



for lumbar and bilateral sacroiliac subluxations. Appellant stopped working on December 9, 2003, the date of injury and the Office placed him on the periodic rolls.

Appellant was treated by Dr. Howard Kuo, a Board-certified neurologist, and Dr. Julio Hip-Flores, a Board-certified internist. On September 1, 2004 Dr. Kuo diagnosed herniated disc at L4-5 and L2-3; cervical spine sprain and strain; and lumbosacral sprain and strain. He opined that appellant was able to work two days per week with restrictions, including no prolonged standing or sitting and no long-distance driving. In a September 2, 2004 second opinion report, Dr. David Rubinfeld, a Board-certified orthopedic surgeon, diagnosed degenerative disc disease of the lumbosacral and cervical spine. He stated that appellant had not fully recovered from the accepted condition, but opined that he was able to return to work full time as a security specialist, provided he be restricted from pushing, pulling or lifting more than 35 pounds, three hours per day. Dr. Rubinfeld noted that appellant took the narcotic percocet to control pain.

On September 7, 2004 appellant returned to work in a limited-duty capacity two days per week and three days per week effective October 18, 2004.

The Office found a conflict in medical opinion and referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, to resolve the conflict. In an April 7, 2005 report, Dr. Dennis opined that appellant's accepted condition had fully resolved and that he was capable of returning to work as a security specialist eight hours per day, five days per week with restrictions. In an accompanying work capacity evaluation, he recommended that appellant be restricted from kneeling or climbing; lifting, twisting or squatting more than one hour per day; sitting, walking, standing, bending or stooping more than four hours per day; or pushing or pulling more than 30 pounds more than four hours per day.

On May 5, 2005 the employing establishment terminated appellant due to his inability to meet the physical requirements of his position. On May 6, 2005 appellant filed a claim for a recurrence of disability, which was accepted by the Office on May 23, 2005. He was again placed on the periodic rolls.

The Office referred appellant for vocational rehabilitation. The record contains a December 27, 2005 report from Robert Sans, rehabilitation counselor, who stated that the employing establishment intended to extend a limited-duty job offer to appellant. Mr. Sans indicated that he had sent a letter to the employing establishment "instructing that they do not send the offer to [appellant] pending a review of the offer by OWCP [the Office]."

By letter dated January 13, 2006, the Office notified appellant that it found the position of security specialist to be medically suitable. It advised him that he had 30 days to accept the offer or provide reasons why he believed the position was not suitable. The Office also stated that a copy of the job offer was enclosed.

The record contains pages two and three of an undated document entitled, "Sub[ject]: RETURN TO WORK IN TEMPORARY LIMITED[-]DUTY CAPACITY UNDER OWCP CASE NUMBER 010294377." The document purports to constitute a job offer for the position of security specialist and states that the position description, which listed the duties of the

position offered, was included. The position description was not included with this document in the record.

Appellant submitted a January 5, 2006 report from Dr. Hip-Flores, who opined that he was totally disabled from work. In a report dated January 10, 2006, Dr. Kuo also stated that appellant was disabled due to his accepted condition.

In a February 6, 2008 letter to the Office, appellant declined the job offer referenced in the Office's January 13, 2006 letter. His decision was based on the advice of his physicians, who concluded that he was unable to meet the physical requirements of the position.

By letter dated February 8, 2006, the Office advised appellant that he had failed to provide valid reasons for refusing to accept the limited-duty job and that, if he had not accepted the position and arranged for a report date within 15 days of the date of the letter, his entitlement to wage-loss and schedule award benefits would be terminated. It stated that no additional reasons for refusal would be accepted.

In response to the Office's February 8, 2006 letter, appellant submitted medical evidence, including a March 6, 2006 impairment rating from Dr. David Weiss, a Board-certified family practitioner, a May 13, 2006 report from Dr. Kuo; and chiropractic notes from October 25, 2005 to May 23, 2006.

By decision dated June 27, 2006, the Office terminated appellant's wage-loss and schedule award benefits effective June 26, 2006, on the grounds that he had refused an offer of suitable work. It did not address the medical evidence submitted subsequent to its February 8, 2006 letter.

On July 6, 2006 appellant requested an oral hearing. He submitted additional medical evidence, including reports from Dr. Rebecca Roberts, a Board-certified osteopath, specializing in the area of family practice; Dr. Harold T. Laroche, a treating physician; and Dr. Alan J. Linkoff, a chiropractor. A telephonic hearing was held on November 13, 2006.

By decision dated February 2, 2007, the Office hearing representative affirmed the June 27, 2006 decision terminating appellant's entitlement to compensation and schedule award benefits, based on his refusal to accept a suitable offer of employment pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act. The representative found that the Office had followed all procedural requirements in terminating appellant's benefits.

On April 23, 2007 appellant requested reconsideration. In support of his request, he submitted numerous documents, including personnel records; chiropractic notes; correspondence with the Office; and forms completed in conjunction with a disability retirement application.

By decision dated May 11, 2007, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review.

## LEGAL PRECEDENT

Section 8106(c)(2) of the 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 him is not entitled to compensation.<sup>1</sup> The 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.<sup>2</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), 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.<sup>3</sup>

With respect to the procedural requirements of termination under 5 U.S.C. § 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow him 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 him a final opportunity to accept the position.<sup>5</sup>

20 C.F.R. § 10.505 provides in pertinent part:

“Upon authorizing medical care, the employer should advise the employee in writing as soon as possible of his or her obligation to return to work. The term ‘return to work’ as used in this subpart is not limited to returning to work at the employee’s normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position.

(a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.”<sup>6</sup>

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<sup>1</sup> 5 U.S.C. § 8106(c)(2).

<sup>2</sup> *M.L.*, 57 ECAB 746, 750 (2006); *Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

<sup>3</sup> *M.L.*, *supra* note 2. *Albert Pineiro*, 51 ECAB 310, 312 (2000).

<sup>4</sup> *Alfred Gomez*, 53 ECAB 149, 150 (2001); *see Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

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

<sup>6</sup> 20 C.F.R. § 10.505.

## ANALYSIS

The Office terminated appellant's entitlement to compensation benefits, based on his refusal to accept a suitable offer of employment pursuant to section 8106(c)(2) of the Act. The hearing representative found that the Office had followed all procedural requirements in terminating appellant's benefits. The Board disagrees and finds that the Office did not properly determine that appellant refused an offer of suitable work.

The Act's implementing regulations provide that, where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.<sup>7</sup> In the instant case, there is no evidence of record that appellant was given a written light work description from the employing establishment in compliance with section 10.505 of the regulations.

On January 13, 2006 the Office notified appellant that it found the position of security specialist to be medically suitable and advised him that he had 30 days to accept the offer or provide reasons why he believed the position was not suitable. It also stated that a copy of the job offer was enclosed. The Board notes that the record contains pages two and three of a document that purports to constitute a job offer for the position of security specialist. However, the document is incomplete and does not include a copy of the position description for the position offered. Moreover, there is no evidence establishing that appellant received a copy of the job offer prior to his receipt of the Office's January 13, 2006 letter.

On December 27, 2005 the rehabilitation counselor stated that the employing establishment intended to extend a limited-duty job offer to appellant. He instructed the employing establishment not to send the offer to appellant pending a review of the offer by the Office. The only evidence of a job offer was contained in the Office's January 13, 2006 30-day letter. In a February 6, 2008 letter to the Office, appellant declined the job offer referenced in the Office's January 13, 2006 letter, based on the advice of his physicians. The Board notes that no reference was made by appellant to any written work description received from the employing establishment. The only logical conclusion that can be drawn from this record is that the employing establishment did not provide appellant with a written job offer.

In this case, the record establishes that appellant did not receive a written description of the light-duty position until he received the Office's letter dated January 13, 2006. Accordingly, neither he nor his physician could have determined whether the job was within his medical restrictions prior to that time. The employing establishment's failure to provide appellant with a written job offer constitutes dispositive error.<sup>8</sup>

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

<sup>8</sup> *See C.S.*, Docket No. 06-2033 (issued August 6, 2007) (where the employing establishment failed to provide a written job offer to appellant in compliance with 20 C.F.R. § 10.505(a) prior to his receipt of the Office's suitability letter, the Board found that the Office improperly determined that the position offered was medically suitable).

**CONCLUSION**

The Board finds that the Office improperly terminated appellant's compensation and schedule award benefits effective June 26, 2006 on the grounds that he refused an offer of suitable work. In light of the Board's ruling on the first issue, the second issue is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 24, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board