United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 21-1275**
	)	**Issued: March 21, 2023**
U.S. POSTAL SERVICE, FORDHAM POST OFFICE, Bronx, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 20, 2021 appellant filed a timely appeal from an April 30, 2021 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective May 20, 2020, for refusing

[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*.

an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether appellant met her burden of proof to establish that her refusal of suitable work was justified.

FACTUAL HISTORY

On May 2, 2012 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she fractured her left shoulder when a door struck her and she fell to the floor. OWCP initially accepted her claim for left humerus closed fracture of the greater tuberosity. It subsequently expanded the acceptance of the claim to include left tenosynovitis and left shoulder impingement syndrome.

On December 5, 2013 appellant underwent an OWCP-authorized arthroscopy of the left shoulder with debridement of the rotator cuff, glenoid labrum, bicep tendons, and hypertrophic synovium with acromioplasty.

On August 16, 2019 Dr. David Benatar, a Board-certified orthopedic surgeon acting as second opinion physician, opined that appellant's work-related impingement syndrome and biceps tenosynovitis had not resolved. He further noted that she could not return to duty as a letter carrier and that this was a permanent circumstance. Dr. Benatar stated that appellant could work in a sedentary occupation for up to eight hours per day. He provided work restrictions of no lifting, pushing, and pulling more than 10 pounds; avoidance of carrying; no climbing on ladders; no reaching above the head with the left shoulder; and limited reaching in any direction with her left upper extremity.

On December 10, 2019 the employing establishment offered appellant a limited-duty job as a modified city carrier. The duties of the modified position involved driving postal vehicles to shuttle carriers to and from their routes and to deliver Express Mail and packages under 10 pounds. The physical requirements of the modified assignment included: sitting and driving a postal vehicle for up to eight hours per day intermittently; standing, bending, and twisting for up to two hours per day intermittently; walking for up to four hours per day intermittently; lifting, carrying, pushing, and pulling up to 10 pounds for up to one hour per day intermittently; and reaching below the shoulder for up to six hours intermittently. Dr. Benatar's work restrictions were summarized as including: lifting and pulling for up to one hour per day with a weight restriction of 10 pounds; sitting for up to eight hours per day; no reaching above the left shoulder; and a 10- to 15-minute break every two hours. Appellant refused the job offer.

On March 9, 2020 OWCP advised appellant that it found the December 10, 2019 job offer was suitable work within the work limitations provided by Dr. Benatar. It afforded her 30 days to accept the offered position or to provide valid reasons for refusal.

In a statement dated April 6, 2020, appellant explained that Dr. Benatar had recommended a limitation regarding reaching in any direction, even below shoulder height, and that, as such, the modified-duty assignment, which included driving in the performance of duty, was not suitable.

On April 30, 2020 OWCP notified appellant that the job remained available to her and that she had 15 days to accept the offered modified position and report for work. It further notified her that if she either did not provide a valid reason for accepting the job offer, or failed to report for work, it would terminate her compensation benefits and entitlement to a schedule award, pursuant

to 5 U.S.C. § 8106(c)(2). OWCP noted that appellant's reasons for refusing the offered position were not justified, noting that, while Dr. Benatar limited her to one hour of occasional pushing, pulling, and lifting of no more than 10 pounds with the left shoulder, appellant was not limited in the use of her right upper extremity. It stated that Dr. Benatar had not specifically limited her capacity to drive at work and that she was able to be seated up to eight hours per day. OWCP further noted that appellant would only have to deliver express packages of less than 10 pounds for up to one hour per day.

By decision dated May 20, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, under 5 U.S.C. § 8106(c)(2) as she refused an offer of suitable work. It found that the job offer was suitable based upon her current work restrictions as provided by Dr. Benatar on August 16, 2019.

OWCP thereafter received a progress report dated May 20, 2020 from Dr. Eial Faierman, a Board-certified orthopedic surgeon, who diagnosed status post left shoulder arthropathy. It also received an attending physician's report (Form CA-20) of the same date, in which he opined that appellant had been totally disabled since May 2, 2012. OWCP continued to receive progress reports from Dr. Faierman dated August 6 and December 1, 2020; and February 10 and April 14, 2021. In these reports, Dr. Faierman diagnosed status post left shoulder arthropathy, noted physical findings, and advised continuation of pain medications and home exercise.

On February 23, 2021 appellant, through counsel, requested reconsideration of OWCP's May 20, 2020 termination decision.[3]

By decision dated April 30, 2021, OWCP denied modification.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] 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.[5] To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] 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.[7]

[3] In an accompanying statement in support of reconsideration, counsel referred to "Exhibit A" as an October 1, 2020 detailed narrative report from Dr. Faierman, not previously considered by OWCP. However, the Board notes that an October 1, 2020 medical report is not found in the case record.

[4] *T.M.*, Docket No. 18-1368 (issued February 21, 2019).

[5] 5 U.S.C. § 8106(c)(2); *see also M.J.*, Docket No. 18-0799 (issued December 3, 2018).

[6] *Supra* note 4.

[7] *Id*.

Section 10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[8] Pursuant to section 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.[9]

Before compensation can be terminated, however, OWCP has the burden of proof to demonstrate that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[10] 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.[11] In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.[12]

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective May 20, 2020, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record establishes that appellant was capable of performing the modified city carrier position offered by the employing establishment on March 8, 2018 and determined to be suitable by OWCP on March 9, 2020. The duties of the modified position involved driving postal vehicles to shuttle carriers to and from their routes, and to deliver Express Mail and packages under 10 pounds. The physical requirements of the modified assignment included: sitting and driving a postal vehicle for up to eight hours per day intermittently; standing, bending, and twisting for up to two hours per day intermittently; walking for up to four hours per day intermittently; lifting, carrying, pushing, and pulling up to 10 pounds for up to one hour per day intermittently; and reaching below the shoulder for up to six hours intermittently. Dr. Benatar's work restrictions were summarized as including: lifting and pulling for up to one hour per day with a weight restriction of 10 pounds; sitting for up to eight hours per day; no reaching above the left shoulder; and a 10- to 15-minute break every two hours. The record does not indicate that the modified city carrier position was temporary in nature.[13]

[8] 20 C.F.R. § 10.517(a).

[9] *Id*. at § 10.516.

[10] *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

[11] *M.A.*, Docket No. 18-1671 (issued June 13, 2019).

[12] *Id*.

[13] 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).

In determining that appellant was physically capable of performing the modified city carrier position, OWCP properly relied on the August 16, 2019 work restrictions provided by Dr. Benatar, the OWCP referral physician. On that date, Dr. Benatar opined that she could work in a sedentary occupation for up to eight hours per day. He provided work restrictions of no lifting, pushing, and pulling more than 10 pounds; avoidance of carrying; no climbing on ladders; no reaching above the head with the left shoulder; and limited reaching in any direction with her left upper extremity. The Board finds that Dr. Benatar provided a well-rationalized opinion based on medical evidence regarding appellant's work capabilities. Accordingly, OWCP properly relied on his opinion in terminating appellant's wage-loss compensation and entitlement to schedule award benefits following her refusal of suitable work.[14]

The Board thus finds that OWCP has established that the modified city carrier position offered by the employing establishment was suitable. For these reasons, OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective May 20, 2020, because she refused an offer of suitable work.[15]

LEGAL PRECEDENT -- ISSUE 2

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[16] 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.[17]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish that her refusal of suitable work was justified.

As noted above, after a termination or modification of benefits clearly warranted on the basis of the evidence at the time of the decision, the burden for reinstating compensation benefits shifts to appellant.[18] The Board has explained that, if a claimant requests reconsideration of a suitable work termination, the issue remains whether appellant has established that he or she was unable to perform the duties of the offered position.[19]

Following OWCP's May 20, 2020 termination decision, appellant requested reconsideration and submitted additional evidence. In a progress report dated May 20, 2020, Dr. Faierman diagnosed status post left shoulder arthropathy. In an accompanying Form CA-20

[14] *See V.R.*, Docket No. 20-1478 (issued November 28, 2022); *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

[15] *See V.R., id.*; *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

[16] 20 C.F.R. § 10.517(a); *see L.A.*, Docket No. 20-0946 (issued June 25, 2021).

[17] *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

[18] *K.P.*, Docket No. 19-1917 (issued October 5, 2021); *K.J.*, Docket No. 17-1971 (issued March 5, 2018); *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[19] *See K.P., id.*; *W.L.*, Docket No. 18-1192 (issued August 14, 2019); *K.J., id.*

of the same date, he opined that appellant had been totally disabled since May 2, 2012. In progress reports dated August 6 and December 1, 2020, and February 10 and April 14, 2021, Dr. Faierman diagnosed status post left shoulder arthropathy, noted physical findings, and advised continuation of pain medications and home exercise. However, he failed to provide an opinion regarding whether appellant could perform the modified job duties.[20]

As the evidence submitted by appellant in support of her refusal of the modified city carrier position is insufficient to justify her refusal of the position, the Board finds that she has not met her burden of proof.

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 met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective May 20, 2020, for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds that appellant has not met her burden of proof to establish that her refusal of suitable work was justified.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

[20] *See V.R., supra* note 14; *T.M.*, Docket No. 18-1368 (issued February 21, 2019).

Issued: March 21, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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