U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLA M. SAPP and U.S. POSTAL SERVICE,
POST OFFICE, City of Industry, CA

Docket No. 99-1850; Submitted on the Record;
Issued April 3, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

In August 1992, the Office accepted that appellant, then a 44-year-old distribution clerk, sustained employment-related bilateral carpal tunnel syndrome. The Office earlier accepted that appellant sustained an employment-related musculoligamentous strain of her right arm. Appellant was terminated from the employing establishment in April 1991 due to lack of limited-duty work and she began to receive temporary total disability compensation. By award of compensation dated October 23, 1997, the Office granted appellant a schedule award for a 20 percent permanent impairment of her right arm and a 5 percent permanent impairment of her left arm. By decision dated October 7, 1998 and finalized October 9, 1998, an Office hearing representative affirmed the Office's October 23, 1997 decision. By decision dated March 3, 1999, the Office denied appellant's reconsideration request on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

In April 1995, appellant was referred for vocational rehabilitation services and she enrolled in a training program to become an x-ray technician.[1] She successfully completed the training program in mid 1998, but she failed to return to school in July 1998 in order to begin an internship.

[1] In October 1994, Dr. Brent W. Miller, an attending Board-certified orthopedic surgeon, indicated that appellant could return to limited-duty work with a restriction from lifting more than 10 pounds. In October 1995, Dr. Miller noted that appellant could lift up to 25 pounds.

By letter dated October 26, 1998, the Office advised appellant of its determination that she had failed to participate in vocational rehabilitation efforts. The Office informed appellant that if she without good cause failed to undergo vocational rehabilitation, she would have her compensation reduced based on what probably would have been her wage-earning capacity had she not failed to undergo vocational rehabilitation. The Office directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed she had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. The Office stated that if these instructions were not followed within 30 days action would be taken to reduce her compensation.

By decision dated March 3, 1999, the Office reduced appellant's compensation effective April 11, 1999 under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. The Office determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to her wage-earning capacity, it further found that, if appellant had participated in good faith in vocational rehabilitation, she would have been able to perform the position of x-ray technician.

The Board finds that the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts.

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.[2]

Section 8113(b) of the Federal Employees' Compensation Act provides:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[3]

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed. section 10.519(a) provides in pertinent part:

> "Where a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational

[2] *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

[3] 5 U.S.C. § 8113(b).

> rehabilitation. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."[4]

A review of the record indicates that appellant was offered repeated opportunities to complete the agreed upon vocational rehabilitation plan. Although she successfully completed the training program for becoming an x-ray technician in mid 1998, she failed to return to school in July 1998 in order to begin an internship. Appellant's vocational rehabilitation counselor made numerous telephone calls and sent letters to appellant's house, but appellant did not respond to these calls and letters. In an October 26, 1998 letter, the Office advised appellant regarding the consequences of not continuing with vocational rehabilitation efforts, but appellant did not respond to this letter.

There is no evidence, therefore, that appellant's failure to fully participate in the vocational rehabilitation program was based on "good cause."[5] The record reflects that, if appellant had participated in good faith in vocational rehabilitation, she would have been able to perform the position of x-ray technician. For these reasons, the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts.

The Board further finds that the case is not in posture for decision regarding the refusal of the Office to reopen appellant's case for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[7] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[8] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[9] The Board has found that the imposition of the

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[4] 20 C.F.R. § 10.519(a).

[5] *See Michael D. Snay*, 45 ECAB 403, 410-12 (1994). It should be noted that the x-ray technician position required lifting up to 10 pounds and there is no medical evidence of record which shows that appellant could not meet the physical requirements of the position.

[6] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2).

[8] 20 C.F.R. § 10.607(a).

[9] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[10]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[11] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[12]

In its March 3, 1998 decision, the Office improperly determined that appellant failed to file a timely application for review regarding her entitlement to schedule award compensation. By letter December 29, 1998, appellant requested reconsideration of the Office's determinations regarding her entitlement to schedule award compensation.[13] The Office rendered its last merit decision on October 9, 1998 and appellant's request for reconsideration was dated December 29, 1998, less than one year after October 9, 1998.

Therefore, the Office improperly applied the "clear evidence of error" standard in denying appellant's reconsideration request. The case should be remanded to the Office for consideration of appellant's reconsideration request under the appropriate standards for a timely reconsideration request, to be followed by an appropriate decision.

[10] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[11] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). The Office therein states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

[13] Appellant submitted medical reports and other documents in support of her reconsideration request. She also made arguments regarding the competence of Dr. Miller to evaluate her impairment.

The decision of the Office of Workers' Compensation Programs dated May 3, 1999 is affirmed. The decision of the Office dated March 3, 1999 is set aside and case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
April 3, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member