

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of SUE SEXTON and DEPARTMENT OF DEFENSE,
FINANCE & ACCOUNTING SERVICE, Aurora, Colo.

*Docket No. 97-2008; Submitted on the Record;
Issued May 20, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

On February 11, 1993 appellant, then a 41-year-old voucher examiner, sustained contusions to the left shoulder and back in the performance of duty when she slipped and fell on ice. She returned to work on April 12, 1993 working four hours a day in a limited-duty capacity. Appellant underwent surgery to her left shoulder on August 2, 1994. On May 28, 1995 appellant returned to limited duty, working four hours per day and continued to work in this position until she voluntarily resigned on July 14, 1995.¹

On September 13, 1995 the Office notified appellant that the employing establishment was making an offer of light-duty employment for the position of voucher examiner which met the physical restrictions outlined by her attending physician, Dr. Byron D. Jones, a Board-certified physiatrist and internist. Appellant was advised that she would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of her position on the day of injury. Appellant was provided with a copy of the job offer along with the physical requirements of the offered position and Dr. Jones' work restrictions. His work restrictions included no lifting over 26 pounds from the ground, no lifting over 11 pounds overhead, no frequent overhead lifting and typing limited to 10 minutes at a time with a 2-hour maximum. The voucher examiner job description listed the physical demands of the position as basically sedentary with some movement, stooping and light lifting in using files and stacks of papers. Appellant was allowed a period of 30 days to either accept the position or provide an argument explaining why she could not accept the position. She was advised that, under 5 U.S.C. § 8106(c), a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.

¹ Appellant indicated on her resignation form that she was resigning to obtain training in a job which did not require extensive use of a computer.

By letter dated October 12, 1995, appellant advised that she would not accept the offered position for the following reasons: management would not accommodate her work restrictions; she received a lower monetary award compared to other employees because she only worked part time; she did not receive her step increase due to her work-related injury; and she had enrolled in pharmacy technician classes on July 24, 1995 and was therefore no longer an employee.

By letter dated October 23, 1995, the Office advised appellant that her reasons for declining the offer of light duty were not valid and appellant was given an additional 15 days in which to accept the position without penalty. She was advised that if she failed to accept the position her entitlement to compensation would be terminated.

By decision dated November 13, 1995, the Office terminated appellant's compensation benefits effective November 11, 1995 on the grounds that she had refused an offer of suitable work.

Following an oral hearing on August 13, 1996, the Office hearing representative affirmed the Office's November 13, 1995 decision. The Office hearing representation stated that appellant was not entitled to compensation after her resignation on July 14, 1995 because the record contained no evidence that she was incapable of performing the light-duty job she held as of the date she resigned.

By letter dated February 5, 1997, appellant requested reconsideration and submitted additional evidence.

In clinical notes dated November 8, 1996 and January 29, 1997, Dr. Arnold Heller, a Board-certified orthopedic surgeon, provided findings on examination and stated, "[i]t is my opinion that from the time of my first examination on April 17, 1996 [appellant] was impaired for activities requiring repetitive lifting and especially sitting with prolonged computer work at a desk until her surgery and subsequent rehab[ilitation] was completed at this date."

By decision dated March 6, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was found to be of an immaterial nature and was not sufficient to warrant review of its prior decision.²

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.³ Section 8106(c)(2) of the Federal Employees' Compensation Act⁴ provides that the Office may

² The Board notes that this case record contains documents relating to another claimant. Upon return of the case record to the Office, these documents should be placed in the correct file.

³ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Bettye F. Wade*, 37 556, 565 (1986).

⁴ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, or procured by, or secured for the employee.⁵ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁶

To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.⁷ 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 medical evidence.⁸

The Board finds that the medical evidence of record establishes that appellant was capable of performing the duties of the voucher examiner position offered by the employing establishment. Dr. Jones completed a work capacity evaluation on July 11, 1995, stating that appellant was disabled for work requiring lifting over 26 pounds from the ground, lifting over 11 pounds overhead, frequent overhead lifting and typing for more than 10 minutes at a time for more than 2 hours a day. The record shows that the physical requirements of the voucher examiner position offered to appellant are within Dr. Jones' work restrictions.

Appellant submitted clinical notes dated November 8, 1996 and January 29, 1997 from Dr. Heller stating that appellant was impaired for activities requiring repetitive lifting and sitting with prolonged computer work at a desk. However, the position offered to appellant did not include such physical requirements. There was no repetitive lifting or prolonged computer use required in the offered position. Therefore, this report does not establish that appellant was not physically capable of performing the offered position.

Section 8106 implementing regulation⁹ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with an opportunity to make such a showing before entitlement to compensation is terminated.¹⁰

Office procedures state 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.¹¹

⁵ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁶ *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁷ *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁸ *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁹ 20 C.F.R. § 10.124(c).

¹⁰ *John E. Lemker*, 45 258, 262 (1993).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

Unacceptable reasons include relocation for personal gain or financial gain, lack of promotion potential, or job security.¹²

In this case, the Office complied with the procedural requirements of advising appellant of the suitability of the job and the sanctions for refusing the job. The Office informed appellant that the job was available and provided her with an opportunity either to accept the position or explain her refusal. Appellant stated that she was refusing the offered position for several reasons. She stated that management would not accommodate her work restrictions. However, the record shows that the physical requirements of the offered position are within the work restrictions set forth by Dr. Jones in his July 11, 1995 work capacity evaluation.

Appellant also stated that she would receive a lower monetary award compared to other employees because she was working part time and that she did not receive a step increase due to her work-related injury. However, Dr. Jones had indicated that appellant was capable of working full time after approximately one month of working four hours a day, progressing to six hours a day and then eight hours. Furthermore, performance awards and step increases are administrative functions of the employing establishment and have no bearing on the suitability of the offered position. Loss of future earnings is not a consideration as an injured employee receives compensation based upon a loss of earning capacity as of the date of injury.

Regarding appellant's argument that the sanctions of section 8106(c) do not apply to her because she had voluntarily resigned, enrolled in pharmacy technician classes and was no longer an employee, this situation has no bearing on the suitability of the offered position. It is the responsibility of the employing establishment to provide suitable employment for partially injured employees if possible and it is the responsibility of the injured employee to accept a valid employment offer in lieu of receiving wage-loss compensation.

While the statute's implementing regulation¹³ permits exceptions for reasonable cause, the founding premise of the Act is that compensation will be paid for disability for work, as determined by medical evidence. Appellant was found fit for light-duty work and a suitable position was available. Therefore, appellant was no longer disabled and her refusal to accept and do the work for other than medical reasons under the circumstances of this case means that she is not entitled to compensation.

The March 6, 1997 and August 13, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
May 20, 1999

¹² *Arthur C. Reck*, 47 ECAB 339 (1996).

¹³ 20 C.F.R. § 10.124(c).

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member