

FACTUAL HISTORY

On May 26, 2003 appellant, then a 48-year-old sorter clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right knee injury on May 23, 2003. She alleged that she injured her knee while casing mail. OWCP accepted the claim for right lateral collateral ligament sprain, right knee lateral meniscus tear and right knee chondromalacia patella. The record indicates that appellant underwent right knee surgeries for a meniscus tear on June 19 and August 28, 2003. She worked in a light-duty position and then stopped working and was placed on the periodic compensation rolls as of March 2005.

In a report dated September 10, 2007, Dr. Phillip LeNoach, an orthopedic surgeon selected as a second opinion physician, provided a history and results on examination. He stated that appellant's total disability had ceased as of July 26, 2007, when she was treated by an attending orthopedic surgeon, Dr. Arthur Wardell.² Dr. LeNoach completed an OWCP-5c report advising that appellant could sit for eight hours, with restrictions on other activity. Appellant was limited to 10 pounds of pushing and pulling for one hour, with no lifting.

In a letter dated January 14, 2008, OWCP advised appellant that she had been referred to a vocational rehabilitation counselor. In a report dated February 29, 2008, the rehabilitation counselor noted that she had met with appellant and the employing establishment would be contacted to determine job prospects.

On April 7, 2008 the employing establishment provided a written job offer for a modified clerk position. The job offer stated the duties were casing letters and flats using a distribution case for eight hours. The physical requirements included lifting/carrying of 10 to 20 pounds intermittently for up to two hours. On April 13, 2008 appellant refused the offer. She noted that her refusal was "due to medical problems request to come off OWCP..." The record indicates that on April 21, 2008 appellant elected Office of Personnel Management (OPM) retirement benefits effective May 15, 2008.

In a letter dated April 18, 2008, OWCP stated that it appeared appellant had "discontinued good faith participation in an OWCP-approved job placement program. The information received shows that you have failed to commit to a considered suitable job offer with your previous agency." OWCP discussed the purpose of vocational rehabilitation and advised that she must make a good faith effort in the placement program. Appellant was advised to contact OWCP and resume a good faith effort in the job placement program, and "[i]f you believe you have good reason for not resuming the placement effort, you should so advise this office in writing, giving the reasons and submitting any supporting evidence." If she did not contact OWCP within 30 days and resume a good faith effort in the placement program, or show good cause for discontinuing her effort, "the rehabilitation effort will be terminated and action will be taken to reduce your compensation to reflect your wage-earning capacity in a job which your rehabilitation counselor has found to be within your restrictions and abilities."

² The record contains a July 26, 2007 report from Dr. Wardell indicating that appellant could work with restrictions and a July 27, 2007 OWCP-5c form report (work capacity evaluation) that provided work restrictions.

By decision dated June 17, 2008, OWCP terminated entitlement to wage-loss and compensation benefits and a schedule award effective June 8, 2008 on the grounds that she had refused to accept suitable work under 5 U.S.C. § 8106(c).

In a letter dated June 16, 2009, appellant's representative requested reconsideration, contending that retirement was a valid reason for not accepting the job offer.

By decision dated February 26, 2010, OWCP reviewed the case on its merits and denied modification. It found the evidence was insufficient to warrant modification. In referring to the June 17, 2008 decision, OWCP stated that the decision was "based on the claimant's refusal to cooperate with ongoing vocational rehabilitation training." It cited the provisions of 5 U.S.C. 8113(b).

In a letter dated September 24, 2010, appellant, through her representative, again requested reconsideration. Appellant argues that the employing establishment could not allow her to accept the job offer because of her status with OPM.

By decision dated December 27, 2010, OWCP reviewed the case on its merits and denied modification. It stated that appellant declined a suitable job offer and also failed to participate in vocational rehabilitation.

LEGAL PRECEDENT

Section 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 OWCP'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, OWCP 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 OWCP 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, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.⁷

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).

⁷ *Id.*

OWCP procedures provide specific requirements for a termination under 5 U.S.C. § 8106(c). The claims examiner (CE) must confirm that the job remains open to the claimant, document the file using Form CA-110, and then advise the claimant in writing that:

“(1) The job is considered suitable.

“(2) The job remains open for the claimant.

“(3) The claimant will be paid compensation for the difference (if any) between the pay of the offered job and the pay of the claimant’s date-of-injury job.

“(4) The claimant can still accept the job with no penalty.

“(5) The claimant has 30 days from the date of the CE’s letter to either accept the job or provide a written explanation of the reason(s) for refusing it.

“(6) A claimant who unreasonably refuses an offer of suitable employment is not entitled to any further compensation benefits (with the exception of medical expenses for treatment of the accepted condition).”⁸

ANALYSIS

OWCP issued a decision dated June 17, 2008 which applied the provisions of 5 U.S.C. § 8106(c) for refusal of suitable work. The February 26, 2010 OWCP decision incorrectly attempted to characterize the decision as being issued pursuant to 5 U.S.C. § 8113(b), which involves an individual that without good cause fails to apply for and undergo vocational rehabilitation. This is a different provision of FECA that requires OWCP to make a finding that absent the failure of undergoing vocational rehabilitation, the wage-earning capacity of the individual would have substantially increased.⁹ OWCP may reduce compensation based on the wage-earning capacity that would have occurred in the absence of the failure to undergo vocational rehabilitation. In addition, 5 U.S.C. § 8113(b) only continues until the individual in good faith complies with vocational rehabilitation.¹⁰

The December 27, 2010 OWCP decision includes a brief finding that, in addition to refusing an offer of suitable work, appellant failed to participate in vocational rehabilitation. There are no references to 5 U.S.C. § 8113(b) or other relevant information. The termination of compensation effective June 8, 2008 was based on a refusal of suitable work under 5 U.S.C. § 8106(c), and there was no final decision properly issued pursuant to 5 U.S.C. § 8113(b).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (July 1997).

⁹ *See, e.g., B.A.*, Docket No. 11-686 (issued October 14, 2011).

¹⁰ *Id.*

Section 8106(c) is a penalty provision that terminates entitlement to compensation for wage-loss and schedule award benefits from that date forward.¹¹ The June 17, 2008 OWCP decision cited 5 U.S.C. § 8106(c), found that appellant had refused an offer of suitable work, and terminated entitlement to compensation for wage-loss and schedule award benefits.

As noted there are specific, well-established procedural requirements that must be followed prior to a termination under 5 U.S.C. § 8106(c). It is evident that the procedural safeguards were not followed in this case. OWCP must advise a claimant that it has found a job offer to be suitable, explain that the position must be accepted or reasons provided for refusing the position, provide an opportunity to accept the job or submit such reasons for refusal and explain the consequences under 5 U.S.C. § 8106(c) for refusing a suitable job.

The April 18, 2008 OWCP letter does not fulfill these requirements. The letter addresses the issues raised under compliance with vocational rehabilitation pursuant to 5 U.S.C. § 8113(b). While there is a reference to “a considered suitable job offer,” OWCP does not explain to appellant that the position must be accepted or specific reasons for refusing the position must be provided. Moreover, it does not properly advise appellant of the consequences for failing to accept the job offer or provide adequate reasons for refusing. The April 18, 2008 letter refers only to the termination of the “rehabilitation effort” and indicates that a wage-earning capacity issue would be further developed. It does not cite to 5 U.S.C. § 8106(c) or properly explain the penalty provision of this section.

The Board accordingly finds that the June 17, 2008 OWCP termination decision was improperly issued as it failed to follow the well-established procedures under 5 U.S.C. § 8106(c). OWCP did not meet its burden of proof in this case.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate compensation pursuant to 5 U.S.C. § 8106(c).

¹¹ See *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 27, 2010 is reversed.

Issued: March 5, 2012
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