U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE E. HUNTER and U.S. POSTAL SERVICE,
POST OFFICE, Albany, NY

Docket No. 98-2070 and 98-2181; Submitted on the Record;
Issued November 21, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for merit review on the issue of her refusal of suitable work; (2) whether the Office met its burden of proof in terminating appellant's compensation benefits effective December 8, 1996 on the grounds that she refused an offer of suitable work; and (3) whether the Office 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.

On December 17, 1983 appellant, then a 52-year-old rural mail carrier, filed an occupational disease claim alleging that on October 24, 1983 she first realized her back condition was due to her employment. Appellant stopped work on October 24, 1983. The Office accepted the claim for aggravation of thoracic and cervical arthritis and placed appellant on the automatic rolls for temporary total disability. Appellant returned to light-duty work six hours per day on July 30, 1991. Thereafter, appellant filed intermittent claims for recurrence of disability which were accepted by the Office.[1] The Office denied appellant's claim for a recurrence of disability beginning August 5, 1994, in an October 26, 1994 decision. The Office denied appellant's

[1] On a claim for a recurrence of disability commencing March 25, 1992, appellant listed Drs. Edward W. Doucet and Joseph Aiello as her treating physicians. In a note dated June 17, 1992, appellant noted that she had been treated by Dr. Doucet, but requested to have her treating physician changed to Dr. Aiello.

reconsideration request in a merit decision dated March 2, 1995 and in nonmerit decisions dated June 30[2] and October 4, 1995.[3]

Appellant returned to work as a general clerk position for six hours per day effective July 30, 1991. Appellant stopped work on June 9, 1993 and resumed her limited-duty position of working six hours per day on June 28, 1993.

In progress notes dated January 30, 1996, Dr. Shashi Patel, appellant's attending physician, noted that appellant had been treated for cervical spondylosis due to a work-related injury and that she had "a partial disability related to her neck as well as her shoulder." Dr. Patel noted that appellant had been working light duty for 6 hours per day since 1991 and opined that appellant "should continue light duty, avoid heavy lifting, pulling/pushing in excess of 20 pounds. Avoid prolonged standing or repeated use of her right shoulder. Recheck 3 months p.r.n."

In a work restriction evaluation form dated February 2, 1996, Dr. Patel noted that appellant was capable of working six hours per day with restrictions on sitting, walking, climbing, twisting and bending and lifting more than 10 pounds.

In a letter dated February 15, 1996, appellant informed the Office that her treating physician had died. Appellant further noted "that portions of this correspondence are copies; originals were lost in the confusion of Doctor Aiello's death and closing of his office and practice and transfer of records to the office of Doctor … Patel."[4]

On April 23, 1996 appellant requested permission to change her treating physician from Dr. Patel to Dr. Doucet, a family practitioner.

By letter dated July 18, 1996, the employing establishment requested Dr. Patel's assistance in determining appellant's work capabilities and asked him to review an October 10, 1995 report by Dr. Edwin Mohler.[5]

In a July 26, 1996 review, the Office noted accepted conditions as aggravation of cervical and thoracic osteoarthritis and aggravation of cervical and thoracic spondylosis with no concurrent conditions before or after the date of injury. The Office noted that Dr. Patel's February 2, 1996 report indicated that appellant could work six hours per day. The current issue

[2] In this decision, the Office denied appellant's request for a hearing on the basis that she had previously requested reconsideration.

[3] Appellant subsequently filed an appeal from this decision. This appeal, docketed as No. 97-256, was dismissed pursuant to appellant's request on April 28, 1997. The dismissal does not constitute a merit decision on appellant's claim.

[4] Dr. Aiello, prior to his death, had been designated as appellant's treating physician per her request dated June 17, 1992 and approved by the Office on July 2, 1992.

[5] The employing establishment referred to Dr. Mohler as a second opinion physician selected by the Office. This report was not contained in the record. Nor were there any letters from the Office to appellant informing her that a second opinion medical examination with Dr. Mohler had been set up by the Office.

was whether appellant could return to full duty and the Office noted that a second opinion should be scheduled.

By report dated August 8, 1996, Dr. Patel opined that appellant was capable of working eight hours per day answering the telephone, typing, and performing other clerical duties, but limited her lifting to 10 pounds.

On August 9, 1996 Dr. Patel reviewed the duties of the modified position of general clerk and indicated that appellant could perform the proposed job eight hours per day. The position forwarded to Dr. Patel from the employing establishment listed duties of answering the telephone, typing, filing, timekeeping, assisting customers, nixies, processing monthly box rent bills, account period vehicle and gas reports, sorting undeliverable business bulk mail, filling out work order forms and other duties as assigned within her restrictions. Restrictions of the position included no lifting over 10 pounds, walking, sitting, standing, squatting, climbing, bending, kneeling and twisting – intermittent.

By letter decision dated August 23, 1996, the Office denied appellant's request to change her treating physician from Dr. Patel to Dr. Doucet.

In a letter dated September 11, 1996, the employing establishment offered appellant a permanent reassignment as a general clerk (modified) effective September 30, 1996. Restrictions included no lifting more than 10 pounds, intermittent walking, standing, bending, climbing, squatting, twisting and kneeling; no pulling or pushing; and no reaching above the shoulder. The duties of the position included typing, filing, answering telephones, timekeeping, assisting customers with insurance claims and nixies, processing monthly box rent and other assigned duties within her physical limitations. Appellant was advised that refusal of the position could have a negative impact on her compensation benefits.

By letter dated October 2, 1996, the Office advised appellant that it had reviewed the offered position and found it suitable. The Office afforded appellant 30 days to accept the position or provide reasons for rejecting the position.

In an October 31, 1996 letter, appellant's counsel responded with medical evidence to support appellant's refusal of the position.

In an October 29, 1996 letter, Dr. Eugene E. Drago, appellant's attending Board-certified cardiologist, noted that appellant had been hospitalized on August 20 and September 11, 1996 for stress-related angina and hypertension. Dr. Drago indicated that appellant had not returned to work since September 11, 1996. The physician stated that appellant had been having "seven to eight episodes of angina pectoris requiring Nitroglycerin for relief" and that the episodes have become more frequent as appellant "has become quite anxious and nervous over the job situation she is in."

Based upon his physical examination, Dr. Drago recommended that appellant "be kept out of work for at least another three to four weeks because of the increasing angina pectoris and elevated blood pressure" which were stress related. Dr. Drago attributed the source of appellant's stress to her supervisor, Connie Hall.

In an October 23, 1996 report, Dr. Doucet noted that he had been treating appellant for severe osteoporosis of the cervical and thoracic spine. Regarding appellant's ability to work, Dr. Doucet opined:

> "This condition has worsened over the past two years. It is my opinion that the condition will continue to worsen. Due to [appellant]'s diagnosis, I feel that she is unable to work at the current position that is being offered to her through the [employing establishment]."

In an October 28, 1996 report, Dr. Samuel S. Caldwell, a physician specializing in orthopedic surgery and sports medicine, performed a physical examination, obtained a work and medical history, and diagnosed cervical spondylosis or degenerative disc disease of the cervical spine. In conclusion, Dr. Caldwell opined:

> "I do not think that she is capable of working an eight-hour day. I also do not think she is capable of doing a job that involves any but the lightest of lifting. I think she is capable of lifting magazines, paper of that weight, writing, using a telephone, but I do not think she is capable of lifting, certainly more than 10 pounds, and probably less than that, probably 5 pounds lifting would be the maximum she could do, and that should not be very repetitive."

By letter dated November 7, 1996, the Office responded to appellant's contentions and found that they were insufficient to justify refusal of the offered position. The Office further determined that the modified clerk position constituted a valid job offer and instructed appellant that she had 15 days in which to accept the job offer or compensation would be terminated under 5 U.S.C. § 8106(c).

In a letter dated November 20, 1996, appellant's counsel rejected the offered position on the basis that her angina had "worsened to the point of disabling her for the job in question" and that appellant's osteoarthritis had worsened since she last worked in September 1996 and that medical documentation would be submitted.

In a November 18, 1996 report, Dr. Drago noted that appellant "had been experiencing increasing episodes of angina pectoris, requiring Nitroglycerin for relief" which were caused by appellant's "increased anxiety and nervousness over the job situation she has been in." In conclusion, Dr. Drago opined that appellant continued "to have recurrent attacks of angina pectoris brought on by the stress of her job situation" and that he recommended that appellant remained out of work until the end of December.

In a December 19, 1996 report, Dr. Drago indicated that appellant had "been under constant mental stress regarding her job status. She continues to experience episodes of angina pectoris, requiring either rest or Nitroglycerine for relief." The physician reported that an electrocardiogram (EKG) demonstrated "sinus rhythm with a heart rate of approximately 78/min" and "suspicion of left ventrical enlargement noted on this tracing and some ST segment changes in leads V3 to V6 as well as the height lateral one in AVL." Dr. Drago opined that appellant remained totally disabled from work and "that this will be indefinite until her other problems have been solved."

By decision dated November 25, 1996, the Office terminated appellant's compensation benefits on the basis that she refused an offer of suitable employment.

In letters dated December 20 and 26, 1996, appellant's representative requested a review of the written record regarding the termination of benefits.

By decision dated September 13, 1997, the Office hearing representative affirmed the November 25, 1996 decision finding that appellant had refused an offer of suitable employment.

By letter dated February 6, 1998, appellant's counsel requested reconsideration of the March 2, 1995 denial of her claim for a recurrence of disability and submitted evidence and legal arguments in support of her request. Appellant argued that her request was timely because her appeal to the Board had been timely filed within a year of the Office's October 4, 1995 denial of her reconsideration request and she had requested dismissal of the appeal before the Board without prejudice so that the file could be returned to the Office for review of the record in another claim. Appellant also argued that the Office erred in giving Dr. William Rogers'[6] report any weight, that the opinion of Dr. Aiello, appellant's treating physician, was sufficient to establish causal relationship, that the Office had not considered all the reports by Dr. Aiello in its October 5, 1995 decision, and that the Office had previously accepted recurrence claims based upon similar evidence.

On March 12, 1998 appellant's counsel requested reconsideration of the hearing representative's decision affirming the termination of her compensation benefits based upon her refusal to accept a suitable job. In support of her request for reconsideration, appellant submitted the November 25, 1996 decision, a December 20, 1996 request for review of the written record and a September 13, 1997 decision by an Office hearing representative.

By decision dated March 19, 1998, the Office found that appellant's request for reconsideration of the denial of her recurrence claim was untimely filed and failed to establish clear evidence of error.

By decision dated March 26, 1998, the Office denied merit review of appellant's request for reconsideration of the termination of her benefits for failure to accept a suitable position.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act[7] provides in pertinent part: "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[8] To prevail under this provision, the Office must

[6] The record contains a report dated September 21, 1994 by Dr. Rogers who was asked to examine appellant for her fitness for duty by the employing establishment.

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8106(c)(2).

show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[9] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[10]

The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.[11] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work or travel to the job.[12] Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[13] Lastly, if the employee is required to move to a certain area, isolated or otherwise, because of health conditions which were caused by the injury or which predated it, the issue of availability must be considered with respect to the new area of residence.[14]

In this case, the Office established that the position of general clerk (modified) was suitable through the reports of appellant's attending physician, Dr. Patel, who concluded that appellant was capable of performing the duties of the position. As the job offer made to appellant on September 11, 1996 complied with the restrictions furnished by Dr. Patel, the Board finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[15]

Subsequently, appellant submitted medical reports in support of her rejection of the job offer, stating that she was physically unable to work. Dr. Doucet, in an October 23, 1996 report, concluded that appellant's condition had worsened over the past two years to the point that she would be unable to perform the offered position. Dr. Drago opined that appellant was totally disabled due to her angina pectoris and high blood pressure. After the Office advised appellant that her reasons for not accepting the job offer were unacceptable, she submitted reports dated November 18 and December 19, 1996 from Dr. Drago concluding that her angina pectoris had worsened to the point of total disability.

---

[9] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

[10] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[11] *Id.*

[12] *Id.*

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning* Capacity, Chapter 2.814.5(a)(5) (July 1996); *see Susan L. Dunnigan*, 49 ECAB ___ (Docket No. 96-2673, issued January 7, 1998).

[14] *Id.* at Chapter 2.814.4(b)(4) (June 1996).

[15] *See John E. Lemker*, 45 ECAB 258 (1993).

The Federal (FECA) Procedure Manual indicates that, if medical reports document a condition which has arisen since the compensable injury and disables an employee from the offered job, the job will be considered unsuitable, even if the subsequently-acquired condition is not employment related.[16] The reports by Drs. Drago and Doucet indicate that appellant subsequently developed osteoporosis, angina pectoris and high blood pressure due to stress which affected appellant's health and disabled her from returning to work. The Office failed to develop this evidence prior to terminating appellant's compensation benefits. The Board, therefore, finds that the Office did not meet its burden of proof to terminate appellant's compensation under section 8106(c) as the medical evidence does not establish that the selected position was suitable in light of these medical conditions.[17]

Next, the Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[18] does not entitle a claimant to review of an Office decision as a matter of right.[19] 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 --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[17] The Board further notes that, in October 23 and December 16, 1996 reports, Dr. Drago, advised that appellant was disabled due to her angina pectoris and high blood pressure due to the stress from appellant's work and that she would continue to be totally disabled until her work problems were resolved.

[18] 5 U.S.C. § 8128(a).

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

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[20] 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.[21] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted under 5 U.S.C. § 8128(a).[22]

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[23] In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[24]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[25] The evidence must be positive, precise and explicit and must be manifest on the fact that the Office committed an error.[26] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[27] It is not enough merely to show that the evidence could be construed as to produce a contrary conclusion.[28]

To show clear evidence of error, the evidence submitted must be of sufficient probative value not only to create a conflict in medical opinion or establish a clear procedural error, but also to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[29] This entails a limited review by the

---

[20] 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).

[21] 20 C.F.R. § 10.138(b)(2).

[22] *Jimmy L. Day*, 48 ECAB 654, 655-56 (1997); *Donald Jones-Booker*, 47 ECAB 785, 788 (1996).

[23] *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

[24] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3 (May 1991).

[25] *Veletta C. Coleman, supra* note 23.

[26] *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[27] *See Jesus D. Sanchez, supra* note 19.

[28] *Fidel E. Perez, supra* note 26.

[29] *Veletta C. Coleman, supra* note 23 at 370.

Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear evidence of error on the part of the Office.[30] 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.[31]

In this case, appellant's February 6, 1998 request for reconsideration was filed within one year of the April 28, 1997 Board decision dismissing appellant's appeal without prejudice. However, it is well established that only decisions on the merits of the claim provide a one-year time period for requesting reconsideration.[32] The April 28, 1997 Board decision was not a merit decision. The last merit decision in this case was issued on March 2, 1995 in the October 4, 1995 nonmerit decision denying reconsideration, appellant was advised that she had one year from the date of the March 2, 1995 decision to request reconsideration. Since the February 6, 1998 reconsideration request was more than one year after the March 2, 1995 merit decision, it was properly considered untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[33] In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[34]

The Board finds that appellant's February 6, 1998 request for reconsideration fails to establish clear evidence of error. The Office properly found the evidence appellant submitted to be insufficient as it had been previously considered by the Office; thus, the evidence submitted by appellant on reconsideration is insufficient to *prima facie* support appellant's claim for a recurrence of disability on August 5, 1994. In addition, appellant's arguments regarding error on the part of the Office are not supported by the record. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that it abused its discretion in denying a merit review.

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

[31] *Fidel E. Perez, supra* note 26.

[32] The one-year limitation for filing a request for reconsideration runs from the date of the last merit decision of record. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) May 1996; *see Robbin Bills*, 45 ECAB 784 (1994).

[33] *Veletta C. Coleman, supra* note 23; *Rex L. Weaver,* 44 ECAB 535 (1993).

[34] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

The decision of the Office of Workers' Compensation Programs dated March 19, 1998 is hereby affirmed and the decision dated September 13, 1997 is hereby reversed.[35]

Dated, Washington, DC
November 21, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[35] Given the Board's disposition in this case, it is not necessary for the Board to address whether the Office, by decision dated March 26, 1998, properly denied appellant's March 12, 1998 request for reconsideration without conducting a merit review of the claim.