

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LYNN O'KELLY and DEPARTMENT OF THE ARMY,  
FORT McCLELLAN, AL

*Docket No. 99-2447; Submitted on the Record;  
Issued August 11, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
DAVID S. GERSON

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

In the present case, the Office accepted that appellant sustained left rotator cuff strain, and subsequent left shoulder surgeries, causally related to her federal employment as a practical nurse. By decision dated September 3, 1997, the Office terminated appellant's compensation on the grounds that she had refused on offer of suitable work. In a decision dated January 21, 1998, an Office hearing representative set aside the termination decision, instructing the Office to obtain a written job offer that outlined the specific physical duties and requirements of the offered position.

In a letter dated February 16, 1999, the Office advised appellant that it found the offered position of sedentary practical nurse to be suitable. The Office noted the provisions of 5 U.S.C. § 8106(c)(2), and indicated that appellant had 30 days to accept the position or provide reasons for refusing it. By decision dated March 17, 1999, the Office terminated appellant's compensation on the grounds that she had refused an offer of suitable work.

The Board has reviewed the record and finds that the Office did not meet its burden of proof in terminating appellant's compensation.

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>1</sup> To justify such a termination, the Office must show that the work offered was suitable.<sup>2</sup> An employee who refuses or neglects to work

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<sup>1</sup> *Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>2</sup> *John E. Lemker*, 45 ECAB 258 (1993).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>3</sup>

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work, and allow appellant an opportunity to provide reasons for refusing the offered position.<sup>4</sup> If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.<sup>5</sup>

In the present case, the Office did notify appellant, by letter dated February 16, 1999, that it found the offered position to be suitable, advised her of the consequences of a refusal of suitable work, and allowed her 30 days to either accept the position or provide an explanation of the reasons for refusing the position. The record indicates that, on February 18, 1999, the Office received a letter dated February 16, 1999 from Alvin Prestwood, Esq., stating that appellant was unable to perform the duties of the offered position. In addition, the record indicates that, on March 11, 1999, the Office received a medical report dated February 24, 1999 from the attending physician, Dr. Duane D. Tippetts, an orthopedic surgeon, who stated that appellant had been offered a job that was the same as a prior offer that required her to lift 30 pounds with both arms, and he indicated that appellant should limit her left-handed lifting to 1 pound.

It is well established that, pursuant to the procedural requirements set forth in *Maggie L. Moore*, “if a claimant submits evidence or reasons or both,” the Office must evaluate the evidence or reasons, and inform appellant as to whether the evidence or reasons were accepted or rejected.<sup>6</sup> If the evidence or reasons are considered unacceptable, appellant must be given an additional period of time to accept the job offer.<sup>7</sup> In this case, the Office did not acknowledge that appellant had timely submitted evidence or reasons. The March 17, 1999 Office decision notes that a letter was received from Mr. Prestwood, but finds that no signed authorization for representation was in the case record. The Office also stated, “no other explanation or evidence has been provided for consideration.” As noted above, appellant did submit relevant medical evidence from Dr. Tippetts with respect to acceptance of the offered position. The Office should have evaluated the evidence, including the February 16, 1999 letter from Mr. Prestwood, notified appellant as to whether it was sufficient to refuse the offered position, and if not, allowed appellant an additional opportunity to accept the position prior to termination of benefits. The failure to provide such notice and opportunity in this case constitutes a procedural error under 5 U.S.C. § 8106(c) that requires reversal of the termination decision in this case.

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<sup>3</sup> *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

<sup>4</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>5</sup> *Id.*

<sup>6</sup> 43 ECAB 818, 824 (1992).

<sup>7</sup> *Id.*

The decision of the Office of Workers' Compensation Programs dated March 17, 1999 is reversed.

Dated, Washington, D.C.  
August 11, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

David S. Gerson  
Member