# United States Department of Labor
# Employees' Compensation Appeals Board

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| **ERIC L. HUMPHREY, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1357** |
| | ) | **Issued: January 4, 2006** |
| **U.S. POSTAL SERVICE, POST OFFICE, Dallas, TX, Employer** | ) | |

*Appearances:*
*Barry W. Finkel, 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 June 10, 2005 appellant, through counsel, filed a timely appeal from a June 17, 2004 decision of the Office of Workers' Compensation Programs, which found that he was not entitled to a schedule award because he refused an offer of suitable work, and an April 5, 2005 decision which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed his appeal with the Board on June 10, 2005 the only decisions properly before the Board are the Office's June 17, 2004 merit decision and the April 5, 2005 nonmerit decision.

### ***ISSUES***

The issues are: (1) whether the Office properly denied appellant's claim for a schedule award because he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to

[1] 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

present clear evidence of error. On appeal, appellant contends that he did not refuse a February 11, 1998 job offer since he worked four hours and took leave without pay for the remaining four hours.

## ***FACTUAL HISTORY***

On June 19, 1987 appellant, a 32-year-old letter carrier, filed a traumatic injury claim alleging that he injured his lower back, right hip and leg on June 16, 1987 while lifting a bundle of mail and then putting it down on the floor. The Office accepted the claim for a lumbar strain and subsequently accepted an L4-5 herniated nucleus pulposus with radiculopathy of the left leg altered gait and aggravation of preexisting degenerative left knee joint disease. The Office authorized microlumbar surgery which was performed on August 26, 1987. On August 7, 1990 the Office granted appellant a schedule award for 4 percent left lower extremity impairment which was subsequently increased to 12 percent left lower extremity impairment. He filed a claim for a recurrence of disability beginning August 2, 1993 which the Office accepted.

By decision dated February 11, 1998, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c), as he refused to return to an eight-hour workday. The Office noted that he was offered a modified letter carrier position working eight hours a day and that appellant returned to work on January 3, 1998 working four hours a day.[2]

On January 26, 2004 appellant filed a claim for a schedule award (Form CA-7). By decision dated June 17, 2004, the Office advised him of the following:

"It has been determined that you are only entitled to (sic) medical coverage on this claim; therefore, you are not eligible to receive a schedule award at this time. You were advised of this in a decision dated February 11, 1998. The reason you are not entitled to compensation is you refused a valid job offer from your [e]mploying [e]stablishment.

> "5 U.S.C. § 8106(c)(2) of the Federal Employees' Compensation Act states that (sic) 'A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.' Therefore, any claimant who refuses an offer of suitable employment is not entitled to any further compensation for wage loss."

In a letter dated January 5, 2005, appellant's counsel requested reconsideration of the Office's June 17, 2004 decision, contending that appellant returned to work on January 3, 1997 and requested additional compensation.

[2] On December 19, 2000 appellant filed a claim for compensation (Form CA-7) for the period November 3 to 13, 2000, which the Office denied on January 10, 2001 based upon his refusal of suitable work. He filed a claim for a recurrence of disability beginning September 26, 2001 on October 16, 2001. By decisions dated December 14 and 20, 2001, the Office denied appellant's recurrence claim. On March 21, 2002 the Office denied his request for reconsideration of the merits on his recurrence claim.

By decision dated April 5, 2005, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

## ***LEGAL PRECEDENT -- ISSUE 1***

The Office regulation provides that in termination under section 8106(c) of the Act[3] a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107[4] of the Act, which includes payment of continuing compensation for permanent impairment of a scheduled member.[5] The Board has found that a refusal to accept suitable work constitutes a bar to receipt of a schedule award for any impairment which may be related to the accepted employment injury.[6]

## ***ANALYSIS***

Appellant requested a schedule award due to his accepted lumbar strain, L4-5 herniated nucleus pulposus with radiculopathy down the left leg, altered gait and aggravation of preexisting degenerative left knee joint disease on June 16, 1987.

In a letter dated June 17, 2004, the Office found that, as a consequence of refusing a suitable work position, appellant was not entitled to payment of a schedule award.[7] Although appeal rights were apparently not included with the Office's June 17, 2004 letter, the Board finds that the Office's June 17, 2004 letter is an appealable decision over which the Board has jurisdiction, as the letter apprised appellant of an adverse action, *i.e.*, that he was not entitled to any compensation, including schedule award compensation due to the termination of his compensation pursuant to section 8106(c) of the Act.[8] Additionally, as the letter contained findings of fact, *i.e.*, advised of terminating compensation benefits for refusing suitable work and conclusions of law, *i.e.*, advised of disentitlement to a schedule award for refusing suitable work, it constitutes a decision.[9]

The Board has held that termination of compensation under section 8106(c), for refusal of suitable work serves as a bar to receipt of schedule award compensation for any period after the termination decision has been reached.[10] As the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work in its February 11, 1998 decision, he is not entitled to a schedule award.

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[3] 5 U.S.C. § 8106(c).

[4] 5 U.S.C. §§ 8105, 8106, 8107.

[5] 20 C.F.R. § 10.517.

[6] *See Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[7] *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

[8] *Julius Cormier*, 47 ECAB 465 (1996).

[9] *See* 20 C.F.R. § 10.126.

[10] *Pete F. Dorso*, 52 ECAB 424, 428 (2001).

## ***LEGAL PRECEDENT -- ISSSE 2***

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[11] 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.[12] 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.[13] The Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[14] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[15]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[16] The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.[17] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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.[20] 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

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[11] 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

[12] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[13] *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[14] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[16] *See Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

[17] *See Pasquale C. D'Arco*, 54 ECAB ___ (Docket No. 02-1913, issued May 12, 2003); *Leona N. Travis*, 43 ECAB 227 (1991).

[18] *See Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez supra* note 13.

[19] *See Leona N. Travis*, *supra* note 17.

[20] *See Nelson T. Thompson*, *supra* note 15.

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.[21] 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.[22]

## ***ANALYSIS -- ISSUE 2***

In this case, the Office properly determined that appellant failed to file a timely application for review of the Office's February 11, 1998 decision which terminated his compensation on the grounds that he refused an offer of suitable work. In implementing the one-year time limitation, the Office 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.

The last merit decision in this case regarding the termination of appellant's compensation was issued by the Office on February 11, 1998. As his January 5, 2005 letter requesting reconsideration was made more than one year after the Office's February 11, 1998 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the Office's decision to terminate his compensation benefits on the grounds that he refused an offer of suitable work as a modified letter carrier, working eight hours a day.

Appellant submitted no medical evidence in support of his request for reconsideration. His counsel contended that appellant returned to work on January 3, 1997 thereby implying that he did not refuse an offer of suitable work. Additionally, his counsel on appeal contends that appellant did not refuse an offer of suitable work since he did return to work for four hours a day on or about January 3, 1998. However, he was offered a modified position working eight hours a day, based upon the opinion of an impartial medical examiner. Appellant was advised by letter dated January 8, 1998, that the record did not establish that he was incapable of working eight hours a day in the offered position and that his refusal to work an eight-hour day in the offered modified job constituted a refusal of suitable work. The record contains no evidence or argument raising a substantial question as to the correctness of the Office's termination of his compensation on the grounds that he refused an offer of suitable work. Because appellant's January 3, 2005 request for reconsideration does not establish, on its face, that the Office's February 11, 1998 decision was erroneous, the Board will affirm the Office's April 5, 2005 decision not to reopen his case for a review on the merits. His untimely request does not warrant such action under the law.

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

[22] *See George C. Vernon*, 54 ECAB ___ Docket No. 02-1954 (issued January 6, 2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

## ***CONCLUSION***

The Board finds that the Office properly determined that appellant was not entitled to a schedule award because he refused an offer of suitable work. The Board further finds that the Office properly denied his request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 17, 2004 and April 5, 2002 are affirmed.

Issued: January 4, 2006
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