

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YOUNG O. CODER and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Dallas, TX

*Docket No. 02-1744; Submitted on the Record;
Issued January 10, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

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

On March 22, 1991 appellant, then a 42-year-old flat sorter machine clerk, filed a traumatic injury claim (Form CA-1) alleging her neck, back and shoulder pain were due to employment duties on January 9, 1991. Appellant filed an occupational disease claim (Form CA-2) on May 21, 1991 alleging that on January 9, 1991 she first realized her neck, back and shoulder pain was due to her employment. The Office accepted the claim for cervical and lumbar strains, cervical and lumbar subluxations, a herniated lumbar disc, right shoulder injury and authorized right shoulder arthroscopy and bilateral decompression surgery at L4-5.¹ The Office subsequently authorized "360-degree lumbar fusion L4-5, anterior inter-body fusion, posterior instrumentation and Patel allograft front and pedicle screw device posteriorly" surgical procedures.

On August 28, 1995 appellant filed an occupational disease claim for left shoulder pain. The Office accepted the claim for left shoulder tendinitis.

On September 6, 1996 appellant started working her limited-duty position for six hours per day.

On June 25, 1997 the Office issued a loss of wage-earning capacity decision, based upon actual earnings in her limited-duty position.

In progress notes dated September 9, 1997, Dr. Ralph F. Rashbaum, an attending Board-certified orthopedic surgeon, noted that appellant "has elected to ask me to go from six to

¹ Appellant filed a claim for a schedule award on April 20, 1998.

four hours in an effort to see if she can get her pain under control that way.” Dr. Rashbaum then stated that he was “going to give her a note requiring her to work only four hours on a permanent basis.”

Appellant filed a recurrence claim on September 16, 1997 alleging that she was only able to work four hours per day, not six hours.

In a report dated November 3, 1997, Dr. Rashbaum diagnosed failure of the spiral fusion at L4-5. He noted that appellant indicated “that she has substantial problems working six hours, but feels that she could work four. Given the problem that I have been able to diagnose, I went ahead and gave her return to work, but not to exceed four hours.” Regarding causal relation to the January 9, 1991 employment injury, the physician opined “The problem that is present at this time is a direct relationship to” appellant’s accepted employment injury and “is rarely a complication of that injury and the surgery made necessary by that injury.”

By decision dated December 11, 1997, the Office denied appellant’s claim for a recurrence of disability.²

In a work capacity evaluation dated January 21, 1998, Dr. Rashbaum diagnosed failed back surgical syndrome, L4-5 degenerative disc disease and chronic low back pain and concluded that appellant could only work four hours per day.

In an attending physician’s reports (OWCP Form CA-20) dated April 20 and September 29, 1998, Dr. Rashbaum diagnosed pseudoarthrosis and stated that she was on a permanent four-hour workday.

Appellant’s representative requested a hearing, which was held on June 25, 1998.

In progress notes dated August 7 and September 28, 1998, Dr. Rashbaum noted that appellant’s hours had been reduced from six to four hours. The physician restricted appellant to working no more than four hours and provided a diagnosis of pseudo arthrosis or failure of fusion in his August 7, 1998 report. Regarding her ability to work only four hours, he noted in his September 28, 1998 report that appellant “has pain all of the time” and that “The bottom line is that she can tolerate that amount of work where as if we try to push her to 6 or 8 hours than this becomes impossible.”

By decision dated August 28, 1998, the hearing representative affirmed the December 11, 1997 decision.

Appellant’s representative requested reconsideration by letter dated October 18, 1998. She contended that the diagnosis of failure of spinal fusion represented a material change in her condition and warranted a modification of her loss of wage-earning capacity determination.

² In the decision, the Office noted that appellant had worked six hours per day and noted that “once a formal determination of a wage-earning capacity is made, it remains in effect until modified.” The Office then found that appellant’s “request to reduce her hour from six to four” failed to meet the criteria for modifying a wage-earning capacity determination.

In a merit decision dated October 28, 1998, the Office denied modification of its prior decision.

Dr. Rashbaum, in a March 30, 1999 report, opined that appellant was only capable of working four hours per day. He noted that when appellant works more than four hours she gets fatigued and that “accumulative fatigue will work after the four hours” and that “She has a bonafide (sic) abnormality, in that she has a failure of fusion.” Regarding her ability to work more than four hours, he concluded that if she was pushed to do this that she would become “incapable of working at all.”

Appellant’s representative requested reconsideration in a letter dated April 6, 1999. She argued that Dr. Rashbaum’s March 30, 1999 report, supported her contention that she was not able to work more than four hours in her limited-duty position and, therefore, modification of her loss of wage-earning capacity determination was warranted.

In a decision dated June 22, 1999, the Office denied modification.

By letter dated September 23, 1999, appellant’s representative requested reconsideration. Appellant argued she had not worked 6 hours in the position for 60 days and thus the loss of wage-earning capacity determination was erroneous.

By nonmerit decision dated October 1, 1999, the Office denied appellant’s request for reconsideration.

In a November 10, 1999 letter, appellant’s representative requested a copy of her file in order to evaluate the claim. She requested that she be paid compensation for working four hours per day instead of six hours and that this be made retroactive. Appellant also requested the case be set for an informal hearing and that “a detailed list of things that need to be resolved in order to get her compensation started or modified” be given to her attorney.

In a letter dated July 3, 2001, appellant’s counsel requested reconsideration of the denial of the Office to pay appellant for an additional two hours of compensation. She contended that appellant be paid the two-hour difference for the period September 10, 1997 through July 27, 1999, the date she became totally disabled, as her physician restricted her to four hours of work per day.

Appellant’s counsel requested reconsideration of the Office’s December 11, 1997 decision, by letter dated April 12, 2002. In support of her request appellant submitted a November 3, 1997 report and progress notes dated July 18 and September 9, 1997, Dr. Rashbaum and a copy of the December 11, 1997 decision. Appellant argued that the Office was incorrect in its December 11, 1997 decision, when it found that appellant had pressured her physician into reducing her hours.

By decision dated May 1, 2002, the Office denied appellant’s request as untimely filed and that she had failed to establish clear evidence of error.

The only Office decision before the Board on this appeal is the May 1, 2002 decision, denying appellant’s request for reconsideration. More than one year has elapsed between the

date of the Office's most recent merit decision on June 22, 1999 which denied appellant's occupational disease claim for a foot condition and the filing of appellant's appeal on June 17, 2002. The Board lacks jurisdiction to review the merits of appellant's claim.³

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.⁵ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision.

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed as to produce a contrary conclusion.⁹ 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.¹⁰

Appellant's letters dated July 3, 2001 and April 12, 2002, requesting reconsideration were filed more than a year after the Office issued its last merit decision on June 22, 1999 and, therefore, appellant's request is untimely.

In both of her reconsideration requests, appellant restated her argument that the Office erred in failing to pay her the additional two hours of compensation for the period May 25, 1997 through September 9, 2000. She restated her argument that her hours had been reduced by Dr. Rashbaum, her attending physician, from four to six hours and that she was, therefore, entitled to compensation for the additional two hours. While Dr. Rashbaum concluded that

³ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *Willie J. Hamilton*, 52 ECAB __ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Willie J. Hamilton*, *supra* note 6; *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Willie J. Hamilton*, *supra* note 6.

appellant was restricted to working four hours per day due to her accepted employment injury, his conclusion was not supported by medical rationale to raise a substantial question as to the correctness of the denial of appellant's claim. Furthermore, his opinions on the subject are repetitive of his reports that were previously considered by the Office¹¹ Appellant, therefore, failed to show that the Office committed clear evidence of error in its October 1, 1999 decision. The Office acted within its discretion in denying her April 12, 2002 reconsideration request.

The May 1, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 10, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹¹ *James A. England*, 47 ECAB 115, 119 (1995).