

of suitable work.¹ The Board found that the Office failed to consider appellant's reasons for refusing the offered position. Accordingly, the Board returned the case to the Office for payment of all compensation due and owing.

On June 18, 2003 the employing establishment offered appellant a position as a part-time flexible distribution clerk, Level 5, Step M, available starting June 28, 2003. The employing establishment noted that the duties and physical requirements of the position were identical to the prior job offer dated April 23, 2002. Appellant was instructed to complete and sign an attached letter accepting or declining the offer by June 25, 2003 and to contact the personnel office no later than June 25, 2003 "to set up a time for completion of [her] new-hire paperwork."²

In a June 18, 2003 letter, the Office advised appellant that the offered part-time flexible distribution clerk position was suitable work within her medical restrictions and that the position remained available. The Office afforded appellant 30 days in which to either accept the position or provide a written explanation for her refusal. The Office noted that an unjustified failure to "report to the offered position" would result in termination of her compensation.

In June 24 and 26, 2003 reports, Dr. James F. Bischoff, an attending Board-certified orthopedic surgeon, restricted appellant to lifting no more than five pounds with her left hand and dismissed her from his care. He noted that appellant had reached maximum medical improvement and had a 10 percent permanent impairment of the left hand.

In a July 23, 2003 letter, the Office noted that appellant had not yet responded to the June 18, 2003 employment offer. The Office reviewed the reasons for refusal she provided on April 25, 2002, pursuant to the prior appeal, and found them insufficient. The Office also noted that the offered position was within Dr. Bischoff's June 24 and 26, 2003 restrictions. The Office advised appellant that if she did not accept the position and arrange a report date within 15 days her "entitlement to wage loss and schedule award benefits [would] be terminated."

Appellant then submitted her acceptance of the offered position, signed and dated June 25, 2003 but postmarked July 28, 2003. She noted that she was presently employed full time and needed to give her employer two weeks notice and train a replacement. Appellant stated that she gave notice and her last day would be August 8, 2003. She could then "come downtown to process preemployment."

In an August 1, 2003 email message, the Office suggested an August 11, 2003 start date as appellant's last day of private sector work would be August 8, 2003. In an August 6, 2003 email message, the Office advised the employing establishment that appellant was uncertain as to when to report for work. Appellant stated in an August 18, 2003 letter to her elected representative that she had left several telephone messages with personnel but received no

¹ *Tammy Flickinger*, 54 ECAB ___ (Docket No. 03-22, issued April 9, 2003). The Board's April 9, 2003 decision is incorporated herein by reference.

² The employing establishment appended a copy of the April 23, 2002 job offer, showing duty hours of 1:30 p.m. to 10:00 p.m. with Wednesday and Thursday off. Appellant would perform clerical duties and process "nixies" and rewraps. Appellant was restricted from lifting over five pounds, "overly repetitive use of either hand" and prolonged writing.

response as to when to report for work. On September 2, 2003 the employing establishment mailed “application forms” to appellant. In a September 3, 2003 email message, the employing establishment advised the Office that appellant “will be notified as to her reporting date for drug screen. I have attempted to contact [appellant] via telephone and left a message ... regarding her drug screen.” In a September 9, 2003 email message, the employing establishment noted that appellant “ha[d] beg[un] processing. She reported for her drug screen” on September 4, 2003 but had not yet returned to complete the employment application required for final processing.

On September 22, 2003 the employing establishment stated that appellant “‘could not make it in for orientation’ today” as she had “been out of town and had not had time to make arrangements for her kids which [was] strange since their ages [were] 11, 16 [and] 19.” In a September 25, 2003 email message, the employing establishment explained that appellant “was placed back on the [p]ostal rolls effective September 20, [2003]; however, she should have reported first day orientation on September 22[, 2003] which would have been her first day of pay.”

By decision dated September 25, 2003, the Office terminated appellant’s compensation effective September 22, 2003 on the grounds that she neglected suitable employment by failing to report to work on September 22, 2003.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office terminated appellant’s compensation under section 8106(c)(2) of the Federal Employees’ Compensation Act, which 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.⁴ To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁵ Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee’s entitlement to compensation based on a refusal to accept a suitable offer of employment.⁶

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.⁷ Pursuant

³ *Linda D. Guerrero*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB ____ (Docket No. 02-66, issued February 28, 2003).

⁵ *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

⁶ *Joan F. Burke*, 54 ECAB ____ (Docket No. 01-39, issued February 14, 2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

⁷ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, 52 ECAB 190 (2000).

to section 10.516, the employee shall be provided the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁸

ANALYSIS

The Office predicated its termination of compensation on the assumption that appellant's failure to report for work on September 22, 2003 constituted neglect of suitable work. However, it is not clear from the record that appellant was specifically advised to report for duty on September 22, 2003. The Office's procedures require that a job offer set forth the date the position is first available, in this case, June 28, 2003.⁹ The Office's 30-day notice dated June 18, 2003 and 15-day notice dated July 23, 2003 effectively extended appellant's start date through August 7, 2003.¹⁰ The Office's August 6, 2003 email to the employing establishment indicates an awareness of appellant's confusion regarding the start date, but apparently no clarification or specific directive was provided at the time. Application forms mailed to appellant on September 2, 2003 are not of record and thus cannot be examined for a start date. Similarly, there is no evidence that the employing establishment gave appellant a start date at the September 4, 2003 drug screening. Although September 22 and 25, 2003 email messages from the employing establishment state that appellant failed to report for orientation on September 22, 2003, there is no evidence of record indicating that she was specifically advised to report for work on September 22, 2003. While the Office found in its September 25, 2003 decision that appellant neglected suitable work by failing to report for duty on September 22, 2003, the Board finds that there is insufficient evidence that appellant was required to start work on September 22, 2003. Accordingly, the Office improperly terminated appellant's compensation under section 8106(c) of the Act.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation.

⁸ 20 C.F.R. § 10.516.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1993).

¹⁰ *Les Rich*, 54 ECAB ___ (Docket No. 01-1995, issued January 2, 2003) (*Rich* is distinguished from the instant case as the claimant did not accept the offered position).

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member