

lumbar surgery, which was performed on May 17, 2004. A L5 laminectomy with bilateral facetectomy and right iliac crest bone graft was performed on August 3, 2004.¹ The Office placed appellant on the periodic rolls for temporary total disability effective May 16, 2004.

In a report dated August 8, 2005 and signed on September 28, 2005, Dr. Keola Chun, a treating Board-certified orthopedic surgeon, concluded that appellant was capable of performing modified work. Work restrictions included no repetitive bending, stooping and heavy lifting.

On February 13, 2006 Dr. Bunsri T. Sophon, a second opinion Board-certified orthopedic surgeon, noted the history of injury and findings on examination. He advised that appellant was status post L4-5 and L5-S1 spinal fusion, which was secondary to L4-5 discogenic disease and degenerative Grade 1 L5-S1 spondylolisthesis. Dr. Sophon found that she was capable of working with restrictions. In an attached work capacity evaluation (Form OWCP-5c), he indicated that appellant had permanent restrictions which included up to six hours of sitting, walking and standing and eight hours of bending/stooping and four hours of lifting.

In a letter dated March 3, 2006, appellant disagreed with Dr. Sophon's conclusions. She contended that she was totally disabled.

On April 28, 2006 the employing establishment offered appellant a modified position as a Move program RN assistant coordinator based upon the eight-hour per day restrictions issued by Dr. Sophon. The employing establishment offered appellant the position of Move program RN assistant coordinator with the hours of 9:00 a.m. to 5:00 p.m. within the physical restrictions noted by Dr. Sophon. The position was available as of May 14, 2006. Duties of the position included providing "indirect patient care mainly via telephone and other form of correspondence care by promotion education." Appellant refused the offered position contending that she could not work the hours indicated and that her pain medication made her sleepy.

In a June 8, 2006 letter, the Office advised appellant that the offered position was found suitable and conformed with her medical limitations. Appellant was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act² and given 30 days to respond. It noted that the work restrictions set by Dr. Chun, her attending physician, were in agreement with those set by Dr. Sophon.

On June 12, 2006 appellant responded to the June 8, 2006 letter. She contended that she was unable to perform the duties of the offered position as the prescribed medication made her drowsy. Appellant also stated that she was incapable of working the offered schedule. She alleged that she would not function well at work or be able to drive to work because of the side effects of her medication.

¹ On March 17, 2003 appellant filed a claim for a recurrence of disability beginning August 31, 2002, which was denied by the Office by decision dated May 5, 2003.

² 5 U.S.C. §§ 8101-8193, § 8106.

On July 10, 2006 the Office found that the offered position was still available and advised appellant that her reasons for refusing it were not acceptable. Appellant was given an additional 15 days to respond. It noted that the job offer conformed to the work restrictions given by Dr. Sophon and her attending physician, Dr. Chun.

On July 18, 2006 appellant reiterated that she was unable to accept the position as she was “not physically able to return to work” and that she was only able to sit or walk for 30 minutes. She also noted that she was unable to move in the morning until she took the pain medication which made her drowsy.

By decision dated July 26, 2006, the Office terminated appellant’s wage-loss compensation effective that date on the grounds that she refused an offer of suitable work.⁵

LEGAL PRECEDENT

The Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.⁴ Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.⁵ 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.⁶ To establish that, a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee’s physical limitations and that the reasons offered for stopping work were unjustified.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 the medical evidence of record.⁸

³ The Board notes that, following the July 26, 2006 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB ____ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003). The Board also notes that appellant filed a request for an oral hearing before an Office hearing representative on August 3, 2006. A hearing was initially scheduled for December 21, 2006 but was cancelled due to appellant’s filing the present appeal with the Board.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ See *Bryant F. Blackmon*, 56 ECAB ____ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁶ See *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁷ See *Wayne E. Boyd*, 49 ECAB 202 (1997).

⁸ See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

Section 10.517(a) of the Act'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.⁹ 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.¹⁰

ANALYSIS

The Board finds that the Office properly terminated appellant's wage-loss compensation for refusing to accept suitable work. The employing establishment offered her a position as a Move program RN assistant coordinator within the physical restrictions that were provided by both Dr. Sophon and Dr. Chun. In determining the daily work hours, the employing establishment used Dr. Sophon's limitation of eight hours as Dr. Chun provided no opinion as to the number of hours appellant was capable of working. The medical evidence of record, therefore, establishes that appellant could physically perform the duties of the offered position particularly as the restrictions complied with those noted by Drs. Chun and Sophon.¹¹

In order to properly terminate appellant's compensation under section 8106, the Office must provide notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.¹² The record in this case establishes that the Office properly followed the procedural requirements. By letter dated June 8, 2006, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. Appellant was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. In a letter dated July 10, 2006, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. She was given an additional 15 days in which to accept the job. There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, her compensation was properly terminated effective July 26, 2006.¹³

Appellant generally alleged that it was improper for the Office to terminate her compensation benefits because her medication made her drowsy and unable to drive to work or work for eight hours. The Board notes the duties of the offered position were within her restrictions provided by both Drs. Chun and Sophon. Appellant did not submit medical evidence to establish that the eight-hour workday or duties of the position were outside appellant's restrictions. The employing establishment complied with the restrictions noted by Drs. Chun

⁹ 20 C.F.R. § 10.517(a); *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04-1561, issued December 21, 2004); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁰ 20 C.F.R. § 10.516; *Mary E. Woodard*, 57 ECAB ____ (Docket No. 05-1023, issued November 14, 2005).

¹¹ *Gayle Harris*, 52 ECAB 319 (2001).

¹² *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹³ *Joyce M. Doll*, 53 ECAB 790 (2002).

and Sophon by offering the job with restrictions on lifting and standing. As the job complied with her physical restrictions, appellant failed to submit medical evidence to establish that she was physically unable to perform the duties of the offered position or was impaired from performing the job due to her medication. The record is devoid of any medical evidence supporting appellant's contention that the medication she takes would prevent her from performing the duties of the offered position or working eight hours. The Office properly terminated her wage-loss compensation effective July 26, 2006 on the grounds that she refused an offer of suitable work.¹⁴

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation effective July 26, 2006 pursuant to 5 U.S.C. § 8106(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 26, 2006 is affirmed.

Issued: May 8, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *Id.*