U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD Y. MIYASHIRO and U.S. POSTAL SERVICE,
POST OFFICE, Kailua, HI

Docket No. 97-1002; Oral Argument Held June 16, 1999;
Issued December 23, 1999

Appearances: *Kerstin Miyashiro,* for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he had refused an offer of suitable work; (2) whether the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error; and (3) whether appellant has established an employment-related disability during the period August 1989 to April 1993.

The case has been before the Board on two prior appeals. In a decision dated August 27, 1992, the Board found that the weight of the medical evidence established that appellant's employment-related disability ended by August 27, 1989.[1] In a decision dated October 28, 1994, the Board found that there was sufficient evidence to require further development of the evidence with respect to a shoulder injury as a consequence of authorized surgery in 1986.[2] The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

Following the Board's remand, the Office further developed the record and accepted that appellant sustained a consequential left shoulder impingement injury resulting in disability as of April 20, 1993.

By decision dated March 25, 1996, the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. This decision was affirmed by an Office hearing representative in a decision dated October 17, 1996.

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[1] 43 ECAB 1101 (1992).

[2] Docket No. 93-2383.

By decision dated December 19, 1996, the Office determined that appellant had submitted a March 8, 1996 request for reconsideration that was untimely and failed to show clear evidence of error. In a decision dated January 15, 1997, the Office determined that appellant was not entitled to compensation during the period August 1989 to April 20, 1993.

The Board has reviewed the record and finds that the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

The Federal Employees' Compensation Act, at 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 appellant a final opportunity to accept the position.[7]

In this case, the Office advised appellant by letter dated February 1, 1996 that it found the offered position of rehabilitation clerk to be suitable, noted the provisions of section 8106(c), and provided appellant an opportunity to accept the position or provide reasons for refusing the position. By letter dated March 8, 1996, the Office advised appellant that the reasons for refusing the position were not acceptable and appellant had a final opportunity to accept the position. Accordingly, the Board finds that the Office met the procedural requirements of termination under section 8106(c)(2).

With respect to the determination that the offered position was suitable, the record indicates that an attending physician, Dr. Stephen Kay, an orthopedic surgeon, received a description of the job offer and on January 18, 1996 approved the job offer. Appellant does not appear to contest that the position was medically suitable, nor is there any evidence that the offered position in this case was not suitable.

[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. § 10.124(c).

[6] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] *Id.*

Appellant's primary contention is that the Office failed to accept the reasons he presented for refusing the position. In a letter dated February 1, 1996, appellant indicated that he and his family had relocated in Cypress, California, since 1988, had recently purchased a house, their children were established in California schools, and his wife's employer did not have offices in Hawaii, the location of the offered position.[8] Appellant also indicated that he did not know if the employing establishment would pay for his relocation expenses. In a letter dated March 12, 1996, appellant stated that "the most essential reason [for refusing the job offer] is lack of funding and not being able to purchase a home. In other words, this move is financially prohibitive unless the [employing establishment] will pay for all we asked."

The Board has recognized that there may be situations when a relocation is financially prohibitive and would constitute a valid reason for refusing a valid job offer.[9] The cost of relocation includes the cost of moving as well as the cost of finding affordable housing in a new area.[10] In *Contreras*, the Board found that there was substantial and uncontradicted evidence that appellant had few assets, significant debts, and had no source of funds to contribute to the cost of relocation. In the present case, however, there is insufficient evidence to establish that the cost of relocation would be financially prohibitive. With respect to the cost of moving, the employing establishment clearly indicated a willingness to reimburse some of appellant's moving expenses. For example, a January 28, 1996 letter from the employing establishment advised appellant that moving expenses would be paid, listing the specific types of expenses that would be reimbursable.[11]

In addition, there is little probative evidence that the cost of finding affordable housing would be financially prohibitive in this case. Appellant submitted a statement dated February 1, 1996 from a real estate agent in Houston, Texas, stating that she had worked as a realtor in Hawaii until 1992, and she had kept up with the Hawaii market through publications and telephone communications. The agent stated that Hawaii was the most expensive real estate market in the country and the average price for a home in Hawaii was approximately $350,000.00. There is a brief discussion of general housing prices in the Kaneohe area; the Board notes that the job offer to appellant was at the Kailua Post Office, and there is no specific mention of housing availability in Kailua. No evidence is presented as to the amount of equity or estimated sales price for appellant's house in California, nor is there probative evidence that all housing opportunities in the commuting area of the offered position would be financially prohibitive to appellant.[12] The unsupported allegation that the employee would be unable to

[8] The record indicates that appellant had moved from Hawaii to Las Vegas in October 1986. There is no indication that appellant was on the agency rolls at the time of relocation. *Cf. Fred L. Nelly*, 46 ECAB 142 (1994).

[9] *Ricardo G. Contreras*, 39 ECAB 777 (1988).

[10] *Id.*

[11] The Board notes that when an employee relocates after having been terminated from the agency's employment rolls, reasonable and necessary relocation expenses may be paid by the Office. 20 C.F.R. § 10.123(f).

[12] Appellant submitted a portion of a newspaper classified section showing advertisements for rental properties, which showed a wide range of monthly rental prices.

afford to live in the relocating city, nor the desire to remain in a less expensive area, are sufficient reasons to decline an offer of suitable work.[13]

The Board accordingly finds that the reasons presented by appellant are not considered to be acceptable reasons for refusing an offer of suitable work. The Office properly found the position to be suitable, and appellant failed to justify that his refusal to accept the position was appropriate.

The Board further finds that the Office properly found appellant's March 8, 1996 request for reconsideration to be an untimely request for reconsideration that did not show clear evidence of error.

Section 8128(a) of the Act[14] does not entitle a claimant to a review of an Office decision as a matter of right.[15] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[16] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[17] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[18] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[19]

As noted above, the Board issued a decision dated October 28, 1994. A merit decision of the Board provides a one-year period to request reconsideration of a final decision of the Office. The record contains a letter dated September 29, 1995, but this letter does not constitute a valid request for reconsideration. Appellant stated that he was requesting a merit review of his claim, and he proceeded to discuss his consequential shoulder injury and the appropriate dates of disability. There was, however, no adverse final decision on these issues at that time. In a letter dated March 8, 1996, appellant requested reconsideration, and discussed his neck, low back and shoulder injuries sustained in 1984. This is a valid request for reconsideration of the termination

[13] *Carl N. Curts*, 45 ECAB 374 (1994).

[14] 5 U.S.C. § 8128(a).

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[16] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[17] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[18] 20 C.F.R. § 10.138(b)(2).

[19] *See Leon D. Faidley, Jr.*, *supra* note 15.

of benefits as of August 1989. Since it is more than one year after the October 28, 1994 decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[20] In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[21]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[22] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[23] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[24] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[25] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[26] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[27] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[28]

In the March 8, 1996 letter, appellant argued that Dr. Reed's report was incorrect, and he submitted reports dated July 5, 1995 and March 4, 1996 from Dr. Robert S. Pashman, an orthopedic surgeon, who stated that a February 1996 MRI scan of the lumbar spine supported appellant's contention of an organic basis to his symptoms; that the etiology was no doubt contributed to by his original work-related injury and that isthmic spondylolisthesis is commonly

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[20] *Leonard E. Redway*, 28 ECAB 242 (1977).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[22] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[23] *See Leona N. Travis*, 43 ECAB 227 (1991).

[24] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[25] *See Leona N. Travis*, *supra* note 23.

[26] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[27] *Leon D. Faidley, Jr.*, *supra* note 15.

[28] *Gregory Griffin*, 41 ECAB 458 (1990).

asymptomatic until incited by an injury and sometimes the symptoms do not subside. He does not discuss appellant's condition in August 1989, nor otherwise fully explain his opinion as to a period of employment-related disability. Dr. Pashman's reports are therefore of diminished probative value to the issue presented, and are not sufficient to show clear evidence of error in the termination of appellant's compensation.

The Board further finds that appellant has not established an employment-related disability during the period August 28, 1989 to April 19, 1993.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.[29]

In the present case, the Board has previously discussed an August 31, 1989 report from Dr. Vincent C. Kent, an orthopedic surgeon, a May 15, 1990 report from Dr. Jacob Rabinovich, an orthopedic surgeon, and a May 23, 1991 report from Dr. James A. Turner, an orthopedic surgeon.[30] The Board noted that all of these reports were of diminished probative value. Moreover, appellant has not submitted any new medical evidence that is sufficient to establish an employment-related disability during the period in question. For example, appellant submitted reports commencing April 24, 1995 through October 30, 1996 from Dr. Kay with respect to appellant's left shoulder condition, but Dr. Kay does not discuss an employment-related disability from August 1989 to April 1993. In the absence of probative medical evidence, the Board finds that appellant has not met his burden of proof in this case.[31]

[29] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[30] 43 ECAB 1101 (1992).

[31] The Board notes that, following the June 16, 1999 oral argument, appellant requested that the Board refuse to consider the Director's June 7, 1999 memorandum in justification on the grounds that it was untimely. The record indicates, however, that the Board granted the Director until June 7, 1999 to file a pleading, and therefore the memorandum in justification was timely filed.

The decisions of the Office of Workers' Compensation Programs dated January 15, 1997, December 19 and October 17, 1996 are affirmed.

Dated, Washington, D.C.
December 23, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member