

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY J. TURLEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Walla Walla, Wash.

*Docket No. 96-1190; Submitted on the Record;
Issued February 25, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's claim for further consideration on the basis that appellant's application for review was not timely filed and did not constitute an abuse of discretion.

On October 17, 1977 appellant, then a 40-year-old radiology technician, injured her back in the course of employment. Appellant received appropriate compensation, authorized surgery and after she suffered several recurrences, was placed on the periodic rolls on December 11, 1983.

By letter dated January 21, 1994, the Office noted that appellant had been offered the position of secretary by the employing establishment which was found to be suitable to her capabilities. The Office informed appellant that she had 30 days from the date of the letter to accept the offered position or provide an adequate explanation for refusing the position.

By letter dated February 16, 1994, appellant refused to accept the position offered on the basis that she did not have the physical capability to perform the position.

By letter dated February 23, 1994, the Office informed appellant that her reason for refusing the offered position was found not to be justified. The Office advised appellant that she had until March 10, 1994 to accept the position and that no additional reasons for refusing the position would be accepted.

On March 14, 1994 the Office notified appellant that she had been offered a position as secretary which was found to be suitable as it met the physical requirements outlined by her physicians. The Office informed appellant that pursuant to 5 U.S.C. § 8106(c) that her

compensation was terminated as she refused an offer of suitable work without good cause. Appellant was terminated from the disability compensation rolls effective March 21, 1994.¹

Appellant requested a hearing on March 29, 1994.²

By decision dated November 30, 1994, the hearing representative affirmed the Office's decision to terminate appellant's compensation benefits on the basis that she refused an offer of suitable employment without good cause.

By letter dated December 6, 1994, appellant requested a copy of a physician's report as she disagreed with his statements.

By letter dated December 11, 1995, appellant requested reconsideration of the decision dated November 30, 1994 by the hearing representative. In support of her request, appellant submitted an initial office evaluation dated November 14, 1995 by Dr. Leslie B. Leicht.³ Dr. Leicht noted that appellant was vague about her dates and noted her current medical status.

By decision dated February 12, 1996, the Office denied appellant's reconsideration request on the grounds that pursuant to 20 C.F.R. § 10.138(b)(2) it had not been filed within one year of the March 14, 1994 decision by the Office⁴ and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The instant appeal follows.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ 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.⁶ 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.⁷

The Board finds that as more than one year had elapsed from the date of issuance of the Office's November 30, 1994 merit decision and appellant's request for reconsideration dated December 11, 1995 and received by the Office on December 15, 1995 her request for

¹ The Board notes that appellant elected to receive civil service annuity benefits effective March 11, 1994 in lieu of compensation benefits.

² In a letter dated September 19, 1994, the hearing representative confirmed his telephone conversation with appellant regarding her decision to have a review of the written record in lieu of an oral hearing.

³ Dr. Leicht noted that appellant works two to three hours per day at a nursing home. The physician offered no opinion on whether appellant was totally disabled from work.

⁴ The latest decision is the November 30, 1994 decision by the hearing representative. Appellant's request for reconsideration of the decision to terminate her compensation benefits is still untimely using the date of the hearing representative's decision.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

reconsideration was untimely. The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's November 30, 1994 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, the Board finds that the newly submitted evidence is of diminished probative value. The November 14, 1995 report by Dr. Leicht offers no opinion on whether appellant was unable to perform the job offered to her by the employing establishment and found to be suitable. The evidence is thus insufficient to establish clear evidence of error and the Office did not abuse its discretion in failing to reopen appellant's claim.⁸

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's November 30, 1994 decision, she has failed to establish clear evidence of error. Therefore, the Office did not abuse its discretion in denying a merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated February 12, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 25, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).