

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

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V.R., Appellant )

and )

U.S. POSTAL SERVICE, MORGAN )  
PROCESSING & DISTRIBUTION CENTER, )  
New York, NY, Employer )

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**Docket No. 20-1478**

**Issued: November 28, 2022**

*Appearances:*

*Capp P. Taylor*, for the appellant<sup>1</sup>

*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

**JURISDICTION**

On August 3, 2020 appellant filed a timely appeal from a July 15, 2020 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 July 15, 2020 decision, appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedures* 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 schedule award compensation, effective March 31, 2019, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On August 12, 2011 appellant, then a 44-year-old letter box mechanic, filed a traumatic injury claim (Form CA-1) alleging that on August 5, 2011 he injured his right hand when installing a metal plate on a relay box while in the performance of duty. He stopped work on that date. OWCP accepted appellant's claim for right hand laceration, and sprains of the right hand, wrist, elbow, and shoulder. It paid appellant wage-loss compensation for periods of disability from work.

In a report dated October 12, 2017, Dr. Richard C. Smith, a Board-certified orthopedic surgeon serving as an OWCP referral physician, opined that appellant was capable of working on a full-time basis. He advised that appellant's work restrictions included no reaching with the right arm above shoulder level, lifting no more than 25 pounds, and lifting for no more than eight hours per day.

On March 8, 2018 the employing establishment offered appellant a full-time position as a modified letter box mechanic. The position involved repairing carts, replacing locks, and painting collection boxes. The physical requirements included no reaching above the shoulder with the right arm, lifting 25 pounds for up to eight hours daily, and standing, walking, climbing, kneeling, bending, and twisting for up to eight hours daily.<sup>4</sup> Appellant refused the offered position and argued that he was physically unable to perform the duties.

In an August 14, 2018 letter, OWCP advised appellant of its determination that the modified letter box mechanic position offered by the employing establishment was suitable based on the October 12, 2017 report of Dr. Smith. It informed appellant that his wage-loss compensation and entitlement to schedule award compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

In response, appellant submitted a September 3, 2018 letter in which he argued that he could not perform the physical requirements of the offered position. No additional medical evidence was received.

In a January 7, 2019 letter, OWCP advised appellant that his reasons for not accepting the modified letter box mechanic position offered by the employing establishment were unjustified. It advised him that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter.

Appellant subsequently submitted an August 5, 2011 report of Dr. Alan Dayan, a Board-certified orthopedic surgeon, who diagnosed severe right shoulder impingement with mild residuals to the right elbow, hand, and wrist.

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<sup>4</sup> Appellant participated in a vocational rehabilitation program and his vocation rehabilitation counselor provided an opinion that the offered position of modified letter box mechanic was suitable.

Appellant did not accept the position within the afforded 15 days.

By decision dated March 26, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective March 31, 2019, because he refused an offer of suitable work.

On January 6, 2020 appellant, through counsel, requested reconsideration and submitted a December 17, 2019 report from Dr. Mark Seldes, a Board-certified orthopedic surgeon, who recommended that appellant not lift more than 10 pounds.

By decision dated February 24, 2020, OWCP denied modification of the March 26, 2019 decision.

On May 6, 2020 appellant, through his representative, requested reconsideration and submitted an April 27, 2020 functional capacity evaluation completed by Sean McCue, a physical therapist.

By decision dated July 15, 2020, OWCP denied modification of the February 24, 2020 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.<sup>5</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>6</sup> To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.<sup>7</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>8</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>9</sup> Pursuant to section

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<sup>5</sup> See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>6</sup> 5 U.S.C. § 8106(c)(2); see also *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>7</sup> See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>8</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>9</sup> 20 C.F.R. § 10.517(a).

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>10</sup>

The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.<sup>11</sup> OWCP procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.<sup>12</sup> In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective March 31, 2019, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record shows that appellant is capable of performing the modified letter box mechanic position offered by the employing establishment on March 8, 2018 and determined to be suitable by OWCP in August 2018. The position involved no reaching above shoulder with the right arm, lifting 25 pounds for up to eight hours daily, and standing, walking, climbing, kneeling, bending, and twisting for up to eight hours daily. The record does not indicate that the modified letter box mechanic position was temporary in nature.<sup>14</sup>

In determining that appellant is physically capable of performing the modified letter box mechanic position, OWCP properly relied on the October 12, 2017 work restrictions provided by Dr. Smith, the OWCP referral physician. On that date Dr. Smith indicated that appellant's work restrictions included no reaching with the right arm above shoulder level, lifting no more than 25 pounds, and lifting for no more than eight hours per day. The Board finds that Dr. Smith provided a well-rationalized opinion based on medical evidence regarding appellant's work capabilities. Accordingly, OWCP properly relied on his opinion relative to work tolerances and limitations in terminating appellant's wage-loss compensation and entitlement to schedule award compensation for refusing an offer of suitable work.<sup>15</sup>

Subsequently, appellant submitted an August 5, 2011 report from Dr. Dayan who diagnosed severe right shoulder impingement with mild residuals to the right elbow, hand, and wrist. However, Dr. Dayan failed to provide an opinion regarding whether appellant could

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<sup>10</sup> *Id.* at § 10.516.

<sup>11</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>12</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *see E.B.*, Docket No. 13-0319 (issued May 14, 2013).

<sup>13</sup> *See G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

<sup>14</sup> If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(5), 9 (June 2013).

<sup>15</sup> *See A.F.*, Docket No. 16-0393 (issued June 24, 2016).

perform the modified job duties at the time.<sup>16</sup> In a December 17, 2019 report, Dr. Seldes recommended that appellant not lift more than 10 pounds. However, his report is of limited probative value because he did not provide medical rationale in support of his opinion. The Board has held that a report is of limited probative value regarding a given medical matter if it does not contain medical rationale explaining that matter.<sup>17</sup> Appellant submitted an April 27, 2020 functional capacity evaluation completed by Sean McCue, a physical therapist, but this would not constitute probative medical evidence of a physician under FECA.<sup>18</sup> The Board, therefore, finds that appellant did not submit medical evidence sufficient to outweigh the well-rationalized opinion of Dr. Smith who addressed both the accepted and concurrent conditions.

The Board thus finds that OWCP has established that the modified letter box mechanic position offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified. The Board has reviewed the evidence and argument submitted by appellant in support of his refusal of the modified letter box mechanic position and finds that it is insufficient to justify his refusal of the position.<sup>19</sup>

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective March 31, 2019, because he refused an offer of suitable work.<sup>20</sup>

### CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective March 31, 2019, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

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<sup>16</sup> *T.M.*, Docket No. 18-1368 (issued February 21, 2019).

<sup>17</sup> *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

<sup>18</sup> *S.T.*, Docket No. 17-0913 (issued June 23, 2017) (a physical therapist is not a physician under FECA). *See* 5 U.S.C. § 8101(2).

<sup>19</sup> The Board finds that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the position offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid. *See generally D.M.*, Docket No. 19-0686 (issued November 13, 2019); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>20</sup> *See M.H.*, Docket No. 17-0210 (issued July 3, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 28, 2022  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board