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

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| **J.P., Appellant** | ) | |
| **and** | ) | **Docket No. 20-0490** |
| | ) | **Issued: August 25, 2022** |
| **U.S. POSTAL SERVICE, JOURNAL SQUARE STATION, Jersey City, NJ, Employer** | ) | |

*Appearances:*
*James D. Muirhead, 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 January 2, 2020 appellant, through counsel, filed a timely appeal from an August 23, 2019 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.

[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 met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits effective August 29, 2017, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## ***FACTUAL HISTORY***

On November 20, 2014 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 20, 2014 she injured her left shoulder[3], right knee, and right thumb when a tray of mail slipped and caused her to fall while in the performance of duty. She stopped work on November 20, 2014.

In a November 20, 2014 statement, appellant explained that she lost control of a tray of mail she was attempting to lift due to its unexpected weight. She noted that she injured her left shoulder and right knee and cut her hand. Appellant advised that she was left-handed.

On March 3, 2015 OWCP accepted this claim for contusion of the right knee, and sprain of the left shoulder and upper arm. In a May 15, 2015 letter, it informed appellant that she would be paid compensation on the periodic rolls beginning April 18, 2015.

On September 22, 2015 appellant underwent a magnetic resonance imaging (MRI) scan of the left shoulder with contrast which demonstrated a full thickness, near full width tear of the supraspinatus tendon.

In a September 24, 2015 report, Dr. Paul W. Codjoe, a Board-certified orthopedic surgeon, reviewed appellant's MRI scan and requested authorization for a repeated left shoulder rotator cuff surgery. He completed a duty status report (Form CA-17) on that same day and indicated that she could work with restrictions including no reaching above the shoulder.

In an October 14, 2015 work capacity evaluation (Form OWCP-5c) Dr. Codjoe again indicated that appellant could not reach above the shoulder and advised that she could work eight hours a day.

On October 28, 2015 OWCP denied authorization for additional left shoulder surgery. It found that the medical necessity for additional surgery was unclear as appellant was able to return to work with restrictions.

On November 25, 2015 Dr. Codjoe noted appellant's history of injury and previous left shoulder surgery. He reported that she continued to experience persistent pain and discomfort involving the left shoulder and that a repeat arthrogram revealed recurrent tearing of the left rotator cuff. Dr. Codjoe recommended revision arthroscopic repair of the left shoulder. He noted that appellant could not return to full-duty work without restrictions due to her left shoulder condition.

[3] The record reflects that appellant previously underwent left shoulder arthroscopy, rotator cuff repair, subacromial bursectomy, and acromioplasty on April 23, 2014.

On December 3, 2015 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion evaluation with Dr. Stanley Askin, a Board-certified orthopedic surgeon.

In his December 18, 2015 report, Dr. Askin reviewed the SOAF and appellant's medical record and noted his examination findings. He noted that her postsurgical MRI scan demonstrated a full thickness tear of the supraspinatus tendon. On physical examination Dr. Askin noted that appellant's left shoulder demonstrated painful limitation in motion. He indicated that she continued to experience disabling residuals of her accepted left shoulder condition. Dr. Askin opined that there was a high failure rate of rotator cuff repairs, because the rotator cuff frequently tore due to a loss of vascularity of the tendon tissue, and the loss of vascularity also contributed to repair failures. He found that there was no further treatment that was likely to improve appellant's condition. Dr. Askin noted that her symptomatic upper extremity was her dominant side and found that she could not return to her date-of-injury position.

Dr. Askin also completed a Form OWCP-5c on December 18, 2015 and found that appellant could work eight hours a day in a light strength level. He provided restrictions on reaching with the left arm for two hours a day, and determined that she should not reach above the shoulder with her left arm. Dr. Askin further limited appellant's pushing, pulling, and lifting up to 20 pounds.

In March 1, 2016 notes, Dr. Codjoe determined that appellant could return to modified light-duty work with no reaching above shoulder level. He also restricted her lifting up to 10 pounds.

On June 3 and 21, 2016 Dr. Codjoe examined appellant due to left shoulder symptoms. He noted that she had difficulties with overhead lifting and lying on her left shoulder. On physical examination Dr. Codjoe reported loss of range of motion of the left shoulder and discomfort to palpation as well as rotator cuff weakness. He again recommended an operative repair. In an August 23, 2016 note, Dr. Codjoe indicated that appellant would continue with physical therapy. On September 30, 2016 he opined that her condition would not improve with physical therapy and again recommended left shoulder surgery.

The employing establishment offered appellant a modified limited-duty city carrier position on November 4, 2016. The duties of this position included carrying mail using a pushcart for six hours, casing mail for two hours, walking six hours, and driving up to six hours. The physical requirements included climbing for six hours, walking for six hours, bending for two hours, and lifting up to 20 pounds for eight hours.

On November 11, 2016 Dr. Codjoe again limited appellant's lifting to 10 pounds and restricted work with her arms above shoulder level. He noted that he was awaiting approval for surgery on October 28, 2016.

Appellant declined the limited-duty position on November 14, 2016 asserting that the physical requirements were not within her medical restrictions, more specifically noting that she could not lift/push/pull more than 20 pounds. Where the job offer indicated that there was "no restriction on the right shoulder," appellant noted that she was left-handed.

By notice of proposed termination dated November 29, 2016, OWCP advised appellant that the temporary light-duty offered position conformed to the work restrictions provided by Dr. Askin. It notified her that, if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to 20 C.F.R. § 10.500(a), her right to compensation for wage loss would be terminated. OWCP afforded appellant 30 days to respond.

In a January 11, 2017 note, Dr. Codjoe indicated that appellant could lift up to 15 pounds. On January 10 and February 7, 2017 he again recommended surgical repair of her left shoulder.

In a February 24, 2017 Form MEO23 (appointment schedule notification), OWCP scheduled appellant for an impartial medical examination. Dr. Ian Fries, a Board-certified orthopedic surgeon, was selected to serve as the impartial medical examiner (IME) with no other physicians bypassed.

In a March 7, 2017 medical note, Dr. Codjoe examined appellant and recommended surgery to repair her left rotator cuff tear.

On March 31, 2017 OWCP referred appellant, a SOAF, and a series of questions to Dr. Fries to resolve the conflict of medical opinion evidence between Drs. Codjoe and Askin, regarding diagnosis, work capacity, and the necessity for surgery for treatment of the accepted employment injury.

In May 2 and 30, 2017 notes, Dr. Codjoe reported appellant's continued left shoulder pain and dysfunction as well as difficulty with overhead lifting. He diagnosed recurrent rotator cuff tear and recommended rotator cuff repair. Dr. Codjoe found that appellant could work, but could not lift over 10 pounds and could not use her arms over shoulder level.

Dr. Fries completed his report on May 22, 2017. He reviewed the SOAF and described appellant's history of injury and medical history. On physical examination he found that she was left-hand dominant, and that she had tenderness in the left trapezius and over the anterior rotator cuff. Dr. Fries found 130 degrees of forward shoulder flexion on the left and 180 degrees on the right, abduction of 180 degrees on the right and 125 on the left, extension 30 degrees on the right and 40 degrees on the left, and external rotation of 70 degrees on the right and 55 degrees on the left with posterior shoulder pain and a pulling sensation. Appellant also reported superior anterior left shoulder pain. Dr. Fries noted that there were no imaging studies available for his review. He diagnosed bilateral trapezius myalgias, left shoulder rotator cuff tear, glenohumeral synovitis, and subacromial bursitis, left[4] shoulder arthroscopic cuff repair and debridement and recent superior labral degenerative tear. Dr. Fries also diagnosed right rotator cuff tendinitis, and right knee contusion and bruise, resolved. He found it reasonable to limit appellant from overhead activities with her dominant left upper extremity and provided a weight limitation of 20 pounds. Dr. Fries opined that repeated left shoulder surgery was not necessary as rotator cuff tears did not require surgical intervention and could be well rehabilitated conservatively. He further opined that it was extremely unlikely a repeated surgery would improve her left shoulder. Dr. Fries determined that appellant's left labral tear could not be related to her employment injury as it was not seen during

[4] Dr. Fries indicated a right shoulder arthroscopic cuff repair, but this appears to be a typographical error.

surgery. He found that she was capable of performing the offered November 4, 2016 position. Dr. Fries concluded that appellant had reached maximum medical improvement (MMI).

On June 14, 2017 Dr. Fries completed a Form OWCP-5c and found that appellant could work eight hours a day with restrictions. He further found that she could perform medium strength work and that she could not reach above the shoulder with her left arm.

By letter dated June 22, 2017, OWCP advised appellant that the offered position was suitable and still available. It notified her that, if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to 5 U.S.C. § 8106(c)(2), her right to compensation for wage-loss compensation or schedule award benefits would be terminated. OWCP afforded appellant 30 days to respond.

Appellant responded on July 21, 2017 and asserted that the pushcart she was required to use violated her pushing restriction of 20 pounds given by Dr. Fries. She further asserted that, if the pushcart was filled with mail, she would be required to push up to 70 pounds of mail. Appellant noted that she was left-handed and that to case and deliver mail she would be required to routinely lift her injured left arm above her shoulder for up to six hours a day. She also provided photographs of the equipment she would be required to use to perform the job.

OWCP ascertained that the position remained available and by letter dated July 25, 2017, advised appellant that her reasons for refusing the offered position were not valid. It afforded her an additional 15 days to accept.

On August 4, 2017 appellant notified the employing establishment that she had accepted the modified city carrier position. She again asserted that the position exceeded her restrictions as she was left-handed. Appellant requested in writing the day that she was to report to work from the postmaster.

In a letter dated August 23, 2017, the employing establishment noted that appellant had not returned to work.

By decision dated August 29, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, pursuant to 5 U.S.C. § 8106(c)(2), effective that date. It noted that the position was within the restrictions provided by Dr. Fries, whose report constituted the weight of the medical evidence; that her reason for refusing the job offer was not reasonable; and that the position remained available.

In a September 5, 2017 e-mail, the employing establishment noted that appellant had returned to work on August 29, 2017 and stopped work on September 5, 2017.

On September 12 and October 14, 2017 Dr. Codjoe noted that appellant had returned to work and started training her right hand to meet the job requirements. He reported that she was sent home due to persistent pain and discomfort

On February 1, 2018 appellant requested reconsideration of the August 29, 2017 decision. She contended that she accepted the modified city carrier position by certified letter received at the employing establishment on August 7, 2017. Appellant noted that she was directed to return

to work on August 31, 2017. She returned to work at 11:30 a.m. and worked until 5:30 p.m. Appellant continued to work on Saturday, September 2, 2017, but developed pain in her left shoulder. She was not scheduled to work on Sunday, September 3 or Monday, September 4, 2017. When appellant reported to work on Tuesday, September 5, 2017, she had a meeting with management regarding her inability to perform the casing and delivery of mail with her nondominant right hand. She began sorting mail for delivery and left to deliver her route, when she was directed to return to the employing establishment.

By decision dated July 10, 2018, OWCP denied modification of its prior decision.

On March 5, 2019 appellant, through counsel requested reconsideration. Counsel contended on April 3, 2019 that Dr. Fries was not properly selected as an IME and that his report was therefore not entitled to the weight of the medical opinion evidence. He requested information on the IME selection process.

On July 2, 2019 the employing establishment noted that appellant had accepted the job offer effective August 7, 2017 and requested reporting information.

In an August 23, 2019 supplemental report, Dr. Fries further defined appellant's work restrictions, noting that he found that she could perform medium work, exerting 20 to 50 pounds of force occasionally or 10 to 25 pounds of force frequently. He noted that he had not reviewed a specific job offer. Dr. Fries again noted that appellant could not reach above the shoulder with her left hand. He opined that she could push, pull, lift, and carry up to 20 pounds with her left hand up to eight hours a day. Dr. Fries found that appellant could push a cart to carry mail with either upper extremity.

By decision dated August 23, 2019, OWCP denied modification.

## ***LEGAL PRECEDENT***

Section 8106(c)(2) of FECA 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."[5] It is OWCP's burden to terminate compensation under section 8106(c)(2) for refusing to accept suitable work or neglecting to perform suitable work.[6] To justify such a termination, OWCP must show that the work offered was suitable.[7]

With respect to the procedural requirements of termination under section 8106(c)(2), 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.[8] If appellant presents reasons for refusing the offered position, OWCP must inform the employee if

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

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

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

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

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.[9]

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.[10] 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.[11] After providing the 30- and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.[12]

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.[13] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[14]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[15] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[16] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[17]

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[9] *Id*.

[10] 20 C.F.R. § 10.516; *S.B., id*.; *C.C.*, Docket No. 15-1778 (issued August 16, 2016).

[11] *Id*.

[12] *Id*. at § 10.517.

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

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

[15] 5 U.S.C. § 8123(a).

[16] 20 C.F.R. § 10.321.

[17] *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

## ***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 August 29, 2017.

OWCP declared a conflict in medical opinion evidence between Dr. Codjoe, appellant's attending physician and Dr. Askin, the second opinion physician, regarding appellant's diagnosis, work capacity, and the necessity for surgery for treatment of the accepted employment injury. Accordingly, it properly referred appellant to Dr. Fries to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

In its August 29, 2017 termination decision, OWCP determined that the November 4, 2016 job offer extended to appellant was suitable based on the work restrictions provided by Dr. Fries in his May 22, 2017 report. The Board finds that OWCP improperly relied on Dr. Fries May 22, 2017 report in determining that the modified position offered by the employing establishment constituted suitable employment.[18]

The November 4, 2016 job offer required carrying mail using a pushcart for six hours, casing mail for two hours, walking six hours, and driving up to six hours. The physical requirements listed included climbing for six hours, walking for six hours, bending for two hours, and lifting up to 20 pounds for eight hours. The record is clear that the accepted employment injury was to appellant's left shoulder, and that her dominant hand was her left hand. Dr. Fries found that she could perform no reaching above the shoulder with her left hand. There is no evidence in the record that he was aware of the specific physical mechanics of casing and delivering mail. Appellant again noted on July 21, 2017 that she was left-handed and asserted that in order to case and deliver mail she would be required to routinely lift her injured left arm above her shoulder for up to six hours a day. OWCP did not clarify the physical requirements of this task with either the employing establishment or Dr. Fries prior to the August 29, 2017 termination decision.

Appellant further alleged that the pushcart she was required to use violated her pushing restriction of 20 pounds given by Dr. Fries. She further asserted that, if the pushcart was filled with mail, she would be required to push up to 70 pounds of mail. In his May 22, 2017 report and June 14, 2017 Form OWCP-5c, Dr. Fries provided contradictory work restrictions. In his May 22, 2017 report, he provided a lifting restriction of 20 pounds, but in his June 24, 2017 Form OWCP-5c he found that appellant could perform medium-duty work, without further defining the physical requirements of such work.

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.[19] The issue of whether a claimant is able to perform the duties of the offered

[18] *E.W.*, Docket No. 19-1711 (issued July 29, 2020); *R.A.*, Docket No. 19-0065 (issued May 14, 2019).

[19] *E.W., id.*; *P.P.*, Docket No. 18-1232 (issued April 8, 2019).

employment position is a medical one and must be resolved by probative medical evidence.[20] OWCP did not secure a medical report that included a review of the job offer and a reasoned opinion as to its suitability for appellant, considering all existing and relevant conditions and specific job duties prior to the August 29, 2017 termination decision.[21] The medical evidence of record therefore fails to establish that the offered position was suitable at the time OWCP terminated her wage-loss and entitlement to schedule award benefits.[22]

Dr. Fries was selected as the IME, to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a). On appeal, and before OWCP, counsel argued that Dr. Fries was not properly selected as the IME. The Board has placed great importance on the appearance, as well as the fact of impartiality in selecting an IME, and only if the selection procedures designed to achieve impartiality are scrupulously followed may the selected physician carry the special weight accorded to an IME.[23]

The Board finds that the selection of Dr. Fries was made in accordance with OWCP's procedures.[24] The February 24, 2017 Form ME023 contains documents and explanations that Dr. Fries was the first physician selected and to agree to the appointment. Accordingly, counsel's argument that Dr. Fries was not properly selected lacks merit.

The Board further finds that Dr. Fries' August 23, 2019 supplemental report cannot be utilized retroactively to cure the defects of the medical evidence present prior to the August 29, 2017 termination decision. Section 8106(c)(2) must be narrowly construed as it serves as a penalty provision.[25] Furthermore, while Dr. Fries clarified appellant could perform medium work, exerting 20 to 50 pounds of force occasionally with both hands, he also opined that she could only

[20] *E.W.*, *id.*; *C.M.*, Docket No. 19-0614 (issued November 1, 2019).

[21] *A.B.*, Docket No. 15-1947 (issued March 14, 2016).

[22] *E.W.*, *supra* note 18; *P.S.*, Docket No. 18-0396 (issued August 17, 2018).

[23] *N.L.*, Docket No. 18-0743 (issued April 10, 2019); *T.D.*, Docket No. 16-0028 (issued November 28, 2016); *L.W.*, 59 ECAB 471, 478 (2008).

[24] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013). Congress did not address the manner by which an impartial medical referee is to be selected. Rather, this was left to the expertise of the Director in administering the compensation program created under FECA. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system. In turn, the Director has delegated authority to each OWCP district for selection of the referee physician by use of the Medical Management Application (MMA) within iFECS. Selection of the referee physician is made through use of the application by a medical scheduler. The claims examiner may not dictate the physician to serve as the referee examiner. The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded. The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare a Form ME023, appointment notification report for imaging into the case file. Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.

[25] *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Joan F. Burke*, 54 ECAB 406 (2003); *Robert Dickerson*, 46 ECAB 1002 (1995).

push, pull, lift, and carry up to 20 pounds with her left hand and could not reach above the shoulder with her left hand. He further noted that he had not reviewed a specific job offer. OWCP did not secure a timely medical report that reviewed the job offered and provided a clear, reasoned opinion as to its suitability.[26] Consequently, it has not met its burden of proof.[27]

## ***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 August 29, 2017.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 23, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 25, 2022
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

[26] *D.M.*, Docket No. 17-1668 (issued April 9, 2018).

[27] *Id.*; *D.G.*, Docket No. 16-1492 (issued January 3, 2017).