

conditions of subluxation of L5, bulging disc at L4-5 and sprain of the right knee on July 26, 1991. The Office reduced appellant's compensation benefits to reflect her capacity to earn wages as a general clerk on May 18, 1992. Following a request for a review of the written record, the Branch of Hearings and Review affirmed this decision on November 13, 1992. The Office also accepted that appellant sustained a herniated disc at L4-5 due to her employment injury and that she was totally disabled beginning November 25, 2000. The Office entered appellant on the periodic rolls on July 26, 2001. By decision dated March 2, 2004, the Office terminated appellant's compensation benefits effective March 21, 2004 on the grounds that she refused an offer of suitable work. In its March 25, 2005 decision,¹ the Board reversed the Office's March 2, 2004 decision finding that the employing establishment made no effort to determine whether reemployment was possible in the location where appellant resided, Conception Junction, Missouri. The Office had an obligation to develop this aspect of the case before determining that appellant had refused suitable work. The facts and the circumstances of the case as set out in the Board's prior decision are incorporated herein by reference.

Appellant filed a claim for compensation on May 11, 2005 and requested wage-loss compensation from March 2004 through May 2005. The Office entered appellant on the periodic rolls on June 2, 2005.

Appellant's attending physician, Dr. Patrick B. Harr, a Board-certified family practitioner, completed a form report on June 23, 2005 and noted that appellant continued to experience back pain requiring narcotic pain medication. He stated that appellant was unable to work eight hours a day and had limited ability to sit, stand or bend. In a treatment note of the same date, Dr. Harr diagnosed chronic low back pain and stated that appellant had no palpable tenderness in the lower lumbar spine, that she walked without an antalgic gait, that she could toe raise and that she had no pain on straight leg raising.

In a letter dated September 30, 2005, the Office requested that the employing establishment determine, based on appellant's 2002 medical evaluations, whether there was a medically suitable position available in Missouri. The Office stated that the employing establishment should provide documentation of its efforts if there was no suitable position available and then provide appellant with another job offer for the position in California.

The employing establishment telephoned the Office on February 15, 2006 and stated that there was no suitable work position available for appellant in Missouri. The employing establishment submitted a series of e-mails which stated that there were no appropriate positions available to appellant in Missouri.

On August 17, 2006 the employing establishment again offered appellant the mail and file clerk position previously offered in 2004 located at the employing establishment, McCloud, California. The work requirements included no prolonged sitting, with position changes as needed, walking up to two hours a day, no limitation on standing, reaching up to eight hours a day, no twisting, pulling and lifting up to 10 pounds, no squatting, bending, kneeling or climbing. By letter dated September 26, 2006, the Office informed appellant that the mail and file clerk position in California was considered to be suitable work and allowed her 30 days to

¹ Docket No. 04-1351 (issued March 25, 2005).

accept the position or offer her reasons for refusal. The Office informed appellant of the penalty provision of 5 U.S.C. § 8106(c). Appellant responded on September 29, 2006 and alleged that the offered position was not suitable as it was based on outdated medical information. She also requested information regarding her relocation expenses and the search for suitable employment within her current area.

In a letter dated November 9, 2006, the Office informed appellant that the current position was found to be suitable based on the December 17, 2001 and March 13, 2002 reports from Dr. John Olsen, a Board-certified neurosurgeon, and appellant's attending physician. The Office stated that Dr. Harr had not provided sufficient medical reasoning in support of his opinion that appellant was unable to work. The Office stated that appellant's reasons for refusing the suitable work position were not valid and allowed her an additional 15 days to accept the offered position.

The Office referred appellant for a second opinion evaluation on December 14, 2006 with Dr. Edward J. Prostic, a Board-certified orthopedic surgeon. In a report dated January 30, 2007, Dr. Prostic noted appellant's history of injury, description of symptoms and diagnosed degenerative disc disease with lumbar spinal stenosis. He stated: "It has been a progressive problem facilitated by the work injury." Dr. Prostic found that appellant had continued low back distress and radicular symptoms and that she was not capable of performing her date-of-injury position. He reviewed the offered mail and file clerk position and stated: "...[Appellant] is physically capable to perform this job with minor restrictions." Dr. Prostic completed a work restriction evaluation and indicated that appellant could walk and stand for six hours a day, could twist, bend and stoop for one hour a day and could lift 20 pounds for two hours a day.

In a letter dated March 1, 2007, the Office informed appellant that she had provided a valid reason for refusing the suitable work position, that the position was based on old work restrictions. The Office stated that Dr. Prostic found that appellant was capable of performing the offered position and again allowed appellant 15 days to accept the file clerk position offered by the employing establishment.

By decision dated March 23, 2007, the Office terminated appellant's compensation benefits effective April 15, 2007 finding that she refused an offer of suitable work based on Dr. Prostic's January 30, 2007 report.

LEGAL PRECEDENT

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that she refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act³ 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 of

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ 5 U.S.C. § 8106(c)(2).

the applicable regulations⁴ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. 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

The Office's regulations also state:

“[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] notification need not state the reasons for finding that the employee's reasons are not acceptable.”⁶

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.⁷

ANALYSIS

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the basis that she refused an offer of suitable work. The Office found that there was no contemporaneous medical evidence in the record supporting that appellant was capable of performing the offered position of mail and file clerk. The Office referred appellant for a second opinion evaluation with Dr. Prostic, a Board-certified orthopedic surgeon, who examined appellant on January 30, 2007. Dr. Prostic stated that appellant could perform the duties of a mail and file clerk “with minor restrictions.” He then indicated on his work restriction evaluation that appellant could only stand for six hours a day. The mail and file clerk position offered by the employing establishment and found suitable by the Office required appellant to stand without limitation or up to eight hours a day. Appellant's physical restrictions as determined by Dr. Prostic, the second opinion physician, exceeded the job requirements of the offered position in regard to the amount of standing that she was capable of performing. This position cannot be considered suitable work. The Office failed to meet its burden of proof to

⁴ 20 C.F.R. § 10.517(a).

⁵ *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

⁶ 20 C.F.R. § 10.516.

⁷ 20 C.F.R. § 10.508 (1999). This regulation applies to both those employees who are no longer on agency rolls and those employees who continue on the agency rolls.

terminate appellant's compensation benefits based on a refusal of a suitable work position based on the medical evidence.

CONCLUSION

The Board finds that the current medical evidence does not support that appellant was capable of performing the duties of the alleged "suitable work" position and that the Office, therefore, failed to meet its burden of proof to terminate her compensation benefits effective April 15, 2007.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 24, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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