

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

P.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Melville, NY, Employer**

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**Docket No. 12-619
Issued: December 17, 2012**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 19, 2012 appellant, through counsel, filed a timely appeal from the August 25 and December 15, 2011 decisions of the Office of Workers' Compensation Programs (OWCP) terminating his compensation on the grounds that he refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective August 28, 2011 as appellant failed to accept a limited-duty job offer by the employing establishment, pursuant to 5 U.S.C. § 8106(c).

On appeal appellant, through counsel, contends that the job offer was inconsistent with appellant's work restrictions. He also contends that OWCP has failed to appreciate the severity of appellant's work condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 12, 2008 appellant, then a 53-year-old clerk, sustained a traumatic injury to his right shoulder while lifting trays. On April 22, 2008 OWCP accepted his claim for a sprain of the right shoulder, upper arm and rotator cuff and disorder of the bursae and tendons in the right shoulder region. On September 8, 2008 appellant underwent an acromioplasty anterior decompression right shoulder and reconstruction chronic rotator cuff tear with retraction of right shoulder.

In a March 3, 2009 note, Dr. James L. Marzec, a treating Board-certified orthopedic surgeon, stated that appellant was approximately six months status post reconstruction surgery. He stated that he would continue aggressive physical therapy three times a week for a minimum of 16 weeks. Dr. Marzec opined that he was temporarily totally disabled.

On March 4, 2009 OWCP referred appellant to Dr. Sanford Wert, a Board-certified orthopedic surgeon, for a second opinion. In a May 4, 2009 report, Dr. Wert noted that he did not have access to the right shoulder surgical report. Based on his clinical evaluation, a temporary moderate partial accident-related orthopedic residual existed with respect to the right shoulder as indicated by diminished range of motion associated with tenderness. Dr. Wert noted that the inability to perform objective testing during physical examination due to appellant's complaints of pain. He found that appellant was capable of working light duty with physical limitations restricting lifting, carrying, pushing and pulling with the right arm to 10 pounds and no overhead reaching. Dr. Wert noted that maximum medical improvement had not been reached and recommended a repeat right shoulder magnetic resonance imaging (MRI) scan. He opined that there was no value in continued physical therapy. In a May 4, 2009 addendum, Dr. Wert reviewed an April 28, 2009 MRI scan of the right shoulder. He stated that he would allow for a repeat right shoulder arthroscopy as the MRI scan showed a recurrent thickness tear of the distal supraspinatus tendon of the rotator cuff.

In a February 12, 2010 report, Dr. Wert noted that he saw appellant on February 9, 2010. He diagnosed status post right shoulder arthroscopy and recurrent full thickness tear, distal supraspinatus tendon right shoulder. Appellant had a moderate partial disability with respect to the right shoulder. Dr. Wert noted that the delay in appellant's recovery was due to not having undergone additional surgical intervention. As appellant did not undergo surgical intervention, he was capable of working in his date-of-injury occupation in a light-duty capacity, eight hours a day, with limited lifting, carrying, pushing and pulling up to 20 pounds and refraining from overhead reaching. Dr. Wert noted that the restrictions were permanent in nature and maximum medical improvement had been reached.

Dr. Marzec submitted additional medical reports advising that appellant remained totally disabled and prescribed physical therapy.

On June 18, 2010 the employing establishment made appellant an offer of modified duty. On June 23, 2010 OWCP determined that the position was unsuitable because it did not limit pushing, pulling and lifting as required by Dr. Wert. It noted that additional information was required before a suitability determination could be made. On June 29, 2010 OWCP advised

appellant that the position of mail processing clerk was suitable and that he had 30 days to accept the position or provide an explanation for refusal.

On July 3, 2010 appellant, through his attorney, stated that appellant was physically and medically unable to accept the offered position as the duties of the assignment are inconsistent with his medical restrictions and abilities.

In a medical report dated July 28, 2010, Dr. Marzec noted that appellant had been in physical therapy since surgery. Although he had made improvement, he continued to lack full motion in the right shoulder joint and continued to experience pain, marked weakness and generalized atrophy of the right shoulder girdle, especially the supraspinatus and infraspinatus fossae. Dr. Marzec opined that appellant had reached maximum medical benefit from physical therapy. Based on appellant's marked weakness, complaint of pain and marked shoulder atrophy he had a permanent severe disability of his right shoulder. Dr. Marzec disagreed with Dr. Wert's opinion that appellant was capable of working in his date-of-injury occupation in a light-duty capacity. He stated that appellant could not repetitively lift or carry 20 pounds without further injury to the right shoulder girdle. Dr. Marzec opined that appellant's disability was permanent and severe due to weakness and atrophy.

On August 17, 2010 OWCP found a conflict in medical opinion between Dr. Marzec and Dr. Wert. It referred appellant to Dr. Neal Hochwald, a Board-certified orthopedic surgeon, selected to resolve the conflict as to the extent of residuals and his capacity for work.

In a September 28, 2010 report, Dr. Hochwald noted that he examined appellant on September 16, 2008. He concluded that there was a causal relationship between the rotator cuff tear involving the supraspinatus tendon and infraspinatus of the right shoulder and the work injury of February 12, 2008. Appellant had evidence of external rotation and supraspinatus tendon weakness and was noted at the time of his surgery to have a rotator cuff tear that was not fully repairable. He showed signs on examination of having persistent rotator cuff pathology with weakness in rotation and elevation of the arm. Dr. Hochwald noted that appellant had a functioning deltoid and functioning of the external rotators, including part of his infraspinatus and teres minor and a functioning subscapularis. He opined that no further treatment was required for the right shoulder as appellant had reached maximum medical improvement. Dr. Hochwald noted that appellant could not perform full lifting duties with his right arm related to his right shoulder injury. He found that appellant was able to work in a light-duty capacity for eight hours a day, with limited overhead lifting and reaching with his right arm. Dr. Hochwald recommended a lifting limit of 20 pounds. In a work capacity evaluation dated September 23, 2010, he noted that appellant could not reach above the shoulder with his right arm. Dr. Hochwald indicated that appellant was limited to lifting, pushing and pulling 20 pounds. He marked on the form that appellant had other limitations, including limitations on sitting, standing, walking, reaching, repetitive movements and operating a motor vehicle; but did not indicate how many hours a day appellant was able to perform specific limited duties. A second work restriction form dated September 23, 2010 contained a note: "Attn: Val Michaels." It listed "unrestricted" under both columns for the number of hours able to work. In a third version of the form with the note, "Attn: Val ... Fleming," the category number of hours able to work is circled and "8" was written with partial initials.

In a September 15, 2010 note, Dr. Marzec advised that appellant had reached maximum medical improvement and should return on an as needed basis. He stated that appellant's disability to his right shoulder was permanent and that he was permanently disabled to do his current line of work. Dr. Marzec recommended that appellant not perform any lifting, pushing or pulling with his right upper extremity.

On November 3, 2010 the employing establishment made a job offer of modified limited duty as a mail processing clerk. The physical requirements would be limited to four hours a day picking up letters weighing less than 20 pounds and reaching above his shoulder. Appellant would be required to sit, stand and walk, according to job functions.

By letter dated December 2, 2010, OWCP informed appellant that the offered position was found suitable and in accordance with appellant's medical limitations. It informed him to accept the job offer or provide reasons for not accepting the position within 30 days.

On December 10, 2010 the employing establishment modified the position description to provide that appellant only reach above the shoulder with his left hand.

On January 18, 2011 Dr. Marzec reiterated that appellant was totally disabled.

By letter dated January 31, 2011, OWCP determined that the position of modified mail processing clerk was suitable, currently available and gave appellant 30 days to accept the position or his reasons for refusing.

By letter dated February 7, 2011, appellant, through counsel, contended that the offer was not within Dr. Hochwald's restrictions.

On August 5, 2011 OWCP reviewed appellant's reasons, and found them not to be valid. It provided him 15 additional days to accept the position.

By decision dated August 25, 2011, OWCP terminated appellant's monetary compensation benefits effective August 28, 2011 finding that he refused to accept suitable work.

By letter dated September 9, 2011, appellant, through counsel, requested reconsideration. He asserted that the job offered appellant was impossible to perform without the use of the right arm.

By letter dated October 5, 2011, the employing establishment responded, contending that the limited-duty job offer was proper and within the restrictions set by the physicians.

On October 19, 2011 counsel argued that the work would actually require the use of both arms.

By decision dated December 15, 2011, OWCP denied modification of the August 25, 2011 decision.

LEGAL PRECEDENT

OWCP has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered.² The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.³ Before compensation can be terminated, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), OWCP has the burden of showing that the work offered to and refused by appellant was suitable.⁴

Section 10.517(a) of FECA's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.⁵ 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.⁶

OWCP regulations provide that in determining what constitutes suitable work for a particular disabled employee, it should consider the employee's current physical limitations whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.⁷ It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁸ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.⁹

Section 8123(a) of FECA provides in pertinent part: 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.¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is

² 5 U.S.C. §§ 8101-8193, 8106.

³ *Stephen A. Pasquale*, 57 ECAB 396 (2006).

⁴ *M.L.*, 57 ECAB 746 (2006).

⁵ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ *Id.* at 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

⁷ 20 C.F.R. § 10.500(b).

⁸ *Richard P. Cortes*, 56 ECAB 200 (2004).

⁹ *Id.*, *Bryant F. Blackmon*, 56 ECAB 752 (2005).

¹⁰ 5 U.S.C. § 8123(a).

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.¹¹

ANALYSIS

OWCP accepted appellant's claim for sprain of the right shoulder and upper arm, torn rotator cuff and a disorder of bursae and tendons in the right shoulder region. Appellant had surgery on September 8, 2008. He was treated by Dr. Marzec, who opined that he was totally disabled. OWCP referred appellant to Dr. Wert for a second opinion. Although Dr. Wert noted continuing residuals from the employment injury, he found that appellant was capable of working full time with physical restrictions.

To resolve the conflict between appellant's treating physician and the second opinion physician, OWCP referred appellant to Dr. Hochwald for an impartial medical examination. On September 28, 2010 Dr. Hochwald found that appellant could not perform full duties. Appellant's right arm work restrictions were related to the employment injury. He could not reach above his shoulder with the right arm and had limitations on pushing, pulling and lifting of 20 pounds. On November 3, 2010 the employing establishment made an offer for a position as a limited-duty mail processing clerk. It noted that appellant would not lift more than 20 pounds and would reach above his shoulder with his left hand only. OWCP determined that this position was within his abilities as set forth by the opinion of Dr. Hochwald, the impartial medical examiner.

The Board finds that the opinion of Dr. Hochwald is not sufficiently rationalized to represent the special weight of the medical evidence. As noted, the report of an impartial medical specialist will be accorded special weight provided his opinion is sufficiently rationalized and based upon a proper factual background.¹² The Board looks at such factors as the opportunity for and thoroughness of examination performed by the physician, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed by the physician on the medical issues addressed to him by OWCP.¹³ Dr. Hochwald did not adequately explain his physical limitations in this case. The record contains three work restriction forms that do not adequately explain appellant's restrictions or the hours he can perform the different tasks. The three different versions of the work capacity evaluation form in the record do not establish what limitations were intended by Dr. Hochwald or whether he reviewed the forms. Due to this discrepancy, his report cannot be given the special weight generally accorded to an impartial medical examiner. Dr. Hochwald's opinion is insufficient to resolve the medical conflict. The Board finds that OWCP improperly terminated appellant's monetary compensation.

¹¹ *L.S.*, Docket No. 12-139 (issued June 6, 2012); *see also Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹² *A.R.*, Docket No. 12-443 (issued October 9, 2012).

¹³ *James T. Johnson*, 39 ECAB 1252, 1265 (1988).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits effective August 28, 2011.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 15 and August 25, 2011 are reversed.

Issued: December 17, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board