United States Department of Labor
Employees' Compensation Appeals Board

R.K., Appellant	)	
and	)	**Docket No. 08-2022**
	)	**Issued: August 25, 2009**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Brooklyn, NY, Employer	)	

Appearances:
Stephen I. Feder, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 11, 2008 appellant, through counsel, filed a timely appeal of a June 6, 2008 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated March 12, 2007 and the filing of the appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On January 10, 1997 appellant, then a 31-year-old clerk, filed a traumatic injury claim alleging that she injured her back, leg, shoulder and head on that date as a result of being pushed out of a chair by a coworker. She stopped work on January 10, 1997. The Office accepted

appellant's claim for multiple contusions to the body. By letter dated May 3, 2006, the Office accepted that she sustained a recurrence of disability beginning on March 11, 2006 causally related to her January 10, 1997 injury.

On May 8, 2006 the employing establishment offered appellant a modified clerk position based on the April 24, 2006 work restrictions of Dr. Laxmidhar Diwan, an attending Board-certified orthopedic surgeon.[1] By letter dated May 10, 2006, the Office advised her that the offered position was suitable, currently available and within her physical restrictions and commuting area. Appellant was afforded 30 days to either accept the position or submit a written explanation for her refusal. The Office notified her of the statutory penalty for refusing an offer of suitable work.

On June 9, 2006 appellant rejected the job offer. She contended that the offered position was not within her physical restrictions and it did not allow her to take two consecutive days off to rest as required by an attending physician. Appellant was concerned about her personal safety in the position as it required her to sit at a desk in a lobby while all of her coworkers worked behind a bulletproof window.

On June 13, 2006 the Office advised appellant that she had not provided any valid reasons for refusing the employing establishment's job offer. It notified her that she had 15 days to accept the offer.

By decision dated July 11, 2006, the Office terminated appellant's compensation effective that date for refusing an offer of suitable work. On August 9, 2006 she requested an oral hearing before an Office hearing representative.

In a March 12, 2007 decision, an Office hearing representative affirmed the termination of appellant's compensation. She found that the offered position was suitable, that the Office complied with all procedural requirements and that appellant refused an offer of suitable employment.

On June 25, 2007 appellant requested reconsideration. In an April 18, 2007 report, Dr. Diwan stated that appellant required two consecutive days off work to rest from her employment-related injury and to prevent further damage or an acute exacerbation of the employment-related injury.

By decision dated July 18, 2007, the Office denied appellant's request for reconsideration. It found that the evidence submitted was repetitious in nature and, thus, insufficient to warrant further merit review of its prior decisions.

In a letter dated March 13, 2008, received by the Office on March 14, 2008, appellant, requested reconsideration of the March 12 and July 18, 2007 decisions. Counsel contended that

[1] Dr. Diwan restricted appellant from sitting and standing more than 15 to 20 minutes, lifting more than 10 pounds, reaching, climbing, bending, pushing and pulling. The offered modified clerk position required appellant to work from 11:00 a.m. to 7:30 p.m. with Sundays and Thursdays off. It also required answering customer inquiries and directing customers to lines. A table and chair would be provided to appellant. The physical requirements included sitting and standing at will, and no reaching, climbing, bending, pushing and pulling.

the offered position was not within appellant's physical restrictions. He stated that the requirements of the position were similar to the requirements of a lobby director, a position previously held by appellant for only two days because she suffered from pain. Counsel contended that the hearing representative did not consider her hearing testimony regarding this work experience.

Appellant submitted a partial copy of the December 19, 2006 hearing transcript, which documented her testimony regarding her inability to sit and stand in the lobby director position and requirement of having two consecutive days off work. A March 12, 2008 letter of Jim Musumeci, a union president, described the requirements of the lobby director position. He stated that the position required continuous sitting and standing for long periods of time depending on customer needs, and weighing and lifting heavy bundles and packages. Mr. Musumeci stated that the position was not limited to answering customer inquires or directing customers to lines as stated by the employing establishment. A copy of the lobby director position was submitted by appellant. In a March 13, 2008 report, Dr. Diwan stated that appellant was unable to work as a lobby director because it required continuous sitting and standing and lifting weights which were beyond her medical restrictions. He opined that these requirements would create undo strain and pressure on her already weak spinal musculature and nerve components, and further increase her radiculopathy and parasthesia. Dr. Diwan noted that appellant previously worked in an identical position for a short period of time but was unable to continue working due to her medical condition. He had always required her to have two consecutive days off work and did not see the need to order it again. An undated treatment note with an illegible signature stated that appellant sustained an injury on January 10, 1997 and that she suffered from low back pain which radiated to her right knee. She was restricted from heavy lifting.

By decision dated June 6, 2008, the Office found that appellant's March 14, 2008 letter requesting reconsideration was dated more than one year after the March 12, 2007 merit decision, and was untimely. It further found that she did not submit any evidence establishing clear evidence of error in the Office's denial of her claim.[2]

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

"(1) end, decrease or increase the compensation awarded; or

[2] On appeal appellant has submitted new evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

"(2) award compensation previously refused or discontinued."[3]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[4] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the employing establishment within the time period allowed.[5]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[6]

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the March 12, 2007 merit decision. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[7]

On appeal, appellant, through counsel, contended that the Office incorrectly stated that her request for reconsideration was dated March 14, 2008 rather than March 13, 2008. The Board finds that appellant's request for reconsideration is dated March 13, 2008. The most recent merit decision was issued by the Office hearing representative on March 12, 2007. The hearing representative affirmed the termination of appellant's compensation on the grounds that she refused an offer of suitable employment. As her March 13, 2008 letter requesting reconsideration was made more than one year after the Office hearing representative's March 12, 2007 decision, the Board finds that it was not timely filed.

The Board further finds that appellant has not submitted evidence establishing clear evidence of error by the Office in finding that she refused an offer of suitable work. Appellant's attorney contends that the offered position did not conform to her physical restrictions, that the

[3] 5 U.S.C. § 8128(a).

[4] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] 20 C.F.R. § 10.607(a).

[6] *Id.* at § 10.607(b).

[7] *Larry L. Litton*, 44 ECAB 243 (1992).

requirements of this position were similar to those of a lobby director which appellant previously performed for only two days due to pain, and that the Office hearing representative failed to consider appellant's hearing testimony regarding this prior work experience. These arguments, however, do not establish clear evidence of error. The evidence reflects that the offered position was based on the restrictions set forth by Dr. Diwan, appellant's attending physician. The Board finds that counsel's arguments are not of sufficient probative value to shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of the Office's decision.[8]

The December 19, 2006 hearing transcript reflects that appellant argued that she was unable to sit and stand as a lobby director and required two consecutive days off work. Mr. Musumeci's March 12, 2008 letter described the requirements of the lobby director position which were different from those set forth in the employing establishment's job offer. A copy of the lobby director position set forth its requirements. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. The submission of factual evidence does not show clear evidence of error because it is not relevant to the main issue in the present case, which is medical in nature. The Board finds that the hearing transcript, Mr. Musumeci's letter and position description do not raise a substantial question concerning the correctness of the Office's March 12, 2007 termination decision and, therefore, do not establish clear evidence of error.

Dr. Diwan's March 13, 2008 report stated that appellant was unable to work as a lobby director because it required her to work beyond her medical restrictions which included no continuous sitting and standing or lifting weights. He opined that these requirements would create undo strain and pressure on her already weak spinal musculature and nerve components, and further increase her radiculopathy and parasthesia. Dr. Diwan indicated that appellant previously worked in an identical position for a short period of time but, she was unable to continue to do so due to her medical condition. He recommended two consecutive days off work. The Board notes that the offered clerk position allowed appellant to sit and stand at will. It also provided her with a chair and table. Dr. Diwan did not provide sufficient medical rationale explaining why appellant have two consecutive days off work due to the accepted January 10, 1997 employment injury. It is well established that a fear of future injury is not a sufficient basis on which to reject an offer of suitable work.[9] The Board finds that Dr. Diwan's March 13, 2008 report does not shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of the Office's termination decision and, therefore, does not establish clear evidence of error.

An undated treatment note with an illegible signature stated that appellant sustained an injury on January 10, 1997 and that she suffered from low back pain which radiated to her right knee. She was restricted from heavy lifting. This evidence does not provide clear evidence of error because it bears an illegible signature which makes it impossible for the Board to determine

[8] *Nancy Marcano*, 50 ECAB 110 (1998).

[9] *See, e.g., Antoinette Florian*, Docket No. 04-2227 (issued May 4, 2005), *citing Edward P. Carroll*, 44 ECAB 331 (1992).

whether the person completing the report qualifies as a physician as defined by the Act.[10] Additionally, the report does not address the issue of whether appellant was able to perform the duties of the offered modified clerk position.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 25, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[10] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).