United States Department of Labor
Employees' Compensation Appeals Board

W.P., Appellant	)	
and	)	**Docket No. 09-504**
	)	**Issued: September 30, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Billings, MT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 22, 2007 appellant filed a timely appeal from a July 12, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. There is no merit decision within one year of the filing of this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

On appeal, appellant asserted that an offered modified position was not suitable work, that the Office was not qualified to determine his work restrictions and that it lost a request for reconsideration.

FACTUAL HISTORY

The Office accepted that on or before July 15, 1998 appellant, then a 58-year-old rural mail carrier, sustained right shoulder impingement syndrome and right carpal tunnel syndrome due to repetitive motion in sorting and delivering mail. Appellant underwent a right rotator cuff

repair and right median nerve release on February 28, 2001. The Office later accepted that on March 18, 2001, he sustained left shoulder impingement syndrome. Appellant received compensation for intermittent periods of disability.

On August 1, 2001 Dr. Donald P. Harrell, an attending Board-certified orthopedic surgeon, released appellant to light-secretarial duties. Appellant returned to work on August 13, 2001 in a temporary modified position, answering the telephone and performing light-clerical duties within his restrictions.

In a November 13, 2001 report, Dr. Harrell found that appellant was permanently disabled for work due to bilateral shoulder pain, weakness and limited motion. He noted work restrictions against lifting more than 10 pounds and overhead lifting. Appellant stopped work on January 10, 2002 and did not return.[1]

Appellant claimed a schedule award, but Dr. Harrell did not provide any impairment rating as requested. In a March 12, 2002 letter to appellant's elected representative, the Office noted that it planned to refer him for a second opinion examination and a schedule award evaluation.

On March 12, 2002 the employing establishment offered appellant a permanent position as a modified carrier, performing the same clerical duties as he had since August 13, 2001. In a March 19, 2002 letter, appellant stated that he neither accepted nor refused the position. By letter dated April 22, 2002, the Office advised him that the offered position was suitable work and his refusal was unjustified. Appellant was given 30 days in which to accept the position or provide valid reasons for his refusal. Otherwise, his compensation would be terminated under 5 U.S.C. § 8106(c)(2).

On April 26, 2002 the Office of Personnel Management (OPM) approved appellant's application for disability retirement. Appellant retired from the employing establishment effective May 3, 2002.

In a May 22, 2002 letter, the Office afforded appellant an additional 15 days to accept the offered modified position. Appellant accepted the offer on June 6, 2002 but did not report for work. The job remained open and available.

By decision dated June 25, 2002, the Office terminated appellant's monetary compensation under section 8106(c)(2) of the Federal Employees' Compensation Act on the grounds that he refused an offer of suitable work without valid justification.

In a July 8, 2002 letter, appellant requested an oral hearing, held on May 21, 2003. At the hearing, he stated that from August 2001 to January 2002, he spent most of his time in the break room, leading to anxiety and hypertension. Appellant noted that "[i]n Montana we have a law that we cannot lock elk up, but we can take a rural carrier and lock him up in the break

[1] In a June 6, 2002 file memorandum, the Office noted that a claims examiner left her position before she had an opportunity to schedule appellant's second opinion examination. As appellant had since refused suitable work, he would not be scheduled for a second opinion examination.

room." He acknowledged that he was physically capable of performing the light-duty job at the time he retired. Appellant asserted that the Office erred by failing to obtain a second opinion.

After the hearing, appellant submitted two January 10, 2002 letters from Dr. Mark C. Paul, an attending family practitioner, who noted bilateral shoulder crepitation and a 25 percent loss of range of shoulder motion bilaterally. He stated that unspecified work duties were "injurious to [appellant's] shoulders" and caused stress and anxiety. Dr. Paul recommended that appellant stop work immediately.

By decision dated and finalized July 9, 2003, an Office hearing representative affirmed the termination of appellant's compensation. He found that Dr. Paul held appellant off work as a preventative measure only as he had performed the job successfully for five months.

In a June 21, 2004 letter, appellant requested reconsideration. He asserted that being made to sit in the break room caused depression.[2] In an October 18, 2000 chart note, Dr. Paul listed that appellant experienced depression after a mitral valve replacement. Dr. Mark F. Rotar, an attending Board-certified orthopedic surgeon, submitted a September 18, 2003 report opining that magnetic resonance imaging (MRI) scan showed increased degenerative changes in both shoulders. He performed a resection of the left acromioclavicular (AC) joint on November 19, 2003. Dr. Rotar recommended a right rotator cuff repair.

By decision dated January 20, 2005, the Office affirmed the termination of appellant's compensation benefits. It noted that appellant had not claimed an employment-related emotional condition. The Office apologized for its delay in assigning appellant's June 21, 2004 reconsideration request to a senior claims examiner for adjudication.[3]

In a January 18, 2006 letter, appellant requested reconsideration. He asserted that the employing establishment erred by offering him a job after he applied for disability retirement. Appellant submitted reports from Dr. Rotar dated January 12, 2004 to January 9, 2006 noting bilateral shoulder symptoms. On April 29, 2005 Dr. Rotar performed a right rotator cuff repair with distal clavicle resection and arthrotomy. April 6, 2006 electrodiagnostic tests showed left median and ulnar nerve entrapment.

By decision dated April 21, 2006, the Office denied modification, of the prior decision. It found that appellant did not establish that the offered position was not suitable work.

In a letter dated April 16, 2007 and postmarked April 18, 2007, appellant requested reconsideration. He asserted that the Office improperly failed to issue a schedule award decision did not fully consider Dr. Paul's opinion, did not pay medical bills promptly, misrepresented facts of his claim to his elected representative and failed to send him for a second opinion examination. Appellant submitted reports dated May 8 to April 9, 2007 from Dr. Rotar

[2] Appellant also submitted December 2004 and January 2005 correspondence with his elected representative about his compensation claim.

[3] The Office did not assign appellant's June 21, 2004 reconsideration request for adjudication until December 17, 2004.

noting continued bilateral shoulder symptoms and recommending a left median nerve release. He also provided a February 1, 2002 letter from the Office regarding his schedule award claim and a June 4, 2002 letter from the Social Security Administration (SSA). Appellant also submitted copies of Dr. Rotar's and Dr. Paul's reports, a March 12, 2002 letter to his elected representative, the April 26, 2002 disability retirement determination and his January 18, 2006 statement.

By decision dated July 12, 2007, the Office denied reconsideration on the grounds that the evidence submitted was cumulative, irrelevant and did not raise a substantial questions as to the correctness of its termination of his monetary compensation benefits. It found that Dr. Paul's January 10, 2002 report and appellant's January 18, 2006 statement were previously of record. The February 1 and March 12, 2002 letters and correspondence regarding appellant's disability retirement benefits were irrelevant to the claim.

LEGAL PRECEDENT

To require the office to reopen a case for merit review under section 8128(a) of the Act,[4] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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) constitute relevant and pertinent new evidence not previously considered by the Office.[5] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[7]

ANALYSIS

The Office accepted that appellant sustained bilateral shoulder impingement syndrome and left carpal tunnel syndrome, for which he received medical benefits and compensation for partial disability. From August 13, 2001 to January 10, 2002, appellant performed a temporary light-duty clerical position within restrictions provided by Dr. Harrell, an attending Board-certified orthopedic surgeon. He stopped work on January 10, 2002 and applied for disability retirement benefits. On March 12, 2002 the employing establishment offered to make the temporary position permanent. On March 19, 2002 appellant declined to accept or refuse the job. The Office advised him on April 22 and May 22, 2002 that the offered position was suitable

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id*. at § 10.608(b). *See also T.E.*., 59 ECAB ___ (Docket No. 07-2227, issued March 19, 2008).

[7] *Annette Louise*, 54 ECAB 783 (2003).

work and of the penalties for his refusal or nonacceptance of the job. Appellant's application for disability retirement was approved on April 26, 2002. On June 6, 2002 he purportedly accepted the offered position but did not even report for duty. In a June 25, 2002 decision, the Office terminated appellant's wage-loss benefits under section 8106(c) of the Act as he refused an offer of suitable work.[8] It affirmed the termination in decisions dated July 9, 2003, January 20, 2005 and April 21, 2006 finding that the evidence supported that appellant refused an offer of suitable work.

Appellant requested reconsideration on April 18, 2007. He asserted that the Office misrepresented his case to his elected representative, disregarded the opinion of his physician, paid medical bills late, did not issue a schedule award decision and failed to refer him for a second opinion examination. The Board finds that these arguments are not relevant to the issue of whether appellant refused an offer of suitable work. Evidence which does not address the issue involved is not a basis for reopening a case.[9]

Appellant also submitted May 2006 and April 2007 reports from Dr. Rotar, an Office letter regarding development of the schedule award issue and a June 4, 2002 letter from the Social Security Administration. As these documents do not address the suitable work issue, they are irrelevant to the underlying issue in this claim.[10] The Board notes that determinations of other administrative agencies are not dispositive with regard to disability arising under the Act.[11]

Appellant also submitted copies of previously submitted reports from Dr. Rotar and Dr. Paul, a March 12, 2002 letter to his elected representative, the April 26, 2002 disability retirement determination and his January 18, 2006 statement. These documents were previously of record in the case and considered by the Office. The Board has held that newly submitted evidence which is only repetitive or duplicative of evidence existing in the record is not sufficient to warrant further merit review.[12]

On appeal, appellant asserted that the offered modified position was not suitable work and that the Office was not qualified to determine his work restrictions. As noted, the job offered to him on March 12, 2002 was within his medical restrictions. In the adjudication of claims under the Act, the Office has the authority to determine the suitability of offered employment including ascertaining work limitations.[13] Appellant also contended that, it lost a request for reconsideration. While the record indicates that the Office may have delayed

[8] 5 U.S.C. § 8106(c).

[9] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

[10] *Id*.

[11] *J.F.*, 59 ECAB ___ (Docket No. 07-308, issued January 25, 2008). *See Beverly R. Jones*, 55 ECAB 411 n.14 (2004); *Daniel Deparini*, 44 ECAB 657 (1993).

[12] *A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009).

[13] *Mary E. Woodard*, 57 ECAB 211 (2005); *Stephen A. Pasquale*, 57 ECAB 396 (2006).

processing his June 17, 2004 request for reconsideration,[14] this delay did not prejudice his claim. There is no evidence that the Office lost any request for reconsideration.

Appellant has not established that the Office improperly refused to reopen his claim for a review of the merits under section 8128(a) of the Act. He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 12, 2007 is affirmed.

Issued: September 30, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[14] *Supra* note 2.