

the employing establishment effective May 24, 1997. On August 27, 1997 the Office determined that these wages represented her wage-earning capacity and terminated appellant's compensation for wage loss. However, following surgery on August 20, 1998, appellant again received total disability compensation.

In a progress note dated May 22, 2003, Dr. Stephen S. Burkhart, a Board-certified orthopedic surgeon, indicated:

“[Appellant] has full range of motion with excellent strength. She complains of persistent pain in the right shoulder. She has a history of having had arthroscopic subacromial decompression in 1996 on the right by Dr. Joe Tippett, [a Board-certified orthopedic surgeon], and had a second arthroscopic procedure in 1998 by Dr. Karen Johnston Jones, [a Board-certified orthopedic surgeon specializing in surgery of the hand], which apparently was for arthroscopic distal clavicle excision.”

Dr. Burkhart further noted that he did not believe that an arthroscopy was appropriate unless appellant's symptoms were to increase. In response to an inquiry by the Office, Dr. Burkhart stated in a letter dated August 14, 2003:

“Certainly, I feel that [appellant] would be able to do some type of light job that would not require heavy lifting or any repetitive overhead work. I think she would need to have [a] lifting restriction of no overhead lifting and no lifting greater than 10 pounds. An ideal job for her would be one in which she did not have to do any significant lifting but which was essentially a desk job.”

By letter dated October 6, 2003, the Office indicated that a position offered by the employing establishment of modified distribution clerk was suitable to appellant's work capabilities, and that she had 30 days to accept the position or provide an explanation of the reasons for refusing it. The letter informed appellant that, if she failed to accept the offered position and failed to establish that the failure to accept was justified, her right to further compensation will be jeopardized pursuant to 5 U.S.C. § 8106(c)(2). Attached to the letter was a copy of a September 4, 2003 letter from the employing establishment to appellant wherein she was offered the position of modified distribution clerk. The position description noted that appellant would not have to lift over 10 pounds and would not perform overhead lifting. The position required intermittent use of appellant's hands for simple grasping and intermittent standing and walking. The position description indicated that the job would “be in strict compliance with [appellant's] physical limitation as determined by [her] physician.” The job offer does not indicate that repetitive lifting would be required.

In a letter dated October 20, 2003, appellant responded to the job offer made by the employing establishment. She indicated that the employing establishment was offering her the same job that she had previously, a job which caused her injuries. Appellant indicated that she did not think she could pass the physical. She contended that, contrary to the assertions by the employing establishment, this job required working overhead and lifting over 10 pounds.

By chart note dated November 4, 2003, Dr. Burkart indicated:

“I am going to send [appellant] to physical therapy, which I think she may need from time to time because of this chronic pain in her right trapezius area. However, I do not think I can help her any further with surgery on her right shoulder. She is to take Tylenol Extra Strength as needed for pain. It is my feeling that she should avoid repetitive lifting since this is what caused her problem in the first place. She apparently has been offered a job by the [employing establishment], which is a clerical distribution job, which would require repetitive lifting, but I do not think that would be good for her because I think it would probably get her back into problems again.”

In a letter dated November 6, 2003, appellant indicated that she was not able to accept the position for the medical reasons as set forth by Dr. Burkart. By letter dated November 6, 2003, the Office indicated that it considered appellant’s reasons for refusing the offered position unacceptable and gave her 15 additional days to accept the position.

By decision dated December 3, 2003, the Office found that appellant’s entitlement to wage-loss and schedule award compensation benefits were terminated effective November 30, 2003 because she refused to accept suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.¹ The burden of proof applies where the Office terminates compensation under 5 U.S.C. § 8106(c), which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.² The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.³

To justify termination, the Office must show that the work offered was suitable based on the claimant’s work restrictions at that time and that the employee was informed of the consequences of his refusal to accept such employment.⁴ An employee who refuses or neglects to work after suitable work has been offered to him must show that such refusal to work was

¹ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

² *Tammy L. Flickinger*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003); *Stephen R. Lubin*, 43 ECAB 564 (1992).

³ *Linda D. Guerrero*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003).

⁴ *Joan F. Burke*, 54 ECAB ____ (Docket No. 01-39, issued February 14, 2003); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

justified.⁵ The employee shall be provided with the opportunity to make such a showing before the Office terminates entitlement to compensation.⁶

ANALYSIS

The Board finds that the limited-duty job offered to appellant constituted suitable work based on the opinion of Dr. Burkhart, who stated that appellant could do work that did not require lifting greater than 10 pounds with no overhead lifting and did not require any repetitive overhead work. The Board notes that the description of job duties provided on the limited-duty work offer specifically stated that appellant was not required to lift over 10 pounds or perform overhead lifting. The position required only intermittent use of appellant's hands for simple grasping and intermittent standing and walking. The position description does not indicate that the job would require repetitive lifting. Furthermore, the description specifically indicated that appellant's job would be within her physician's requirements. Because the limited-duty job offer is within the work restrictions provided by Dr. Burkhart, the Office met its burden to establish that the position was suitable.

In the case of *Maggie L. Moore*,⁷ the Board held that, when the Office makes a preliminary determination of suitability and extends the employee a 30-day period either to accept the position or to give reasons for not accepting the position, the Office must consider any reasons given for not accepting the position before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of section 8106(c) without first affording the employee the opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.⁸

Because appellant was offered a suitable job, she had the burden to demonstrate that her refusal to work was justified. The regulations at 20 C.F.R. § 10.516 codified the Board's ruling in *Moore*. This regulation provides that, if the "[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." If the employee does not accept the job within the 15-day period, compensation, including schedule award payments, will be terminated under section 8106(c).⁹

The Office followed these procedures and afforded appellant the protections set forth in *Moore*. The Office gave appellant a reasonable opportunity to accept the offer of employment,

⁵ 20 C.F.R. § 10.517(a) 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. See *Sandra K. Cummings*, 54 ECAB ____ (Docket No. 03-101, issued March 13, 2003).

⁶ 20 C.F.R. § 10.516.

⁷ *Supra* note 4.

⁸ *Id.*

⁹ See 20 C.F.R. § 10.516-517; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d), 2.814.5(d)(1) (July 1997).

notified her of the penalty provision of section 8106(c) and properly considered her reasons for refusing the offered job. Although appellant submitted evidence from her treating physician to justify her refusal to work, this evidence indicated that Dr. Burkhart opined that he did not think repetitive lifting “would be good for her because I think it would probably get her back into problems again.” When appellant did not accept this offer, the Office properly invoked the penalty provision of section 8106(c). Thus, the Board finds that the Office met its burden of proof in terminating appellant’s compensation.

Regarding appellant’s contention that she is entitled to a schedule award, it is well established that once compensation is terminated pursuant to section 8106(c)(2), it is a bar to receipt of compensation for a schedule award after the date of termination. The penalty provision of section 8106(c) serves as a bar to a claimant’s entitlement to further compensation for total disability, partial disability or a schedule award for permanent impairment arising out of an accepted employment injury.¹⁰

CONCLUSION

The Board finds that the Office properly terminated appellant’s compensation effective November 30, 2003 because she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated December 3, 2003 is affirmed.

Issued: December 22, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ See *Albert Pineiro*, 51 ECAB 310, 313 (2000); *Stephen R. Lubin*, 43 ECAB 564 (1992).