

that under 5 U.S.C. § 8106(c)(2) an employee who refuses to work after suitable work is offered is not entitled to compensation and appellant had 30 days to accept the position or provide reasons for refusing acceptance. Through counsel appellant submitted a May 28, 2008 letter arguing that the job offer was not suitable. In a letter dated June 17, 2008, the Office advised appellant that the reasons for refusal of the job offer were not valid, and appellant had 15 days to accept the position or compensation for wage loss would be terminated.

Following the submission of a May 22, 2008 report from appellant's attending physician, Dr. James Pritchett, the Office determined that additional development of the medical evidence was necessary. A July 21, 2008 Office letter advised appellant that, upon resolution of the medical issue, his compensation may be terminated without further notice.

The Office referred appellant for a second opinion examination by Dr. Paul Reiss, an orthopedic surgeon. In a report dated August 6, 2008, Dr. Reiss opined that he was in agreement with Dr. Pritchett that appellant was capable of performing some employment. He completed a work restriction evaluation (OWCP 5c). The Office determined that a conflict in the medical evidence existed and appellant was referred to Dr. James Champoux, a Board-certified orthopedic surgeon, for a referee examination.

In a report dated October 27, 2008, Dr. Champoux provided a history and results on examination. He indicated that he did not review an April 25, 2008 job offer. On November 13, 2008 the Office sent appellant a copy of the job offer and requested an opinion as to whether appellant could perform the job duties. In a report dated November 24, 2008, Dr. Champoux stated, "I believe this job is reasonable for [appellant], based on my review of the medical records and my physical examination on October 27, 2008."

By decision dated December 30, 2008, the Office terminated appellant's compensation for wage loss on the grounds that he had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.¹ To justify such a termination, the Office must show that the work offered was suitable.² An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.³

¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

² *John E. Lemker*, 45 ECAB 258 (1993).

³ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

ANALYSIS

In this case, the Office had initially found that the modified sales, service and distribution associate position offered to appellant on April 25, 2008 was suitable, based on the existing medical restrictions from Dr. Pritchett. A May 14, 2008 letter advised appellant that the offered position was considered suitable and appellant had 30 days to accept the position or provide reasons for refusing the position.

Prior to the final decision, the Office undertook additional development of the medical evidence, and eventually concluded that the reports from referee physician, Dr. Champoux, were sufficient to establish the offered position as medically suitable. It is well established that, when the Office undertakes further development of the medical evidence after it has issued a 30-day letter, and seeks to terminate compensation under 5 U.S.C. § 8106(c)(2) based on new medical evidence, it must again provide a claimant with 30 days to accept the job offer or provide reasons for refusing.⁴ The Office cannot change the basis of its finding that the offered position was suitable, without providing a claimant notice and a meaningful opportunity to be heard on that basis.⁵ The Office's statement in its July 21, 2008 letter that it could terminate compensation without further notice is not supported by Board precedent or the Office's own procedures.⁶

The Board therefore finds the Office did not issue the December 30, 2008 decision in accord with the procedural requirements of 5 U.S.C. § 8106(c)(2).⁷ It is the Office's burden of proof to terminate compensation under 5 U.S.C. § 8106(c)(2), and the Office did not meet its burden of proof in this case.

CONCLUSION

The Board finds that the Office did not comply with the procedural requirements of 5 U.S.C. § 8106(c)(2) and therefore the Office did not properly terminate compensation for wage loss.

⁴ See *Adrienne L. Curry*, 53 ECAB 750 (2002) (the Office obtained an additional clarifying report from a referee physician after a letter finding the offered position was suitable; the Board held appellant was entitled to a new letter giving her 30 days to accept the position or provide reasons for refusing); *Barbara L. Chien*, 53 ECAB 579 (2002) (a conflict still existed at the time of the suitability letter and when the Office later received a referee's report, the Office should have given appellant an additional 30 days to accept the position or provide reasons for refusal). See also *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008).

⁵ *Adrienne L. Curry*, *supra* note 4.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d) (July 1997) (when further investigation of the issues regarding refusal of offer work is warranted, the claims examiner should contact the claimant for clarifying information and set another 30-day deadline).

⁷ On appeal, appellant raised issues regarding the sufficiency of the written job offer, the statement of accepted facts, and the medical evidence. The Board will not address the merits of the suitability determination in light of the procedural error in this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 30, 2008 is reversed.

Issued: December 3, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board