U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA G. KANE and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Columbus, OH

Docket No. 98-1718; Oral Argument Held October 7, 1999; Issued March 22, 2000

Appearances: *Alan J. Shapiro, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review on the grounds that her request was untimely filed and did not present clear evidence of error.

On September 15, 1993 appellant, then a 47-year-old accounting technician, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she tore cartilage and dislocated her right knee when she slipped on water on the floor and fell on her right hip.[1] The Office accepted the claim for sprain medial collateral ligament and sprain cruciate ligament on November 3, 1993. Appellant returned to work for four hours per day effective February 7, 1994. On June 15, 1994 appellant returned to her regular job duties.

On January 26, 1995 appellant filed a Form CA-1 alleging that on January 25, 1995 she strained/tore ligaments and dislocated her right knee when she slipped on black ice in the parking lot.[2] The Office accepted the claim for a dislocated patella in the right knee.[3] The Office authorized arthroscopy and open realignment of the right knee. The Office authorized compensation for lost wages from January 26, 1996.

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[1] This was assigned claim number A9-381389.

[2] This was assigned claim number A9-389660.

[3] On December 8, 1997 the Office combined claim A9-381389 into A9-398660. By letter dated March 2, 1998, the Office advised appellant's attorney that the two claims had been combined and that master number was A9-398660.

By letter dated March 14, 1996, the employing establishment offered appellant the position of modified accounting technician based upon the opinion of Dr. Larry Watson, appellant's treating physician, that she could return to work with some restrictions.

By letter dated March 19, 1996, the Office informed appellant that the position of modified accounting technician with the employing establishment was still found to be suitable and still available. The Office advised appellant that she had 30 days to accept the position or provide her reasons for refusing the job, and that if she refused the offer or failed to report for work, her compensation benefits for wage loss or schedule award would be terminated.

By letter dated April 5, 1996, appellant declined the position of modified accounting technician as her husband's job transferred him to Cincinnati, Ohio. She also noted that the employing establishment did not have any positions in the Cincinnati area.

In a report of a telephone conversation on April 8, 1996, appellant again informed the Office that she was moving to Cincinnati due to her husband's transfer there. The Office advised appellant that, if she refused the offered position of modified accounting technician, she would no longer be entitled to any compensation benefits.

By letter dated April 19, 1996, the Office advised appellant that her reason for refusing the job offer with the employing establishment was not justified and allowed her an additional 15 days to accept the job offer. The Office informed appellant that, if she failed to accept the position within 15 days and return to work, her compensation would be terminated.

In a letter dated May 6, 1996, the employing establishment advised the Office that appellant resigned effective April 1, 1996 from her position due to her moving to Cincinnati, Ohio.

By decision dated May 6, 1996, the Office terminated appellant's compensation on the grounds that she had not accepted the modified accounting technician position or provided an acceptable reason for refusing the position.[4]

By letter dated November 13, 1996, appellant requested the Office to change her address from 9261 Deercross Parkway, Apartment C1, Cincinnati, Ohio to 3603 Tiffany Ridge Lane, Cincinnati, Ohio.

On January 30, 1997 appellant's counsel enclosed appellant's new address, a physical capacity examination, noted that appellant had returned to work and inquired regarding a schedule award for appellant.

By letter dated February 26, 1997, the Office advised appellant's attorney that no information could be released to him as the record contained no authorization form naming him as her representative.

[4] The Office mailed the decision to appellant at 9261 Deercross Parkway, Apartment C1, Cincinnati, Ohio which was the address she noted on her April 5, 1996 letter to the Office declining the offered position.

By letter dated March 7, 1997, appellant submitted an authorization form for her counsel and requested the status of the case.

By letter dated August 9, 1997, the Office advised appellant's counsel that the last action taken on the claim had been a termination of compensation based upon appellant's refusal of suitable employment.

By letter dated August 21, 1997, appellant requested a schedule award and submitted medical evidence in support of her request.

On November 19, 1997 the Office advised appellant that a schedule award could not be issued as appellant's compensation benefits were terminated for failure to accept a suitable position.

By letter dated February 23, 1998, appellant requested reconsideration of the May 6, 1996 decision terminating her benefits. Appellant's counsel argued that the Office failed to apply the proper law, deprived appellant of her due process right and denied her appellate rights. Lastly appellant argues that she did not refuse suitable employment as she terminated her employment with the federal government.

By decision dated April 30, 1998, the Office denied appellant's February 23, 1998 request for reconsideration under 20 C.F.R. § 10.138(b)(2) as it was made and received more than one year following the May 6, 1996 merit decision terminating compensation for failure to accept a suitable position and failed to present clear evidence of error by the Office in the May 6, 1996 decision.[5]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a merit review on the grounds that his request was untimely filed and did not present 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.[6] As appellant filed her appeal with the Board on June 1, 1998, the only decision properly before the Board is the April 30, 1998 decision denying appellant's request for a merit review. The May 6, 1996 decision terminating appellant's compensation benefits is not before the Board on the present appeal. Thus, the only relevant issue on appeal is whether appellant's February 23, 1998 request for reconsideration of the May 6, 1996 decision was timely filed within the one-year time limitation of section 8128(a) of the Federal Employees' Compensation Act.

[5] Appellant filed her appeal with the Board on June 1, 1998.

[6] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Act[7] does not entitle a claimant to review of an Office decision as a matter of right.[8] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> '(1) end, decrease, or increase the compensation awarded; or
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> '(2) award compensation previously refused or discontinued.'"

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[9] As one such limitation, the Office has stated that it 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.[10] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[11]

In the present case, with her request for reconsideration, appellant submitted several new legal and factual arguments. Appellant, through her representative, argued that the Office's decision to terminate compensation was in error since the Office failed to apply the proper statutes, the Office failed to give appellant her due process rights, appellant had not refused suitable employment as she was not given a chance to respond, appellant had not received the notice of termination of benefits due to her moving, that appellant had resigned from her position effective April 1, 1996, and that her counsel had not been informed of the May 6, 1996 decision until August 9, 1997.[12] Furthermore, the arguments advanced by appellant's counsel fail to demonstrate clear evidence of error on its face in the May 6, 1996 decision as the Office properly found.

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[7] 5 U.S.C. § 8128(a).

[8] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *See* cases cited *supra* note 8.

[12] In appellant's January 30, 1998 request for reconsideration of the Office's May 6, 1996 decision and on appeal, appellant stated that she never received the Office's May 6, 1996 decision terminating her compensation benefits. The record supports that the Office's May 6, 1996 decision terminating compensation was sent to appellant at the address of record and does not indicate that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *A.C. Clyburn*, 47 ECAB 153 (1995).

On appeal, appellant's counsel also argued that the job offer was not suitable because appellant was outside the commuting area of Columbus, Ohio. He also argued that because appellant had to accompany her husband when he was transferred to Cincinnati, Ohio. Appellant's attorney contended that, since appellant's relocation was involuntary on her part and necessary to keep her family together, that to require appellant to accept an offer of suitable employment in Columbus, Ohio would be against the regulations. Appellant's explanation that she refused the offer of suitable employment to accompany her husband and keep her family together is exemplary, but also constitutes a personal reason for the relocation. The Board finds that her relocation is insufficient to constitute a reasonable basis for refusal of suitable work as it was based upon a personal reason.[13]

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and therefore denied appellant's untimely request for a merit review on that basis.

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

[13] *Susan L. Dunnigan*, Docket No. 96-2673 (issued January 7, 1998); *see Fred L. Nelly*, 46 ECAB (1994) (finding that appellant's reason for suitable work -- he now lives 1,200 miles from the employing establishment in Ohio, that he did not wish to return to a cold climate, that his daughter's physician's were located in his new home, that he was purchasing property there and that it would be a hardship to return to Ohio -- were found to be unacceptable; appellant had been on the employing establishment's rolls for approximately eight years before suitable work had been offered.

The decision of the Office of Workers' Compensation Programs dated April 30, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 22, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member