

contusion, lumbar strain, herniated disc L4-5 left side and sciatica of the left leg and paid appellant appropriate compensation benefits.¹

In a report dated May 20, 2004, Dr. Richard Fishbein, a Board-certified orthopedic surgeon and treating physician, noted appellant's history of injury and treatment. He conducted an examination and recommended a neurological evaluation. Dr. Fishbein opined that appellant had reached maximum medical improvement and prescribed permanent restrictions comprised of no lifting of any weight greater than 10 pounds repetitively and 20 pounds maximally. He advised that appellant continue with symptom relieving measures such as surgical intervention, physician care, ice, heat, analgesics, rest and occupational/physical therapy. Dr. Fishbein also advised that appellant obtain surgery to repair his documented herniated disc.

By letter dated April 26 2005, the employing establishment offered appellant the position of modified mail handler in accordance with Dr. Fishbein's restrictions.² The position was located in Newark, New Jersey. Appellant filled in "N/A" in response to whether he accepted or rejected the offer and added: "I cannot answer this at the present time. Please refer all questions in this matter to my lawyer...."

In a memorandum of telephone call dated June 7, 2005, the employing establishment confirmed that appellant remained on its employment rolls.

By letter dated June 8, 2005, the Office notified appellant that the position of modified mail handler was found to be suitable work within his medical restrictions, which were prescribed by his treating physician, Dr. Fishbein, and the position remained currently available. The Office also advised appellant that under section 8106(c)(2) of the Federal Employees' Compensation Act³ "a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation." The Office provided appellant 30 days in which either to accept the position or provide reasons for refusal.

By letter dated June 23, 2005, appellant's representative advised the Office that appellant was no longer on the employing establishment's rolls and suggested that relocation expenses were payable. He contended that the offered position was not suitable, explained that appellant could not relocate for personal reasons and noted that appellant's wife was severely ill with cancer.

In a memorandum of telephone call dated July 12, 2005, the employing establishment confirmed that appellant remained on their rolls and that the offered position remained available.

By letter dated July 13, 2005, appellant's representative was advised that the offered position was found to be suitable and that his reasons for rejecting the offered position were not acceptable. The Office also informed him that the employing establishment verified that appellant was "still an active and current employee on their rolls." Regarding appellant's refusal

¹ Appellant relocated to Lebanon, Tennessee in 2001.

² This was an amended modified job offer. A previous job offer was not found suitable by the Office.

³ 5 U.C.S. § 8106(c).

to accept the position and explanation that he could not relocate due to his wife's illness, the Office explained that there was no provision in the procedures to accommodate an employee who was still on the employing establishment's rolls, who had moved and could not return to the area of residence at the time of the injury due to illness of a family member. The Office informed appellant's representative that his wife's health concerns was not an acceptable reason for refusal of the job offer. The Office further advised appellant's representative that appellant had 15 days to accept the offered position or it would terminate his compensation.

In a memorandum of telephone call dated August 2, 2005, the employing establishment confirmed that the offered position remained available; however, it indicated that appellant had not reported for duty.

By decision dated August 3, 2005, the Office terminated benefits effective August 7, 2005 for the reason that appellant failed to accept suitable work offered to him and failed to show sufficient cause for failure to accept the job offered.

On August 9, 2005 appellant's representative requested a hearing, which was held on December 20, 2005. Counsel contended that appellant neither accepted nor rejected the offer of employment, but instead indicated that he was "waiting to speak with his doctor." His representative noted that appellant was still residing in Lebanon, Tennessee. Appellant's wife was ill with cancer and he was not able to relocate at the time the job was offered. Counsel indicated that appellant's wife died on October 25, 2005. It was asserted that the Office's procedure manual considered this an acceptable reason for refusal of a job offer. Counsel advised that appellant was currently ready to relocate to New Jersey and accept the job offer as soon as he could sell his house and relocate.

By decision dated March 8, 2006, the Office hearing representative affirmed the August 3, 2005 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.⁴ This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work.

Section 8106(c)(2)⁵ of the Act 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. Section 10.517(a)⁶ of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,⁷ the Office will terminate the

⁴ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

⁵ 5 U.S.C. § 8106(c)(2).

⁶ 20 C.F.R. § 10.517(a).

⁷ *Id.* at § 10.516.

employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable⁸ and must inform appellant of the consequences of refusal to accept such employment.⁹ According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.¹⁰ Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.¹¹

With regard to relocation, Office regulations provide that the employer, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.¹²

ANALYSIS

In this case, the employing establishment offered appellant a sedentary position in Newark, New Jersey, which accommodated the work restrictions given by his treating physician, Dr. Fishbein. The Office reviewed the position and found it to be suitable for appellant. After appellant did not report for duty, the Office terminated his compensation for refusing suitable work.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.¹³ In this case, by letter dated June 8, 2005, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified him that the position remained open, that he would be paid for any difference in pay between the offered position and his date-of-injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

By letter June 23, 2005, appellant refused the position because he could not relocate from Lebanon, Tennessee, for personal reasons which included that his wife was severely ill with cancer.

⁸ See *Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

⁹ *Maggie L. Moore*, 42 ECAB 484 (1991). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

¹¹ *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Chapter 2.814.5(c) (July 1996).

¹² 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB ____ (Docket No. 04-1707, issued December 9, 2004).

¹³ See *Maggie L. Moore*, *supra* note 9; *reaff'd on recon.*, 43 ECAB 818 (1992).

The Board notes that the Office did not make an attempt to determine whether suitable employment was possible or practical in or around Lebanon, Tennessee, the location where appellant and his wife, who was dying of cancer, resided at the time of the job offer. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee resided at the time of the job offer. The record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible in or around Lebanon, Tennessee. The Office should have developed this aspect of the case before finding the offer suitable. Office regulations state that the employer should offer suitable reemployment where the employee currently resides, if possible.¹⁴ In this case, appellant would have needed to move over 900 miles to accept the offered position in Newark, New Jersey. The Office, therefore, should have developed the issue of whether suitable reemployment was possible in the Lebanon, Tennessee area. The Board finds that the Office erred in terminating appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.¹⁵

Under the circumstances of this case, the Office did not properly find that appellant refused suitable work.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation effective August 7, 2005 on the grounds that he refused an offer of suitable work.

¹⁴ 20 C.F.R. § 10.508 (1999). See *Sharon L. Dean*, *supra* note 12.

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 6, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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