# United States Department of Labor
# Employees' Compensation Appeals Board

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| **J.N., Appellant** | ) | |
| **and** | ) | **Docket No. 10-1864** |
| | ) | **Issued: May 11, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer** | ) | |

*Appearances:*
*Thomas Ruther,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On July 7, 2010 appellant filed a timely appeal from a May 14, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether the Office properly terminated appellant's entitlement to monetary compensation on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

### *FACTUAL HISTORY*

Appellant filed a traumatic injury claim (Form CA-1) alleging a shoulder injury in the performance of duty on August 28, 1999 while working on a sorting machine. The Office accepted that she sustained shoulder injuries causally related to her federal employment as a mail handler: right shoulder sprain; right shoulder villodular synovitis; left shoulder impingement and

[1] 5 U.S.C. § 8101 *et seq.*

left shoulder rotator cuff tear. Appellant underwent left shoulder arthroscopic surgery on February 28, 2008 and received compensation for wage loss.

In a report dated June 11, 2008, Dr. Louis Rose, an attending orthopedic surgeon, opined that appellant should remain off work and continue physical therapy. The Office referred appellant for a second opinion evaluation by Dr. Stanley Soren, an orthopedic surgeon. In a report dated October 24, 2008, Dr. Soren provided a history and results on examination. He found that appellant could work full time, with restrictions that included 30 pounds lifting, no climbing or reaching above the shoulder.

The Office found a conflict in medical opinion and referred appellant to Dr. Martin Barschi, a Board-certified orthopedic surgeon. In a report dated February 11, 2009, Dr. Barschi opined that she could work full time with restrictions. He completed a work capacity evaluation (OWCP 5c) indicating that appellant could work with no reaching above shoulder, 20 pounds lifting and pulling and 30 pounds pushing.

On March 25, 2009 the Office received a light-duty job offer dated March 24, 2009. The job offer provided work restrictions in accord with Dr. Barschi's report.

By letter dated April 1, 2009, the Office advised appellant that the employing establishment had informed it that "an offer of work has been made to you" consistent with her work restrictions. Appellant was advised of the provisions of 5 U.S.C. § 8106(c) and the Office stated that she had 30 days to either accept the job or provide an explanation for refusing the position.

In a letter dated April 27, 2009, the employing establishment stated that it was attaching a light-duty job offer for eight hours a day "as per restrictions from [appellant's] second opinion physician, Dr. Barschi." Appellant was advised that she had 14 days (May 12, 2009) to accept the offer and that the job has been prepared to make reasonable accommodation for injury. The employing establishment also advised her of the provisions of 5 U.S.C. § 8106(c).

By decision dated May 6, 2009, the Office terminated appellant's entitlement to monetary compensation as she had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

In a memorandum of telephone call dated May 11, 2009, appellant indicated that she would attempt the job although she was not sure if she could physically perform the position. On May 14, 2009 she submitted a note that she had accepted the position on May 11, 2009.

On May 21, 2009 appellant requested a hearing before an Office hearing representative. A hearing was held on March 17, 2010.

By decision dated May 14, 2010, the Office hearing representative affirmed the May 6, 2009 Office decision. With regard to the April 27, 2009 employing establishment letter, the hearing representative stated that it "did not create an extension of time for [appellant] to respond to the Office's April 1, 2009 letter (30-day notice). Rather, the April 27, 2009 Postal Service letter pertained only to communication between the employing agency and the claimant regarding acceptance of the offered job."

## ***LEGAL PRECEDENT***

According to the Office's procedures, an offer of employment by the employing establishment to the claimant must be in writing and must include a description of the duties performed, physical requirements of the position, location of the job, date available and date for a response to the job offer.[2] 5 U.S.C. § 8106(c) 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.[3] To justify such a termination, the Office must show that the work offered was suitable.[4] 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.[5]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.[6] 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 her a final opportunity to accept the position.[7]

## ***ANALYSIS***

As noted, a claimant is subject to the provisions of 5 U.S.C. § 8106(c) after suitable work is offered. The procedural requirements of a suitable work determination provide that, when an offer of a position is made to a claimant, the Office will make a determination as to whether the offer is suitable and if so, advise appellant of its findings and provide an opportunity for the claimant to accept the position or provide reasons for rejecting the offer.

The Office issued an April 1, 2009 letter stating that appellant had been extended an offer of work. The evidence of record does not establish that the employing establishment made an offer to her as of April 1, 2009. The Office noted that appellant had received a copy of a job offer dated March 24, 2009. The clear language of the April 27, 2009 employing establishment letter suggests that it was not until that date that the employing establishment actually made a job offer to her. According to the April 27, 2009 letter, the job offer was attached and the employing

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (June 1996).

[3] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[4] *John E. Lemker*, 45 ECAB 258 (1993).

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

[6] *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992). *See also supra* note 2 at Chapter 2.814.4(c) (December 1993), which provides that a claimant be advised he/she has 30 days to accept the position or provide reasons for refusing.

[7] *Id.*

establishment described the work as comporting with the restrictions of Dr. Barschi. Appellant was advised that she had 14 days to accept the job. There was no evidence that the employing establishment had previously provided a written job offer to her, in accord with Office procedures noted above. It is not a question of whether the April 27, 2009 letter created an extension of time to respond to the April 1, 2009 letter. The Office cannot properly make a finding that a job offer is suitable until the employing establishment has made a written offer to the injured employee. The record does not support the finding in the April 1, 2009 letter that appellant received a job offer from the employing establishment as of that date.

The Board finds that the Office failed to properly follow its procedures with respect to 5 U.S.C. § 8106(c)(2). Appellant should have been provided with an appropriate letter noting the provisions of 5 U.S.C. § 8106(c)(2) and providing 30 days to respond after the job offer was made on April 27, 2009.

## ***CONCLUSION***

The Board finds the Office did not properly terminate appellant's compensation pursuant to 5 U.S.C. § 8106(c).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 14, 2010 is reversed.

Issued: May 11, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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