U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETE F. DORSO and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

Docket No. 00-610; Oral Argument Held December 5, 2000;
Issued July 9, 2001

Appearances: *Robert A. Taylor, Jr., Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB,[1]

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case under 5 U.S.C. § 8128(a), on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review.

In March 1993, the Office accepted that appellant, then a 33-year-old mailhandler technician, sustained employment-related carpal tunnel syndrome. He received compensation for periods of disability.[2] In December 1993, the employing establishment offered appellant a limited-duty job as a rewrap clerk and in January 1994 the Office advised him that the position was suitable.[3] Appellant refused the position and, by decision dated April 13, 1994, the Office terminated his compensation effective April 1, 1994 on the grounds that he refused an offer of suitable work. By decision dated February 27, 1995 and finalized February 28, 1995, an Office hearing representative affirmed the Office's April 13, 1994 decision.

In March 1995, appellant requested both an oral hearing and reconsideration. By decision dated September 20, 1995, the Office denied appellant's request for an oral hearing on

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[1] The Board notes that Valerie Evans-Harrell, who participated in the oral argument on December 5, 2000, was not an Alternate Member of the Board after March 11, 2001, as her temporary appointment expired, and did not participate in the preparation of this decision.

[2] Appellant underwent carpal tunnel releases of both wrists in late 1992 and a left re-release in early 1993, which were authorized by the Office.

[3] The position involved repairing damaged mail at the worker's own pace and did not require repetitive hand or arm movements or lifting more than 20 pounds.

the grounds that his claim had already been reviewed. By decision dated September 20, 1995, the Office denied appellant's reconsideration request on the grounds that the evidence submitted in support of his application was insufficient to require merit review.

On October 17, 1996 appellant again requested reconsideration before the Office. By decision dated December 13, 1996, the Office denied appellant's claim on the grounds that his only avenue of appeal was to the Board. Appellant filed an appeal with the Board. By motion dated May 24, 1999, the Office acknowledged that it had not properly adjudicated his reconsideration request and asked the Board to remand the case for further action under 20 C.F.R. § 10.138(b). On July 6, 1999 the Board issued an order granting the Director's May 24, 1999 motion and remanded appellant's case to the Office.[4] On September 9, 1999 the Office denied appellant's reconsideration request on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's September 9, 1999 decision denying appellant's request for a review on the merits of its February 28, 1995 decision. Because more than one year has elapsed between the issuance of the Office's February 28, 1995 decision and October 21, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 28, 1995 decision.[5]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office's regulations provide 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) submit relevant and pertinent new evidence not previously considered by the Office.[7] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[8] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[9] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[10]

In its September 9, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on February 28,

[4] Docket No. 97-1337 (issued July 6, 1999).

[5] *See* 20 C.F.R. § 501.3(d)(2).

[6] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2).

[8] 20 C.F.R. § 10.607(a).

[9] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[10] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

1995 and appellant's request for reconsideration was dated October 17, 1996, more than one year after February 28, 1995.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[11] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[13] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[17]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[18] The Board makes an independent determination of whether a claimant has submitted clear evidence

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[11] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

[13] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[14] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[15] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[16] *See Leona N. Travis*, *supra* note 15.

[17] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[18] *Leon D. Faidley, Jr.*, *supra* note 11.

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.[19]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's reconsideration request showed clear evidence of error, which would warrant reopening appellant's case for merit review. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

In support of his October 1996 reconsideration request, appellant, through his attorney, made a series of arguments that his compensation was improperly terminated.[20] The Board finds that the arguments and evidence submitted by appellant in support of his application for review do not raise a substantial question as to the correctness of the Office's decision and thus are insufficient to demonstrate clear evidence of error.

Appellant argued that the proposed termination of his compensation violated due process requirements of the U.S. Constitution because the Office, in several letters, failed to advise him of the consequences of refusing the rewrap clerk position and did not give him an adequate opportunity to provide additional argument before terminating his compensation. Appellant's argument that the Office violated the due process requirements of the U.S. Constitution is not relevant in that he did not adequately articulate the basis for this argument.

Appellant alleged that the Office failed to advise him that the rewrap clerk position was deemed to be suitable. He claimed that the Office violated its procedure and Board precedent because its January 6, 1994 letter, which provided him with 30 days to accept the offered position, did not advise him that his future entitlement to schedule award compensation was also in jeopardy. Appellant also generally alleged that the Office did not advise him of the consequences of refusing the offered position or of its "final intentions" after he was advised that his reasons for refusal were unacceptable.

Appellant's argument regarding termination of schedule award compensation is not relevant. The Board has held that termination of compensation under section 8106(c) for refusal of suitable work serves as a bar to receipt of schedule award compensation.[21] Further, appellant had not established entitlement to schedule award compensation. The Board finds that appellant
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[19] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458, 466 (1990).

[20] Appellant also submitted numerous documents, but these mostly consisted of documents, which had already been submitted and considered by the Office. He submitted 1996 medical reports regarding his emotional condition but these would not be relevant to the main issue of the present case.

[21] *See Stephen R. Lubin*, 43 ECAB 564, 572-73 (1992).

has not clearly shown that the Office erred in its procedures covering the suitability of the rewrap clerk position or of the consequences of refusing the offered position.[22] In addition, a limited review of the evidence does not reveal any error regarding appellant's arguments that the Office failed to advise him of its "final intentions" before terminating his compensation.[23]

Appellant claimed that he was not medically capable of performing the rewrap clerk position. However, appellant's claim that he was not medically capable of performing the offered position is irrelevant because he is not qualified to provide a medical opinion on his ability to perform the position.[24] Nor has he identified medical evidence of record, showing that he could not work as a clerk. Appellant claimed that the opinion of Dr. Denis Franks, his attending Board-certified hand surgeon, established that he could not perform the duties of the rewrap position.

However, a limited review of the evidence reveals that Dr. Franks indicated that appellant was able to perform such work. In a report dated September 13, 1993, Dr. Franks indicated that appellant was capable of performing "at least some type of duty" and that he should be evaluated for a release to work as of September 20, 1993. In a report dated October 11, 1993, Dr. Franks indicated that while appellant could not do his regular job, he was capable of performing modified duty. In a report dated October 21, 1993, Dr. Franks indicated that appellant was capable of working in a "nonrepetitive, nonsorting or keying type manner." Although Dr. Franks did not provide specific work restrictions, his reports essentially show that appellant could perform the nonrepetitive tasks of the rewrap clerk position. Appellant has not presented medical evidence, which clearly shows that he was not physically capable of performing duties of the selected position.[25]

Moreover, a limited review of the evidence reveals that Dr. Gaylord Clark, a Board-certified hand surgeon, who served as an Office referral physician, approved the rewrap clerk position. In a work restriction form dated October 16, 1993, Dr. Clark provided restrictions which would be within the duties of the rewrap clerk position. He indicated that appellant could work for 4 hours per day, lift up to 20 pounds and engage in fine manipulation, simple grasping

[22] For example, the Office, in its January 6, 1994 letter, advised appellant that the rewrap clerk position was deemed to be suitable and that he had 30 days to accept the position or provide reasons for not accepting it. The Office indicated that a final decision would be made on his case and described the provisions of section 8106(c) of the Act. The Office stated, "Therefore, if you fail to accept the offered position and fail to demonstrate that the failure is justified, your entitlement to compensation will be terminated."

[23] In its March 16, 1994 letter, the Office explicitly informed appellant that his reasons for refusing the position were unacceptable. It then stated that he had 15 days to accept the position and noted, "Should you refuse to accept this position, you will not be entitled to further compensation from this Office." *See Rosie E. Garner*, 48 ECAB 220, 224-25 regarding the procedural requirements of considering a claimant's reasons for refusing an offered position. *See generally Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[24] *C.W. Hopkins*, 47 ECAB 725, 726-27 (1996) (finding that the claimant's opinion that he was not physically capable of performing the offered position was of no probative value because the determination of such physical capability was a medical question).

[25] The record contains reports, dated in November 1993 and February 1994, in which Dr. Franks noted that appellant reported continuing symptoms, but these reports do not show that Dr. Franks altered his opinion regarding appellant's ability to work.

and reaching above the shoulders.[26] On February 10, 1994 Dr. Clark specifically found that appellant could perform the duties of the offered position.

Appellant alleged that he had an emotional condition in late 1993 and early 1994, which prevented him from working as a rewrap clerk. This argument is irrelevant because appellant has not identified medical evidence showing that an emotional condition prevented him from performing the duties of the rewrap clerk position when it was offered in early 1994.[27] A limited review of the record does not show that appellant had any disabling emotional condition around the time the position was offered.[28] He also claimed that the Office failed to determine whether subsequently acquired medical conditions prevented him from performing the position. Appellant did not explain the relevance of considering medical conditions acquired after early 1994 when he refused the offered position.

Appellant claimed that the job offer was withdrawn by the employing establishment when he was "barred" from its premises. However, this argument is not relevant because appellant did not provide any description of the claimed incident or explain how such an incident would relate to the availability of the offered position. Moreover, a limited review of the relevant evidence reveals that the rewrap position remained available to appellant through the Office's February 28, 1995 termination decision.[29]

Appellant alleged that the Office had a duty to provide him with vocational rehabilitation so that he could qualify for what he deemed to be a "better" position. He did not explain the relevance of his belief that the Office was required to provide him with a "better" position. It is well established that dislike of a particular job is not an acceptable reason for refusing an offer of suitable work.[30] The record reveals that the Office advised appellant that it was not necessary to

[26] Dr. Clark indicated that vocational rehabilitation "would help" but he did not indicate that it was a prerequisite for performing such modified duty.

[27] Appellant had not filed a claim alleging that he sustained an employment-related emotional condition and the Office has not accepted such a condition.

[28] In a report dated August 15, 1996, Dr. Miguel Sadovnik, an attending Board-certified internist, stated that in August 1993 appellant was diagnosed with depression for which he received medication. In a report dated April 1, 1996, Dr. Miguel A. Frontera, an attending Board-certified psychiatrist, indicated that in late 1993 appellant presented with symptoms of depression. These reports do not, however, show that appellant had an emotional condition in early 1994 that disabled him from performing the rewrap clerk position. Around the time appellant refused the offered position in early 1994, the record did not contain any evidence of his claimed emotional condition and he did not claim that it prevented him from working at that time.

[29] The record contains a February 22, 1994 letter in which the employing establishment indicated that the rewrap clerk position continued to be available.

[30] *See C.W. Hopkins*, *supra* note 24 at 727; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

refer him to vocational rehabilitation as suitable work was being offered to him by the employing establishment.[31]

Appellant asserted that he was not required to accept the offered position because it would have resulted in a loss of wage-earning capacity. However, the Office clearly advised appellant that he would receive compensation for the four hours per day that his employment-related injury prevented him from working.[32]

Appellant claimed that the Office should have determined his loss of wage-earning capacity instead of terminating his compensation by applying suitable work procedures.[33] Appellant argued that Office procedure violates constitutional due process rights because employees, who abandon suitable work are subject to loss of wage-earning capacity determinations whereas those who reject suitable work are not subject to such determinations. A reading of the portions of Office procedure cited by appellant does not support this interpretation.

The September 9, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 2, 2001

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[31] Appellant cited a portion of Office procedure, which indicates that vocational rehabilitation is most effective when it begins early in the recovery process. Appellant has interpreted this section as a mandate that he should have been referred to vocational rehabilitation, but a plain reading of the section does not support such an assertion. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5 (December 1993).

[32] Appellant claimed that he would have suffered a loss of wage-earning capacity if he accepted the offered position, because his leave benefits in the position would be calculated based on actual hours worked rather than on an eight-hour workday. However, appellant did not explain the basis for his belief that the method of calculating a benefit not related to wage compensation would be an acceptable reason for not accepting suitable work.

[33] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7, 9-10 (December 1995).