

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

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<b>H.L., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-1114</b>
	)	<b>Issued: February 27, 2024</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>CALVERTON NATIONAL CEMETERY,</b>	)	
<b>Calverton, NY, Employer</b>	)	
_____	)	

*Appearances:* *Case Submitted on the Record*  
*Paul Kalker, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 20, 2022 appellant, through counsel, filed a timely appeal from a June 17, 2022 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 an 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 June 17, 2022 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 met its burden of proof to terminate appellant's wage-loss and compensation, and entitlement to a schedule award, effective June 17, 2022, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On September 17, 1993 appellant, then a 40-year-old cemetery caretaker, filed a traumatic injury claim (Form CA-1) alleging that on April 22, 1993 he strained his right shoulder when setting headstones while in the performance of duty. OWCP accepted the claim for right shoulder strain. It subsequently expanded its acceptance of the claim to include a right rotator cuff tear, right acromioclavicular (AC) joint sprain, cervical spondylosis, and cervical disc disorder with radiculopathy. Appellant worked intermittently from April 22 to May 3, 1993. OWCP paid him wage-loss compensation beginning May 4, 1993.<sup>5</sup>

In a letter dated April 12, 2021, OWCP requested that Dr. Vincent Johnson, an osteopath and treating physician, provide a detailed report addressing appellant's current condition and work restrictions.

In a progress report dated May 28, 2021, Dr. Johnson discussed appellant's complaints of cervical pain that increased with activity.<sup>6</sup> He provided findings on examination and diagnosed cervical radiculopathy and cervical spondylosis. Dr. Johnson opined that the incident appellant described was the "competent medical cause of this injury." He noted that appellant "states that he has been disabled since 1993." Dr. Johnson submitted similar progress reports on July 14 and August 30, 2021.

A magnetic resonance imaging (MRI) scan of the right shoulder, performed on July 29, 2021, showed supraspinatus tendinosis and partial thickness tearing, a widened AC joint, subscapularis tendinosis/tendinopathy, and mild spur formation at the anterior glenoid. An MRI scan of the cervical spine, obtained on even date, included a new straightening of the cervical curvature, disc bulging at C2-3, C5-6, and C7-T1, and disc herniations at C3-4, C4-5, and C6-7.

In a report dated July 19, 2021, Dr. Eric Price, a Board-certified orthopedic surgeon, evaluated appellant for pain in his right shoulder and neck. He provided the date of injury as April 22, 1993 and noted that it had occurred setting a headstone. Dr. Price indicated that appellant was not working due to his injury. On examination he found right trapezial and paracervical spasm

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<sup>4</sup> *Order Remanding Case*, Docket No. 21-0918 (issued December 9, 2021).

<sup>5</sup> OWCP assigned the present claim OWCP File No. xxxxxx397. It previously accepted that appellant sustained a right shoulder sprain on April 29, 1992, under OWCP File No. xxxxxx942, and a right shoulder sprain on October 9, 1992 under OWCP File No. xxxxxx906. OWCP has administratively combined OWCP File Nos. xxxxxx942, xxxxxx906, and xxxxxx397, with the latter serving as the master file.

<sup>6</sup> On May 5 and June 23, 2021 Dr. Johnson performed cervical steroid injections.

and tenderness and altered right upper extremity sensation. Dr. Price diagnosed cervical radicular pain and myofascial strain, cervicalgia, right shoulder bursitis, and degenerative disc disease of the cervical spine by x-ray.

An electromyogram (EMG) study performed on July 26, 2021 revealed mild-to-moderate acute and chronic right radiculopathy at C4 to C6.

In a report dated August 30, 2021, Dr. Mark Stephen, a Board-certified orthopedic surgeon, discussed appellant's history of pain beginning after he was struck by a water hose in 1992 or 1993. He noted that appellant was "not working due to injury." On examination, Dr. Stephen found a positive left Spurling test and noted that an EMG had shown radiculopathy at C5-6. He discussed possible surgical intervention.

On September 27, 2021 OWCP referred appellant to Dr. Arnold Goldman, a Board-certified orthopedic surgeon, for a second opinion examination. It provided Dr. Goldman with a May 19, 2021 statement of accepted facts (SOAF), which did not include appellant's accepted right shoulder sprain.

In a report dated October 25, 2021, Dr. Goldman discussed appellant's history of injury on April 22, 1993. He noted that he had a prior injury in 1992 following which he returned to work. Dr. Goldman provided his review of the medical evidence and diagnosed cervical spine spondylolysis and right shoulder rotator cuff arthropathy. On examination he found pain on palpation of the paraspinal muscles, more on the right, limited shoulder motion, and positive right Yergason's, Neer, and Hawkins signs. Dr. Goldman opined that the subjective complaints of pain in the neck and right shoulder corresponded with the objective findings. He noted that the MRI scans showed multiple cervical disc herniations and bulges and a partial to full-thickness rotator cuff tear. Dr. Goldman asserted that the employment-related conditions had not resolved. He found that appellant could perform light work. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Goldman found that appellant could work full time sitting and performing repetitive wrist and elbow movements for eight hours per day, walking, standing, reaching, reaching above the shoulder, kneeling, and operating a motor vehicle to and from work for four hours per day, operating a motor vehicle at work for two hours per day, twisting, bending, squatting, and stooping for two hours per day, and pushing, pulling, and lifting up to 20 pounds for eight hours per day. He further found that appellant required 16-minute breaks twice a day.

In an October 11, 2021 progress report, Dr. Stephen reviewed appellant's complaints of burning pain in his neck radiating into his right upper extremity. He noted that the pain was aggravated by movement. Dr. Stephen indicated appellant's work status as "disabled due to work injury." He diagnosed cervical disc displacement and recommended surgery.

On December 13, 2021 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In an undated report, received by OWCP on January 6, 2022, Dr. Johnson related that he had initially treated appellant on August 15, 2019 for a neck and right shoulder injury that had occurred on April 22, 1993. He reviewed the results of MRI scans of the cervical spine and right shoulder.

On January 25, 2022 the employing establishment offered appellant a full-time permanent position as a program support clerk. The offer indicated that the position was “primarily sedentary in nature and requires sitting at a desk, working on a computer, and light lifting. Physical demands will not violate your restrictions. Any lifting of objects will be less than 20 pounds.”

On February 1, 2022 appellant refused the offered position. He advised that he was medically unable to accept the position due to his continued employment-related disability.

On February 11, 2022 OWCP requested that Dr. Johnson review the offered position of program support clerk, and address whether appellant was medically able to perform the position.

On March 1, 2022 the employing establishment confirmed that the offered position remained available.

By letter dated March 4, 2022, OWCP advised appellant that it had determined that the January 25, 2022 offered position was suitable, and afforded him 30 days to accept the position or provide reasons for his refusal. It found that the position was in accordance with the limitations provided by Dr. Goldman in his October 25, 2021 report. OWCP informed appellant that an employee who refused an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation. It further notified him that he would receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

Thereafter, OWCP received a report dated February 20, 2022 from Dr. Price.<sup>7</sup> Dr. Price provided appellant’s history of an injury when he twisted his back setting a headstone. He noted that he had also experienced right shoulder pain and had a history of a work-related right shoulder injury in 1992. Dr. Price reviewed the results of diagnostic testing and diagnosed cervicalgia, right shoulder bursitis, cervical myofascial strain, cervical radicular pain, and cervical degenerative disc disease. He opined that appellant’s neck and right shoulder conditions resulted from his April 22, 1993 employment injury.

On May 3, 2022 OWCP notified appellant that his reasons for refusing the offered position were not valid and provided him 15 days to accept the position or have his entitlement to compensation benefits terminated. It advised him that the offered position remained available.

Subsequently, OWCP received a March 11, 2022 progress report from Dr. Stephen. Dr. Stephen provided findings on examination and diagnosed cervicalgia and cervical disc displacement. He noted that appellant had worsening lumbar pain. Dr. Stephen indicated that he had provided appellant with a “note to excuse him from work until reevaluation.”

Appellant submitted a May 18, 2022 report from a physician assistant. On June 6, 2022 he underwent a cervical epidural injection.

By decision dated June 17, 2022, OWCP terminated appellant’s wage-loss compensation and entitlement to a schedule award, effective that date, as he had refused an offer of suitable work.

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<sup>7</sup> Appellant underwent a lumbosacral epidural injection on January 18, 2022.

## LEGAL PRECEDENT

Under FECA,<sup>8</sup> once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.<sup>9</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>10</sup>

Section 10.517 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 proof to show that such refusal or failure to work was reasonable or justified.<sup>11</sup> Pursuant to section 10.516, the employee shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.<sup>12</sup>

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.<sup>13</sup> Section 8106(c)(2) 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>14</sup>

## ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award, effective June 17, 2022.

On September 27, 2021 OWCP referred appellant to Dr. Goldman for a second opinion examination. It provided Dr. Goldman with a SOAF that did not include appellant's accepted right shoulder sprain.

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<sup>8</sup> *Supra* note 2.

<sup>9</sup> *M.S.*, Docket No. 20-0676 (issued May 6, 2021); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>10</sup> *Supra* note 2 at § 8106(c)(2); *see also M.S., id.; M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>11</sup> 20 C.F.R. § 10.517.

<sup>12</sup> *Id.* at § 10.516; *see M.S., supra* note 9; *Ronald M. Jones*, 52 ECAB 406 (2003).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.8144 (June 2013). *See also R.A.*, Docket No. 19-0065 (issued May 14, 2019).

<sup>14</sup> *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *see also Joan F. Burke*, 54 ECAB 406 (2003).

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.<sup>15</sup> Its procedures provide that the claims examiner is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. It should include a complete record of all pertinent facts related to the injury or medical condition. The omission of a critical fact diminishes the validity of a medical opinion or decision as much as an incorrect statement.<sup>16</sup> When an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete, inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>17</sup> Consequently, OWCP erred in relying on Dr. Goldman's report in finding that appellant had the physical capacity to perform the offered position, as he relied upon a SOAF which did not identify the entirety of appellant's accepted, employment-related conditions.<sup>18</sup>

Thus, the Board finds that OWCP failed to meet its burden of proof to justify the termination of appellant's compensation benefits.

### CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award, effective June 17, 2022.

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<sup>15</sup> *A.G.*, Docket No. 20-1087 (issued December 31, 2020); *N.W.*, Docket No. 16-1890 (issued June 5, 2017); *K.V.*, Docket No. 15-0960 (issued March 9, 2016).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.4a(2) (September 2009).

<sup>17</sup> *Id.* at Chapter 2.809.4a(4); *M.C.*, Docket No. 18-1199 (issued April 5, 2019).

<sup>18</sup> *See C.S.*, Docket No. 20-1475 (issued October 4, 2021); *P.C.*, Docket No. 20-0935 (issued February 19, 2021); *see also N.W.*, *supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 27, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board