shoulder arthroscopy with subacromial decompression, excision of lose body, osteophyte, distal clavicle excision, and glenohumeral debridement on August 8, 2016; and reverse total right shoulder arthroplasty and right biceps tendonesis on June 29, 2017. OWCP paid her wage-loss compensation on the periodic rolls and subsequently on the supplemental rolls.

On July 22, 2019 OWCP obtained a second opinion report from Dr. Robert M. Moore, a Board-certified orthopedic surgeon regarding appellant's residuals and ability to perform her date-of-injury job or a modified position.

Dr. Moore reviewed medical records and a statement of accepted facts (SOAF). On examination of the right shoulder he noted a well-healed anterior incision, mild tenderness in the right anterior shoulder and proximal humerus region, 50 degrees of active and passive abduction, 70 degrees of active and passive forward elevation, 40 degrees of internal and external rotation, and total discomfort and pain at the end ranges. Dr. Moore also noted grade 4 strength in the active abduction and forward elevation, and an intact neurovascular status. He diagnosed status post reverse right shoulder arthroplasty and treatment of rotator cuff tear and cuff arthropathy of the right shoulder. Dr. Moore opined that appellant's right cuff rotator cuff tear for which she underwent authorized surgery on two attempts to repair her right shoulder, followed by reverse shoulder arthroplasty resulted from her September 11, 2015 employment injury. He advised that she was unable to perform her regular rural carrier work duties and returned her to modified work with restrictions that included, no lifting more than 10 pounds with the right arm and no reaching above the right shoulder. Dr. Moore reviewed the employing establishment's February 20, 2019 offer for a modified rural carrier associate position and opined that appellant was unable to perform the offered position because she was unable to lift more than 10 pounds with her right arm and could not lift above right shoulder level.[4]

On August 21, 2019, based on Dr. Moore's restrictions, the employing establishment offered appellant a full-time, temporary, modified clerk position, which required her to work as a lobby assistant, perform data entry, write second notices, answer telephones, provide service to customers, and perform passport services at the main post office and the Socastee Post Office. The

[4] The employing establishment's February 20, 2019 job offer required appellant to case and deliver a rural route and lift 20 pounds overhead.

position also required her to perform custodial duties. The physical requirements of the position required intermittent standing, sitting, walking, writing with a pen, simple grasping, and no reaching above the right shoulder. Appellant refused the position and did not report for duty.

The record reflects that, commencing June 8, 2019, OWCP paid appellant wage-loss compensation on the supplemental rolls.

In an August 29, 2019 letter, counsel, on behalf of appellant, contended that the offered position required appellant to "cross craft," which was prohibited by the employing establishment's Employee and Labor Relations Manual (ELRM). He further contended that the custodial duties of the offered position were not within appellant's restrictions. Additionally, counsel asserted that the position appeared to be an odd-lot and makeshift position. He also asserted that OWCP neglected to address a May 2, 2019 note of Dr. Eleyanya Ogburu-Ogbonnaya, a neurologist, who advised that appellant could return to work with restrictions that included no lifting more than five pounds and no overhead lifting, and recommended that she undergo a functional capacity evaluation (FCE). Lastly, counsel maintained that the offered position was temporary in nature, which was considered unsuitable pursuant to 5 U.S.C. § 8106(c).

In an August 30, 2019 letter, the employing establishment responded to counsel's August 29, 2019 letter. It noted that appellant could file a grievance if there was any violation of its ELRM. The employing establishment further noted that she would receive training on the custodial duties within her restrictions. It contended that the offered position was within appellant's restrictions and that if work was not available within her restrictions, she could file a claim for compensation (Form CA-7).

On September 27, 2019 the employing establishment confirmed to OWCP that the offered position remained available.

In a notice of proposed termination dated January 14, 2020, OWCP proposed to terminate appellant's wage-loss compensation in accordance with 20 C.F.R. § 10.500(a) based on her refusal of the August 21, 2019 temporary, light-duty position. It advised appellant that it had reviewed the work restrictions provided by Dr. Moore and found that his opinion represented the weight of the medical evidence. OWCP further determined that the position offered appellant was within her restrictions. It informed her of the provisions of 20 C.F.R. § 10.500 (a) and advised her that any claimant who declined a temporary, light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss. OWCP noted that the offered pay rate of $1,389.20 per week for working 40 hours was greater than that on her date of injury and, therefore, she would not be entitled to ongoing wage-loss compensation. It afforded appellant 30 days to accept the assignment and report to duty or provide a written explanation of her reasons for not accepting the assignment.

Appellant filed Form CA-7 claims for leave without pay (LWOP) during the period January 4 through 17, 2020.

In a February 13, 2020 letter, counsel disagreed with OWCP's proposed termination of compensation. He contended that OWCP's January 14, 2020 notice constituted a loss of wage-earning capacity (LWEC) determination rather than a proposed termination of compensation. Counsel reiterated his prior contentions that the offered position was temporary in nature and the

custodial duties were not within her restrictions and required her to "cross craft" in violation of the ELRM. He noted that the employing establishment indicated on appellant's December 17, 2019 Form CA-7 claim that there was no light-duty work available, but also acknowledgement that the offered position was still available. Additionally, counsel asserted that Dr. Moore's opinion could not constitute the weight of the medical opinion evidence as he did not review the August 21, 2019 job offer.

OWCP subsequently received additional medical evidence.

In a March 3, 2020 decision, OWCP finalized the January 14, 2020 proposed termination and terminated appellant's wage-loss compensation, effective that date, because she failed to accept the August 21, 2019 temporary, modified-duty assignment in accordance with 20 C.F.R. § 10.500(a). It found that the weight of the medical evidence rested with Dr. Moore, who provided permanent work restrictions. OWCP indicated that its procedures provided that a temporary, light-duty assignment could be provided to an employee who was on the periodic rolls and was stable and well-defined or had permanent restrictions, and the employing establishment was actively pursuing permanent employment to accommodate these restrictions. As appellant would have sustained no wage loss had she accepted the assignment, OWCP determined that she was not entitled to wage-loss compensation.

On March 9, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. She also submitted medical evidence.

OWCP thereafter continued to receive medical evidence. The telephonic hearing was held before an OWCP hearing representative on July 9, 2020.

By decision dated September 18, 2020, OWCP's hearing representative affirmed the March 3, 2020 decision.

LEGAL PRECEDENT

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. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph)."[5]

When it is determined that an appellant 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 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.[6] 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.[7]

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 WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment)."[8]

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective March 3, 2020, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

The physical requirements of the offered temporary, light-duty assignment were within appellant's medical restrictions provided by Dr. Moore, in his capacity as a second opinion referral physician.

In his July 22, 2019 report, Dr. Moore noted appellant's history of injury and medical treatment. He reviewed the employing establishment's February 20, 2019 offer for a modified rural carrier associate position and opined that she was not capable of performing the offered position because she was restricted to lifting no more than 10 pounds with her right arm and no lifting above right shoulder level. While Dr. Moore did not review the August 21, 2019 full-time, temporary, light-duty modified clerk job offer in question, the employing establishment offered appellant the position based on the restrictions set forth by Dr. Moore.

The August 21, 2019 offered position involved work as a lobby assistant, performing data entry, writing second notices, answering telephones, providing service to customers, and performing passport services at the main post office and the Socastee Post Office, and custodial duties. The physical requirements of the position involved intermittent standing, sitting, walking, writing with a pen, simple grasping, and no reaching above the right shoulder. Contrary to

[5] 20 C.F.R. § 10.500(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.2(c)(a) (June 2013).

[6] Federal (FECA) Procedure Manual, *id*. at Chapter 2.814.9(c)(1) (June 2013).

[7] *Id*.

[8] Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.8(c)(10).

counsel's contention that the offered position was not suitable, the employing establishment maintained that the position was within appellant's restrictions and vocational skills. Additionally, it maintained that appellant could file a grievance if she believed that the offered position violated its ELRM and more importantly she would receive training for the required custodial duties. Further, the employing establishment noted that, if work was not available within her restrictions, she could file a Form CA-7 claim for compensation. Regarding counsel's contention that the offered position was temporary in nature and, thus, unsuitable pursuant to 5 U.S.C. § 8106(c), the Board notes that, as stated above, the penalty provision of 5 U.S.C. § 8106(c)(2) will not be imposed on such assignments under section 10.500(a).[9]

The evidence of record establishes that appellant declined the temporary limited-duty assignment offered by the employing establishment, which was suitable and would have paid her wages greater than those of her date-of-injury job[10] and that appellant was notified in writing on August 21, 2019 of the available job, which was within her work restrictions.[11]

Thus, the Board finds that OWCP met its burden of proof to terminate appellant's entitlement to compensation, effective March 3, 2020, pursuant to 20 C.F.R. § 10.500(a) based on her earnings had she accepted the temporary limited-duty assignment.[12]

On appeal counsel contends that the offered position was not suitable. For the reasons set forth above, the Board finds that, under the provisions of 20 C.F.R. § 10.500(a), OWCP properly terminated appellant's compensation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective March 3, 2020, pursuant to 20 C.F.R. § 10.500(a), because she refused a temporary, limited-duty assignment.

[9] *Supra* note 4.

[10] The Board finds that OWCP properly applied the formula set forth in provisions in *Albert C. Shadrick* in determining appellant's LWEC. 5 ECAB 376 (1953) (codified by regulation at 20 C.F.R. § 10.403). The clerk position would have paid $1,389.20 per week, which was greater than appellant's date-of-injury job of $1,349.76 per week.

[11] *See supra* note 5; *L.B.*, Docket No. 17-0405 (issued January 25, 2019); *S.M.*, Docket No. 15-1667 (issued April 20, 2016).

[12] *J.J.*, Docket No. 17-0885 (issued June 16, 2017); *G.C.*, Docket No. 17-0140 (issued April 13, 2017).

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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