

**D.S., Appellant**

**U.S. POSTAL SERVICE, SOUTH MACON  
POST OFFICE, Macon, GA, Employer**

### Case Submitted on the Record

<sup>3</sup> The Board notes that, following the April 26, 2021 decision, appellant submitted additional evidence to OWCP. 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 February 28, 2018, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment.

## **FACTUAL HISTORY**

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

On December 19, 2014 appellant, then a 61-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 20, 2014 she injured her lower back and right shoulder when she picked up a bucket of mail while in the performance of duty. OWCP accepted her claim for aggravation of lumbar degenerative disc disease and bursitis of the right shoulder, and paid wage-loss compensation for total disability, effective January 5, 2015.

Appellant received medical care from Dr. Dennis Jorgensen, a Board-certified orthopedic surgeon, and Dr. Jeremy Prine, a Board-certified anesthesiologist. On August 18, 2016 she underwent a functional capacity evaluation (FCE), which demonstrated that she had physical work capacity at the sedentary-light level. On September 7, 2016 Dr. William W Brooks, a Board-certified orthopedic surgeon, completed a September 7, 2016 report and accompanying work capacity evaluation (Form OWCP-5c) in which he advised that appellant was capable of working full time with restrictions, including no reaching above shoulder level with her right arm.

On November 21, 2016 OWCP referred appellant for a second opinion examination with Dr. Sarveswar Naidu, a Board-certified orthopedic surgeon to evaluate her work capacity. In a December 6, 2016 report, Dr. Naidu diagnosed complete rotator cuff tear of the right shoulder and postoperative lumbar fusion at L4-5 with stenosis and radiculopathy. He noted that appellant's lumbar sprain and right shoulder bursitis had resolved, but noted that there were residuals from the intervertebral disc degeneration and fusion of the lumbar spine, and from the right rotator cuff injury. Dr. Naidu confirmed that she needed repair of the right rotator cuff and follow-up therapy, but opined that she was still capable of performing a sedentary job as indicated in the FCE. He completed a Form OWCP-5c on December 6, 2016 which listed recommended work restrictions, including no lifting, pushing, or pulling more than 10 pounds, and no reaching above shoulder level with the right arm. Dr. Naidu advised that appellant needed to take 10-minute breaks every 2 hours. In a February 8, 2017 addendum report, he opined that the diagnosed rotator cuff tear was causally related to the November 20, 2014 employment injury.

Based on Dr. Naidu's reports, OWCP expanded the acceptance of appellant's conditions to include sprain of the rotator cuff capsule and complete rotator cuff tear of the right shoulder. On June 15, 2017 it requested that the employing establishment extend a job offer to her based on the work restrictions of Dr. Naidu.

Appellant was scheduled for rotator cuff repair surgery on June 20, 2017; however, the surgery was postponed due to nonwork-related bronchial symptoms. A June 15, 2017 report was

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<sup>4</sup> Docket No. 20-1086 (issued January 27, 2021).

later received from Dr. Prine, wherein he noted that she was not medically able to return to work at that time. He indicated that appellant was unable to return to work without restrictions noting that she first needed to undergo treatment with intra-articular injections. OWCP authorized this treatment and she underwent the first injection on August 23, 2017.

On August 31, 2017, the employing establishment offered appellant a full-time, temporary light-duty job as a modified rural carrier. The duties of the position included answering telephone calls, handling web camera alerts, engaging in package location resolution duties, and enterprise customer care duties. Each of these four duties were to be performed for two hours per day. The physical requirement of sitting for eight hours per day was listed on the first page of the job offer. However, on the second page of the job offer the position was listed as sedentary in nature, and it was noted that, in general, sedentary work involved sitting most of the time, but might involve walking or standing for brief periods of time. In addition, a notation on the second page indicated that appellant had to engage in "sitting/walking/standing" for four hours per day. The job offer also advised that sedentary work involved exerting up to 10 pounds of force occasionally to lift, carry, push, pull, or otherwise move objects, including the human body. The position did not require reaching above shoulder level, twisting with the right arm, bending, stooping, squatting, kneeling, or operating a motor vehicle at work. In an addendum section on the second page, the job offer noted that the package location resolution duties required appellant to investigate customer inquiries utilizing a computer or telephone, and that enterprise customer care duties involved case research and follow up of closed cases to ensure quality closure and timely handling of customer issues. It was also noted that handling the web camera alerts required monitoring lobby activity on a web camera in order to improve customer service.

On September 18, 2017 the employing establishment advised OWCP that appellant had not reported to work.

Appellant submitted a September 15, 2017 report from Dr. Prine, who opined that she was unable to sit for eight hours at a time and recommended an additional FCE be performed before she returned to work.

A September 19, 2017 report from Dr. Jorgensen noted that she was at maximum medical improvement (MMI) regarding her back, and that she wanted to discuss being rescheduled for right shoulder surgery. He indicated work restrictions of no lifting greater than five pounds, no pushing or pulling, and no above-head activity pending surgery approval. The case record reflects that appellant underwent a second intra-articular injection on September 28, 2017.

On October 5, 2017 the employing establishment confirmed that the temporary job offer remained available.

On October 12, 2017 OWCP notified appellant of its proposed termination of her wage-loss compensation in accordance with 20 C.F.R. § 10.500(a) based on her refusal of the temporary light-duty assignment. It advised that the temporary modified assignment offered by the employing establishment on August 31, 2017 appropriately accommodated Dr. Naidu's work restrictions, which constituted the weight of medical evidence with respect to such restrictions. OWCP afforded appellant 30 days to accept the job and return to work, or to provide written explanation for not doing so.

In a November 10, 2017 response, counsel noted that appellant still had not been medically cleared to undergo the approved right shoulder surgery. He noted the restrictions of Dr. Naidu and indicated that the job offer did not mention his recommendation for 10-minute breaks every 2 hours. Counsel asserted that on September 19, 2017, Dr. Jorgensen limited appellant's lifting capacity to 5 pounds, rather than the 10 pounds indicated by Dr. Naidu. He contended that she was denied due process because OWCP did not provide her treating physicians with a copy of Dr. Naidu's second opinion report, and that there was a conflict in the medical opinion evidence between Dr. Jorgensen and Dr. Naidu regarding the lifting restrictions. Counsel argued that Dr. Naidu's restrictions were not contemporaneous with the job offer and should not be relied upon. For these reasons, he contended that OWCP had failed to meet its burden of proof to terminate appellant's wage-loss compensation.

Appellant submitted October 10, November 14, and December 12, 2017 and January 30, 2018 reports from Dr. Prine who reported the findings of his physical examinations, and diagnosed radiculopathy of the lumbosacral region, intervertebral lumbar disc disorders with radiculopathy, bursitis of right shoulder, and long-term and current use of opiate analgesic. A November 28, 2017 letter from the employing establishment advised that she had failed to respond to the job offer, which was still available, and that she had not reported back to work.

By decision dated February 27, 2018, OWCP terminated appellant's entitlement to wage-loss compensation benefits, effective February 28, 2018, in accordance with 20 C.F.R. § 10.500(a), on the basis that she failed to accept a temporary light-duty assignment deemed appropriate by OWCP. It explained that, if she had accepted the temporary light-duty assignment, her actual earnings in the assignment would have met or exceeded the current wages of the job she held when injured.

On March 22, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 11, 2018.

Appellant subsequently submitted a July 19, 2018 report from Dr. Jorgensen, who provided work restrictions, which included no pushing, pulling, or lifting greater than 10 pounds for above shoulder level work. She also submitted June 22, July 20, and August 24, 2018 reports from Dr. Prine who reported the findings of his physical examinations and diagnosed radiculopathy of the lumbosacral region, intervertebral lumbar disc disorders with radiculopathy, and long-term (current) use of opiate analgesic.

By decision dated September 24, 2018, OWCP's hearing representative affirmed the February 27, 2018 decision.

Appellant subsequently submitted additional medical evidence, including September 18, October 15 and 29, November 11, and December 5, 2018, and February 19, 2019 reports of Dr. Prine who discussed the history of her medical treatment, reported physical examination findings, and diagnosed radiculopathy of the lumbosacral region, intervertebral lumbar disc disorders with radiculopathy, bursitis of the right shoulder, and long-term (current) use of opiate analgesic. In reports dated November 29 and December 11, 2018, Dr. Jorgensen reported physical examination findings and diagnosed disorder of right shoulder, full-thickness left rotator cuff tear, and osteoarthritis of the right acromioclavicular joint. Appellant also submitted numerous reports from her hospitalization related to OWCP-authorized right shoulder surgery performed on February 13, 2019.

On September 23, 2019 appellant, through counsel, requested reconsideration of the September 24, 2018 decision. Appellant also submitted additional medical evidence including an October 1, 2019 report of Dr. Brooks and October 3 and 25, 2019 reports of Dr. Jorgensen.

By decision dated October 31, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Appellant appealed to the Board and, by decision dated January 27, 2021,<sup>5</sup> the Board set aside the October 31, 2019 decision and remanded the case to OWCP for further development, to be followed by the issuance of a *de novo* decision. The Board directed OWCP to provide adequate facts and findings, particularly with regard to the evidence submitted on reconsideration.

By decision dated April 26, 2021, OWCP denied modification of its prior termination decision, finding that the temporary modified assignment offered by the employing establishment on August 31, 2017 appropriately accommodated Dr. Naidu's work restrictions, which constituted the weight of medical evidence with respect to such restrictions.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.<sup>6</sup> It may not terminate compensation without establishing that the disability ceased, or that it was no longer related to the employment.<sup>7</sup>

Section 10.500(a) of OWCP's regulations provides that 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.<sup>8</sup>

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>9</sup> For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.<sup>10</sup> In situations where the case is properly referred to an

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<sup>5</sup> Docket No. 20-1086 (issued January 27, 2021).

<sup>6</sup> *L.L.*, Docket No. 18-1426 (issued April 5, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>7</sup> *A.D.*, Docket No. 18-0497 (issued July 25, 2018). In general the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury. See 20 C.F.R. § 10.5(f).

<sup>8</sup> 20 C.F.R. § 10.500(a).

<sup>9</sup> 5 U.S.C. § 8123(a); see *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

<sup>10</sup> *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

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.<sup>11</sup>

### **ANALYSIS**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 28, 2018, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary light-duty assignment.

Dr. Naidu had completed a Form OWCP-5c on December 6, 2016, which listed recommended work restrictions, including no lifting, pushing, or pulling more than 10 pounds, and no reaching above shoulder level with the right arm. The Board notes, however, that there is a more recent report, dated September 19, 2017, wherein Dr. Jorgensen, an attending physician, indicated work restrictions of no lifting greater than five pounds, and no pushing or pulling. Therefore, there is a conflict in the medical opinion evidence between Dr. Jorgensen and Dr. Naidu regarding the extent to which appellant could engage in lifting, pushing, and pulling, which has not been resolved.<sup>12</sup>

The Board thus finds that OWCP improperly terminated appellant's wage-loss compensation, effective February 28, 2018.

### **CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 28, 2018.

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<sup>11</sup> See *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>12</sup> See *supra* notes 9 through 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 26, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 22, 2024  
Washington, DC

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

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

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