

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORI J. ROBERTS and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 00-1124; Submitted on the Record;
Issued December 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review.

On March 14, 1992 appellant, then a 31-year-old mail processor, sustained employment-related cervical and lumbar strains, right shoulder impingement and aggravation of degenerative disc disease.¹ She stopped work on March 16, 1992 and returned to four hours of light duty on September 3, 1992. On December 10, 1992 she filed a claim, alleging that she sustained a recurrence of disability on December 4, 1992 when she stopped work. By decision dated March 31, 1992, the Office denied the recurrence claim on the grounds that the medical evidence failed to establish that appellant was totally disabled. She continued to receive wage-loss compensation for four hours a day. On February 25, 1994 the employing establishment offered her a modified distribution clerk position which she accepted on March 8, 1994.

On June 21, 1995 the Office offered appellant a modified distribution clerk position for eight hours per day. Appellant did not respond and stopped work on July 20, 1995. By letter dated August 1, 1995, the Office advised appellant that the position offered was suitable. In an August 10, 1995 letter, appellant responded that she was "staying and working" within the job offer of February 1994. On September 13, 1995 she filed a recurrence claim, stating that she had a flare-up of pain on July 20, 1995. By letter dated October 16, 1995, the Office advised appellant that the reason given for not accepting the job offer was unacceptable.

¹ The record further indicates that on July 10, 1989 appellant sustained an employment-related lumbar strain. She missed one week's work, returned to light duty and on September 15, 1989 returned to full duty. On April 28, 1990 she sustained employment-related right shoulder and cervical strains. She was off work for two weeks and missed intermittent periods thereafter until June 30, 1990 when she returned to full duty.

By decision dated November 3, 1995, the Office terminated appellant's wage-loss compensation, effective October 31, 1995, on the grounds that she refused an offer of suitable work. An employing establishment investigative report dated November 21, 1995 advised that appellant was witnessed painting her porch railing and doing yard work, including mowing, weeding and sweeping. Appellant timely requested reconsideration of the Office decision, and in a decision dated March 8, 1996, the Office denied modification of the prior decision. On March 14 and April 19, 1996 appellant again requested reconsideration. In decisions dated March 20 and July 17, 1996, the Office denied appellant's requests. By letter dated May 26, 1998, she filed an appeal with the Board. In an order dated February 26, 1999, the Board dismissed the appeal on the grounds that it was untimely filed.² On June 10, 1999 appellant filed a recurrence claim, alleging that on June 3, 1999 she sustained a recurrence of disability. On November 9, 1999 appellant, through counsel, requested reconsideration with the Office. By decision dated February 11, 2000, the Office denied the request on the grounds that it had not been filed within one year of the March 8, 1996 merit decision and did not show clear evidence of error. The instant appeal follows.

The only decision before the Board is the Office's February 11, 2000 decision denying appellant's request for reconsideration of the March 8, 1996 decision. Because more than one year had elapsed between the issuance of this decision and February 28, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 8, 1996 Office decision.³

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁴ The Office 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.⁵ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁶

The Board finds that as more than one year had elapsed from the date of issuance of the Office's March 8, 1996 merit decision and appellant's request for reconsideration dated November 9, 1999, her request for reconsideration was untimely. The Board further finds that the arguments made by appellant in support of this request do not raise a substantial question as to the correctness of the Office's March 8, 1996 merit decision.⁷

² Docket No. 98-1853.

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.607(b) (1999); see *Gladys Mercado*, 52 ECAB ____ (Docket No. 00-898, issued February 12, 2001).

⁶ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ The Board notes that, in the February 11, 2000 decision, the Office cited federal regulations that were no longer in effect. The Board deems this error harmless, however, as the proper regulation found at 20 C.F.R. § 10.607(b) contains substantially equivalent language.

In support of her November 9, 1999 reconsideration request, appellant submitted a copy of a grievance arbitration decision dated September 17, 1997 which found that the employing establishment's removal of appellant on June 10, 1996 was without just cause because she was not interviewed prior to the initiation of the discipline. Appellant was then reinstated to her position. The Board, however, has held that findings by a different federal agency are not dispositive regarding issues arising under the Act where such findings are made pursuant to different standards of proof. In a case such as this where the issue of whether appellant abandoned suitable work is, in part, a medical issue and the grievance finding that the employing establishment erred in not interviewing appellant prior to her dismissal is of little relevance.⁸

The record also contains a number of medical reports submitted subsequent to the March 8, 1996 decision.⁹ None of these, however, contains an opinion regarding the suitability of the position offered to appellant in September 1995.

Lastly, appellant's counsel contends that she did not refuse suitable employment because she returned to work. The record indicates, however, that by letter dated August 1, 1995 the Office advised appellant of the penalty provisions of section 8106, that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position. In a second letter dated October 16, 1995, appellant was advised that her reasons for not accepting the offered position were not acceptable and gave her an additional 15 days. She did not respond, and the Office issued the November 3, 1995 decision finding that appellant refused an offer of suitable work. It was only then that appellant contacted the employing establishment about returning to work.¹⁰

Office procedures provide that 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 an error. Evidence such as a well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case.¹¹ In this case, the Board finds that the evidence and argument submitted by appellant are insufficient to establish clear evidence of error on the part of the Office.¹² Therefore, as appellant did not, by the submission of factual and medical evidence, raise a substantial question as to the correctness of the Office's March 8, 1996 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

⁸ See *Wayne E. Boyd*, 49 ECAB 202 (1997).

⁹ This evidence consists of treatment notes from appellant's treating Board-certified orthopedic surgeon, Dr. James T. Bilbo, dating from April 25, 1996 to October 31, 1997 and reports from another treating Board-certified orthopedic surgeon, Dr. Francis X. Florez dating from November 11, 1998 to December 20, 1999.

¹⁰ Appellant apparently returned to four hours work per day on November 8, 1995.

¹¹ *Jeanette Butler*, 47 ECAB 128 (1995).

¹² See *Gladys Mercado*, *supra* note 5.

The decision of the Office of Workers' Compensation Programs dated February 11, 2000 is hereby affirmed.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member