United States Department of Labor
Employees' Compensation Appeals Board

YVONNE BROWN, Appellant	)	
and	)	**Docket No. 03-2143**
	)	**Issued: February 19, 2004**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Virginia Beach, VA, Employer	)	

Appearances:
Yvonne Brown, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 3, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs dated August 22, 2003. The Office terminated her wage-loss compensation based upon her refusal of suitable work. Under 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

Whether the Office properly terminated appellant's wage-loss compensation effective August 20, 2003 under section 8106(c) of the Federal Employees' Compensation Act, on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On May 23, 2001 appellant, a 52-year-old cashier, filed a traumatic injury claim alleging that on May 20, 2001 she injured her arm, shoulder, back and neck when she lost her balance while participating in a team exercise. The Office accepted the claim for thoracic strain,

scalp/head contusion and left shoulder/arm contusion. Subsequently, the Office authorized left shoulder arthroscopy with a subacromial decompression and bursectomy on May 14, 2002 and left shoulder arthroscopic surgery on November 26, 2002. Appellant worked intermittently from the date of the injury until June 26, 2001 and was subsequently placed on the automatic rolls for total disability.

On September 18, 2002 the Office referred appellant, together with a statement of accepted facts, questions to be answered and the medical record, to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, selected as an impartial medical specialist. The Office found a conflict in the medical opinion evidence between Dr. James A. Maultsby, a second opinion Board-certified orthopedic surgeon, and Dr. James W. Markworth, an attending Board-certified orthopedic surgeon, on appellant's work restrictions and whether appellant required further injections.

On January 9, 2003 the employing establishment offered appellant the light-duty position of modified sales store checker. The employing establishment noted that the position was available and would remain available contingent upon normal budgetary and operation requirements or you are separated by reduction-in-force (RIF) under 5 C.F.R. Part 351.

In a March 6, 2003 report, Dr. Jeffrey L. Gross, an attending Board-certified orthopedic surgeon, concluded that appellant was capable of working with restrictions on heavy lifting and overhead work.

On July 15, 2003 the Office referred appellant for vocational rehabilitation.

In a July 17, 2003 facsimile transmittal, the employing establishment noted that appellant did not respond to a January 9, 2003 job offer and that "[s]he was later RIF'd out of the position." In the next paragraph, it noted that "the job offer remains available to [appellant] and the [employing establishment] wants a suitability decision."

In a July 18, 2003 letter, the Office advised appellant that the modified sales store checker position was found to be suitable work as it was within her medical restrictions and remained currently available. The Office also advised appellant that under section 8106(c) of the Act (5 U.S.C. § 8106(c)), "a partially disabled employee who refuses to work after suitable work is offered to, procured by or secured for her is not entitled to compensation." Appellant was afforded 30 days in which to either accept the offer or provide "an explanation of the reasons for refusing it." The Office stated that, if appellant failed "to accept the position any explanation or evidence which [she would] provide will be considered prior to determining whether or not [her] reasons for refusing the job are justified."

In a letter dated July 22, 2003, appellant submitted papers from the employing establishment informing her that she was to be separated from the employing establishment due to a RIF. She asked the Office to provide clarification as to her status since she was confused as to whether she was employed or not due to the RIF and documents from the Office referring appellant for vocational rehabilitation. The November 15, 2002 notice of separation noted her position as sales store checker and informed appellant that she was "being displace[d] (sic) by an employee with a higher retention standing. Based on your retention standing, an offer of

continued employment cannot be made to you at this time and you will be separated effective midnight January 25, 2003." The employing establishment further noted that appellant was "not entitled to severance pay because you are receiving injury compensation."

In a letter dated August 8, 2003, the Office informed appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2) and that, if she did not return to work by August 18, 2003, then her compensation would be terminated. The Office reviewed the paperwork submitted by appellant from the employing establishment which stated that she was separated from the employing establishment due to a RIF on January 25, 2003. The Office noted that the employing establishment stated that the job offered on January 9, 2003 remained open and available to appellant.

By decision dated August 22, 2003, the Office terminated appellant's wage-loss compensation benefits due to appellant's refusal to accept an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[1] This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[2]

Under section 8106(c)(2) of the Act[3] the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[5]

Section 10.516 of the implementing regulation[6] provides in pertinent part:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office]'s

[1] *Linda D. Guerrero*, 54 ECAB ___ (Docket No. 03-267, issued April 28, 2003).

[2] *Juan A. Dejesus*, 54 ECAB ___ (Docket No. 03-1307, issued July 16, 2003).

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[4] *Sandra K. Cummings*, 54 ECAB ___ (Docket No. 03-101, issued March 13, 2003); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[5] *Linda D. Guerrero, supra* note 1; *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[6] 20 C.F.R. § 10.516.

notification need not state the reasons for finding that the employee's reasons are not acceptable."[7]

Section 10.517 of the regulation[8] further provides:

"(a) 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses to seek suitable work or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. 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.

"(b) After providing the two notices described in sec[tion] 10.516, [the Office] will terminate the 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."[9]

ANALYSIS

The Board finds that the Office, in a letter dated July 18, 2003, properly advised appellant that it had found the offered work to be suitable and afforded her 30 days to accept the job or present any reasons to counter the Office's finding of suitability. The record indicates that appellant provided a copy of the separation letter from the employing establishment informing her of her separation due to a RIF. She requested clarification of her status. The Office rejected appellant's arguments and stated that it found the work to be suitable. However, the Board finds that the Office failed to notify appellant that she had 15 days in which to accept the offered work without penalty.

In the case of *Maggie L. Moore*,[10] the Board held that when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision. Section 10.516 of the Office's implementing federal regulations provides that, after the Office has determined that the reasons the employee gives for refusing the position are unacceptable, the employee will be notified of that determination and given 15 days to accept the offered position with no penalty, but if the job is not accepted within the 15-day time frame then her wage loss and

[7] *Id.*

[8] 20 C.F.R. § 10.517(a), (b).

[9] *Id.*

[10] 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB 476 (2001).

schedule award payments will be terminated under 5 U.S.C. § 8106(c).[11] In the instant case, the Office determined that appellant's reasons for refusing the job were unacceptable but gave her only 10 days to accept the position with no penalty.

Moreover, the record is unclear as to whether the job remained open and available to appellant in light of the RIF upon her separation which was effective midnight January 25, 2003. The record contains no evidence that the Office investigated whether the job was still available to appellant in light of the RIF. Thus, the Office did not meet its burden in terminating appellant's compensation for refusing an offer of suitable employment when there was a question as to whether the position was actually available to appellant.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's disability compensation for refusal of suitable employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 22, 2003 is reversed.

Issued: February 19, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[11] 20 C.F.R. § 10.516.