

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH W. NEWCOMB and U.S. POSTAL SERVICE,
POST OFFICE, Lake Oswego, Oreg.

*Docket No. 97-696; Submitted on the Record;
Issued March 1, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused an offer of suitable work (Claim No. A14-243762) and whether the Office abused its discretion in declining to reopen appellant's stress claim (No. A14-286633) for merit review on the grounds that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On June 5, 1989 appellant, then a 35-year-old letter carrier, filed a notice of traumatic injury, claiming that he hurt his back while leaning down to pick up a parcel off the floor. The Office accepted his claim for a low back strain and paid appropriate compensation.

Appellant returned to work for four hours a day, gradually increasing his time but was disabled for intermittent periods during 1990 to 1991. On September 30, 1991 appellant underwent a discography at L4-6 and on November 15, 1991 he had a bone fusion and a Steffe plate was inserted in his back.¹

Following extensive physical therapy, appellant returned to limited, part-time duty on October 21, 1992.

On September 6, 1993 appellant filed a notice of recurrence of disability, claiming that he was unable to lift his arms constantly as necessary to perform his limited-duty job and that he experienced severe pain spasms and weakness. The employing establishment noted that appellant had been off work since June 24, 1993 and had been hospitalized in July for stress.

¹ The Office did not authorize these operations, based on the findings of an independent medical panel to which it had referred appellant.

On August 18, 1993 appellant underwent surgery for removal of the metal plate that had been used in his spinal fusion operation. His physician, Dr. Kent M. Grewe, a neurosurgeon, stated that appellant should be able to return to work within eight weeks.

Subsequently, appellant underwent a physical capacity evaluation (PCE), which concluded that appellant was limited to performing sedentary activities on a part-time basis. The examiner noted that appellant viewed himself as significantly disabled and displayed much verbal and nonverbal pain behavior as well as inconsistent effort throughout the evaluation. The examiner concluded that, from a practical standpoint, attempts to return appellant to work were unlikely to succeed since appellant made it clear that he would not under any circumstances return to the employing establishment.

On January 31, 1994 Dr. Grewe completed a work restriction evaluation indicating that he agreed with the PCE and appellant could return to work in the position of manual distribution clerk as modified and described by the employing establishment on June 9, 1993. He noted that appellant claimed he could not work eight hours a day but he had "no objective neurological deficit" to prevent such work.

On February 15, 1994 the Office informed appellant that he had been released by Dr. Grewe to return to work gradually, starting with four hours a day and increasing to full time over six weeks, and that the position of manual distribution clerk, as modified, had been found to be suitable. On March 3, 1994 in response to appellant's questions, the Office warned him that refusing to return to work would result in termination of his disability compensation.²

On March 18, 1994 the Office informed appellant that a change of treating physicians and an upcoming physical evaluation by the Department of Veterans Affairs were not sufficient to justify his refusal to report to work. The Office permitted appellant until April 4, 1994 to accept the offered position.

On April 15, 1994 the Office terminated appellant's compensation, effective April 3, 1994, on the grounds that he had refused an offer of suitable work. Appellant's subsequent requests for reconsideration were denied on November 9, 1994, February 14 and September 29, 1995, the last on the grounds that the evidence submitted in support was insufficient to warrant modification of the prior decision terminating appellant's compensation.

On October 31, 1996 the Office denied appellant's August 21, 1996 request for reconsideration of the September 29, 1995 decision on the grounds that the evidence submitted in support -- a July 25, 1996 report from Dr. Standish McCleary, a licensed clinical psychologist, and an August 20, 1996 report from Dr. Richard M. Rush, a general practitioner, describing his psychological problems -- was insufficient to warrant review of its prior merit decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation because he refused suitable employment.

² The employing establishment directed appellant to report for work on February 14, 1994, but he called in sick.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.³ Section 8106(c)(2) of the Federal Employees' Compensation Act⁴ provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.⁵ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁶

The implementing regulation⁷ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.⁸ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁹

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹⁰ Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential, or job security.¹¹

In this case, appellant's own physician released him as capable of performing the duties of the modified clerk position on January 31, 1994. While Dr. Grewe submitted an October 14, 1994 report clarifying the earlier Office form,¹² he did not change his assessment that appellant could return to the modified clerk position he had previously held.¹³ In addition,

³ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

⁴ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

⁵ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

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

⁷ 20 C.F.R. § 10.124(c).

⁸ *John E. Lemker*, 45 ECAB 258, 263 (1993).

⁹ *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

¹¹ *Arthur C. Reck*, 47 ECAB 339 (1996).

¹² The item 3 to which Dr. Grewe's report refers concerns the number of hours appellant was able to perform the listed activities. Dr. Grewe used this part of the form to indicate a gradual return to full-time work. He also stated that appellant was not totally disabled but, "for various reasons," was not a candidate to return to employment with the employing establishment. Dr. Grewe did not explain further but again concurred with the sedentary to light-duty status recommended by the PCE.

¹³ The modified position was fully described in a March 26, 1993 letter to appellant. The position was modified

Dr. Grewe opined repeatedly that appellant had no neurological deficits that would preclude him from working and noted appellant's exaggerated pain behavior, which was inconsistent with his clinical findings upon physical examination.

In support of reconsideration, appellant submitted reports from Drs. McCleary and Rush, who essentially attributed all of appellant's problems, both physical and psychological, to the back strain he sustained in 1989. While Dr. McCleary found appellant to be "totally disabled for meaningful employment," and Dr. Rush stated that appellant had permanent disabilities of his lower extremities, neither physician specifically addressed appellant's capability to perform the duties of the modified clerk position. Therefore, their reports do not constitute medical evidence of appellant's inability to do the job.¹⁴ Rather, the medical evidence established appellant's ability to work at the time of the job offer within the restrictions listed by Dr. Grewe.¹⁵ Therefore, appellant's refusal to accept the modified position was not warranted and the Office properly terminated appellant's compensation.¹⁶

The Board also finds that the Office properly followed its procedures in terminating appellant's compensation. The Office informed appellant of the job offer twice and sent him copies of the PCE and Dr. Grewe's January 31, 1994 report approving the position. On February 15, 1994 the Office informed appellant that the offered position had been found to be suitable and on March 3, 1994 warned him of the consequences of refusing suitable employment. On March 18, 1994 the Office told appellant that his reason for not accepting the job offer was insufficient and that he had until April 4, 1994 to report to work. Thus, appellant had ample notice that his compensation would be terminated if he refused suitable employment.

The Board also finds that the Office did not abuse its discretion in declining to reopen appellant's stress claim for merit review.

On July 27, 1993 appellant filed a notice of occupational disease, claiming that his stress was caused by working for an agency that was continuously trying to fire him after he returned to limited, part-time duty in October 1992 following his 1989 back injury and surgery. In support of his claim, appellant submitted a July 19, 1993 report from Dr. Ronald Spangler, a Board-certified psychiatrist who diagnosed depression and paranoia while treating appellant in the hospital. Appellant listed the following as causes of his stress: a supervisor told him that management believed that appellant was "faking" the severity of his back problem and that he

further, effective June 19, 1993, on the basis of Dr. Grewe's medical restrictions and appellant accepted the offer on June 18, 1993.

¹⁴ See *Henry W. Shepherd, III*, 48 ECAB ____ (Docket No. 96-814, issued March 3, 1997) (finding that appellant's compensation was properly terminated after the Office found his reasons for refusing suitable work unacceptable).

¹⁵ See *Michael I. Schaffer*, 46 ECAB 845 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).

¹⁶ See *Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).

needed to obtain more detailed medical documentation to support the amount of resting he did while on the clock; a supervisor tried to pressure appellant to work faster and made remarks within other employees' hearing that if appellant would just learn the work schemes and speed up, everyone could go home sooner; appellant was humiliated and broke down in tears after being told to shut up and mind his own business when he interrupted two supervisors who were discussing his leave status at a desk behind his work station; on May 27, 1993 appellant fell because of pain spasms and a supervisor threatened to call his wife to take him home if he made an issue of his "supposed injury"; on June 4, 1993 appellant was involved in an altercation with his supervisor after she ordered him back to work -- the supervisor told appellant he would be fired if he did not learn the work schemes and remain at his station instead of lying down for long periods, talking to other employees and causing safety problems by walking around; employees asked appellant if he was going to bring a gun and shoot people after his supervisor stated she was concerned that appellant would hurt her; and on June 18, 1993 appellant received a letter stating that he had lied about a felony conviction on his employment application -- appellant believed that the employing establishment was looking for any excuse to fire him.

The employing establishment responded in detail to appellant's allegations. On November 17, 1993 the Office requested that appellant review these comments, submit statements from individuals who witnessed the incidents and copies of any grievances or other actions relating to the incidents and provide a comprehensive medical report from his treating physician.

Appellant stated in a December 10, 1993 letter that he was "denied access" to employees who witnessed the alleged incidents and that he could not obtain information to contact them outside work. Appellant requested clarification of "damaging and possibly inflammatory" statements by his supervisors and added that one source of stress in his personal life was the hit-and-miss system of paying his disability compensation.

On August 29, 1994 the Office denied appellant's claim on the grounds that the evidence failed to establish that his mental condition was sustained in the performance of duty. The Office found that the incidents alleged by appellant were either not substantiated by corroborating evidence or were not work related.

Appellant requested reconsideration and submitted a September 7, 1994 report from Dr. McCleary, a disability form dated September 8, 1994 and an October 14, 1994 report from Dr. Grewe. The Office denied appellant's request on November 9, 1994 on the grounds that the evidence was insufficient to warrant modification of its prior decision. The Office found that Dr. Grewe's report was immaterial to the issue and that Dr. McCleary's opinion was based on unsubstantiated allegations by appellant or nonwork factors.

On August 21, 1996 appellant again requested reconsideration and submitted medical reports from Drs. McCleary and Rush. On October 31, 1996 the Office denied appellant's request as untimely filed. The Office stated that the evidence submitted in support of reconsideration was insufficient to establish clear evidence of error.

The only decision the Board may review on appeal is the October 31, 1996 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on December 6, 1996.¹⁷

Section 8128(a) of the Act¹⁸ does not entitle a claimant to a review of an Office decision as a matter of right.¹⁹ Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.²⁰ The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.²¹

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.²² The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.²³ Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.²⁴

Clear evidence of error is intended to represent a difficult standard.²⁵ The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.²⁶ The evidence submitted must be sufficiently probative not only to

¹⁷ *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); see 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

¹⁸ 5 U.S.C. § 8128(a).

¹⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

²⁰ 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

²¹ *Leon D. Faidley, Jr.*, *supra* note 20 at 111.

²² *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

²³ *Howard A. Williams*, 45 ECAB 853, 857 (1994).

²⁴ *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

²⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.²⁷ 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.²⁸

In this case, the Office issued its decision denying appellant's initial request for reconsideration on November 9, 1994. Appellant's request for reconsideration was dated August 21, 1996, almost two years after the November 9, 1994 decision denying modification of his stress claim and was therefore untimely filed.

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim. As the Office stated, Dr. McCleary's July 24, 1996 report is almost an exact duplicate of the September 7, 1994 report previously considered and is therefore insufficient to establish clear evidence of error.

Further, the August 20, 1996 report fails to specify what work factors, aside from the 1989 injury, have contributed to appellant's current emotional condition. Dr. Rush concluded that the initial back strain and subsequent surgery ultimately led to appellant's physical and psychological problems, including lack of self-esteem and sexual dysfunction, but offered no medical rationale for this opinion.

Even if Dr. Rush's conclusions were well rationalized and his report could be construed to support a causal connection between appellant's employment and his present mental state, such a construction is insufficient to establish clear evidence of error because the submitted evidence must not only be sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also be *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the Office's October 31, 1996 decision.²⁹ Dr. Rush's report consists of generalities and bare causal statements and does not rise to the requisite standard.³⁰

Finally, appellant does not allege any misapplication of the law or procedural error by the Office in processing his claim. Inasmuch as appellant's request for reconsideration was

²⁷ *Bradley L. Mattern, supra* note 23 at 817.

²⁸ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

²⁹ *See Frances H. Kinney*, Docket No. 94-2401 (issued June 12, 1996) (finding that various medical reports submitted in support of appellant's untimely request for reconsideration failed to raise any substantial question of error).

³⁰ *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992)(same).

indisputably untimely and he failed to submit evidence substantiating clear evidence of error,³¹ the Board finds that the Office did not abuse its discretion in denying merit review of his stress claim.

The October 31, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
March 1, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

³¹ Compare *Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) with *Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).