

employing establishment offered a position in a different Rochester facility. On June 7, 2003 Dr. Zax responded that this was not acceptable because it did not address her basic problem: “She doesn’t feel safe in the local (northwestern New York) area all of which is administered by the same people who have let her down in the past and where she is represented by a union that [has] not protected or fought for her in the past.” He added: “It will have to be in a postal district outside of this area. She will gladly consider any job outside of Northwestern New York State.”

On June 30, 2003 the Office notified Dr. Zax that appellant had used his narrative as a basis for declining the modified job offer. To help explore other placement opportunities, the Office asked him to complete a work capacity evaluation. Completing such an evaluation on July 13, 2003, Dr. Zax reported that appellant could perform her usual job “in a different locale away from present supervisors and union representatives.” He added: “She prefers to live in Florida if she must move but this is not absolutely necessary.”

The employing establishment offered appellant a position in a different craft at “USPS, Rochester, New York,” which Dr. Zax found unacceptable because it simply moved appellant to a different job in the same geographic region.

On December 8, 2003 appellant advised the Office that she was moving to Florida. She noted that vocational rehabilitation services had stopped its efforts to place her with her previous employer and was initiating a plan development directed toward finding her outside employment. Appellant explained that she discussed the matter with the Office rehabilitation counselor, who advised that she was free to make the move and that efforts would be made to find suitable employment in her new location. Appellant stated: “I will be making the first of several trips to the Fort Myers/Bonita Springs/Naples areas of Florida in the next few weeks to find suitable housing. I plan on being settled in a new location by the end of March 2004, depending on how quickly things happen in my house here in Rochester.”

On February 3, 2004 the employing establishment offered appellant a position in Utica, New York. The employing establishment explained that the physical requirements of the position were not applicable because she had no limitations other than not working in her current district. The employing establishment stated that appellant was being offered a job in the Albany District, “which is not part of your current District.”

On February 3, 2004 the Office notified appellant that the offer was suitable: the employing establishment stated that it would incur relocation expenses, and the position was clearly in accord with Dr. Zax’s restriction that she be placed outside her current geographic and management area. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c) and advised that she had 30 days either to accept the offer or to provide a reasonable, acceptable explanation for refusing it.

On February 17, 2004 appellant informed the Office of her new mailing address in Fort Myers, Florida, and explained that there would be a delay in responding to any correspondence because she was still in the process of moving things from Rochester. She stated that she planned on leaving Rochester with the last of her belongings on March 1, 2004.

On February 18, 2004 appellant refused the offered position in Utica. On February 20, 2004 she explained that she informed the Office in a December 8, 2003 letter that she would be moving, settled in and ready to work in Fort Myers by the end of March 2004. She stated that this was with the approval of the Office's vocational rehabilitation specialist. In addition to incurring moving expenses, appellant stated that she already rented out her house in Rochester, surrendered her New York State driver's license for a Florida one, established residency with her sister on January 21, 2004, opened a bank account, rerouted her direct deposits to the new account, signed a lease and put a deposit on a house in Fort Myers. "There is a substantial amount of money," she stated, "tied up in nonrefundable payments." Further, she convinced her sister to give up her apartment to live with her in a three-bedroom apartment; accepting the offer would force them to break their lease and affect their credit ratings. With respect to the job offer, she noted that it did not move her out of the Northeast management area, as her restrictions required.

On February 21, 2004 Dr. Zax reported that he was advising appellant to follow through on her move to Florida. He noted many of the circumstances related by appellant, including reliance on Office vocational rehabilitation personnel that placement efforts with her previous employer had ceased and that there was no reason not to move. Dr. Zax noted that the most recent job offer had provoked, quite predictably, many of the symptoms appellant had with her original problem: "I cannot see how moving to a post office job in Utica at this point in time would be good for them [appellant and her husband] or the post office." Dr. Zax stated that his advice to appellant to follow through on the move was the best resolution to the situation.

On February 23, 2004 the Office advised appellant that her February 13, 2004 correspondence was insufficient to establish the Utica job offer as unsuitable because she made no mention and presented no evidence indicating her rationale for refusing to accept the job.¹ The Office reminded appellant of the provisions of 5 U.S.C. § 8106(c) and notified her that her compensation benefits would be terminated within 15 days if she refused the employment or failed to report to work when scheduled.

In a decision dated March 16, 2004, the Office terminated appellant's compensation benefits for refusing an offer of suitable work. The Office addressed all the evidence received since its suitability finding on February 3, 2004 and found appellant's reasons for refusing the offer unjustified. The Office noted that the offered position satisfied Dr. Zax's restriction that she work in a different area.

In a decision dated May 6, 2004, the Office denied a merit review of appellant's case.

LEGAL PRECEDENT

Section 8106(c) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.² The

¹ There is no February 13, 2004 correspondence. The Office may have meant appellant's February 18, 2004 refusal.

² 5 U.S.C. § 8106(c).

Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office 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.³ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.⁴

If possible, the employer 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.⁵

ANALYSIS

This case presents several apparent issues, including the specific and reasonable scope of appellant's work restriction; whether the position in Utica, New York, satisfied that work restriction; whether appellant, who was still on the agency's employment rolls, was eligible to receive relocation expenses to Fort Myers, Florida; whether accepting the Utica offer would nonetheless be financially prohibitive; and whether appellant relied in good faith on the advice of her physician. The most relevant, however, is whether suitable reemployment was possible or practical in or around Fort Myers, Florida. Appellant notified the Office on December 12, 2003 that she was relocating to the Fort Myers area, and as her correspondence in February 2004 made clear, her new residency was established and her relocation was all but complete when the Office notified her that the Utica offer was suitable. 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 currently resides. The record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible in Florida. The Office, knowing that appellant would have to move back to New York to accept the Utica offer, should have developed this aspect of the case before finding the offer suitable.

In 1987 the pertinent regulation applied only to former employees, employees who were terminated from the agency's employment rolls:

“Where an injured employee relocates after having been terminated from the agency's employment rolls, the Office encourages employing agencies to offer suitable reemployment in the location where the former employee currently resides. If this is not practical, the agency may offer suitable employment at the employee's former duty station or other alternate location.”⁶

³ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁴ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁵ 20 C.F.R. § 10.508 (1999).

⁶ 20 C.F.R. § 10.123(f) (1987).

The regulation in effect since 1999 contains no such restrictive language.⁷ The regulation now states that the employer “should” offer suitable reemployment where the employee currently resides, if possible. Under the circumstances of this case, where appellant would need to move to accept a position in Utica, New York, the Office should have developed the issue of whether suitable reemployment in or around Fort Myers, Florida, was possible. It was reversible error for the Office to terminate appellant’s compensation benefits without positive evidence showing that such an offer was not possible or practical.⁸

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation benefits under 5 U.S.C. § 8106(c) and the implementing regulations.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2004 decision of the Office of Workers’ Compensation Programs is reversed.⁹

Issued: December 9, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ See *supra* text accompanying note 5.

⁸ See *Martin Joseph Ryan*, Docket No. 00-1262 (issued June 14, 2002) (holding that it was proper for the employer to offer a job in New York where the record contained evidence showing that the employer first attempted to assess the practicality of offering suitable reemployment in Clearwater, Florida, the location where the claimant resided).

⁹ Reversal of the Office’s decision to terminate compensation benefits renders moot the May 6, 2004 decision not to grant a merit review of appellant’s case.