U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LADONNA D. HUMPHREY and U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Houston, TX

Docket No. 02-617; Submitted on the Record;
Issued August 16, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective February 26, 2001, on the grounds that she refused an offer of suitable work; and (2) whether the Office properly found that appellant's April 24, 2001 request for reconsideration of the Office's September 29, 1999 decision was not timely filed and failed to present clear evidence of error.

On August 26, 1996 appellant, then a 52-year-old mailhandler, filed a traumatic injury claim alleging that she injured her upper and mid back while pushing an overloaded mail hamper. The Office accepted the claim for cervical and lumbar strains and paid all appropriate compensation benefits.[1] Appellant stopped work on the date of injury. On March 3, 1997 she returned to limited-duty work, eight hours a day, but only worked two days before stopping work completely. Appellant returned to limited duty, four hours a day, on March 18, 1997 and began working six hours a day on August 8, 1997. She continued working six hours a day until October 4, 1998, when she stopped working and filed a claim, Form CA-8, for total disability compensation.

In a decision dated February 23, 1999, the Office denied appellant's claim for total disability compensation on the grounds that the medical evidence was insufficient to establish that she was unable to perform her light-duty work beginning October 4, 1998. After an oral hearing, held at appellant's request, in a decision dated September 29, 1999, an Office hearing representative held that she was still entitled to compensation for two hours a day, as she had been working only six hours a day prior to stopping work, but was not entitled to any additional

[1] On October 8, 1996 the Office accepted appellant's claim for a lumbar strain. By letter dated November 25, 1996, the Office noted that lumbar strain had been accepted in error, that appellant's accepted condition was cervical strain and asked appellant to disregard its October 8, 1996 letter. The Board notes, however, that the most recent statement of accepted facts contained in the record, dated June 17, 1997, indicates that the Office accepted both cervical and lumbar strains.

compensation, as she had not established that she was totally disabled for work beginning October 4, 1998.

In a report dated December 7, 2000, Dr. Jeffrey Charnov, appellant's treating Board-certified anesthesiologist, stated that appellant could work eight hours a day in a sedentary position, with restrictions on lifting no more than 10 to 20 pounds.

On January 10, 2001 the employing establishment offered appellant a full-time limited-duty position as a modified mailhandler, eight hours a day. The position called for appellant to sit at a rest bar and case finance letters into appropriate holdouts. The position required light lifting of not more than 10 to 20 pounds and picking up letters a handful at a time to sort them, sitting at rest bar and reaching forward.

In a letter dated January 10, 2001, the Office advised appellant that the offered job was found suitable to her work capabilities and advised her of the penalty provision under 5 U.S.C. § 8106(c)(2) for refusing a position found suitable. The Office allowed appellant 30 days to accept the position or to provide an explanation of the reasons for refusing it.

By letter dated January 26, 2001, appellant stated that she could not return to work until a work hardening program, previously requested by her physician and not yet approved by the Office, had been completed.[2] In a letter dated February 12, 2001, the Office advised appellant that her reasons had been considered and found insufficient to justify the refusal of the offered position and instructed her that she had 15 days in which to accept the job offer or compensation payments would be terminated under 5 U.S.C. § 8106(c).

In a decision dated February 26, 2001, the Office found that appellant had refused a suitable job offer and terminated monetary compensation under 5 U.S.C. § 8106(c) effective immediately.

On April 24, 2001 appellant requested reconsideration of the Office's February 26, 2001 decision and submitted additional medical evidence in support of her request. She stated that she had in fact signed the limited-duty job offer indicating her acceptance, but was unable to report for duty because her physician had not released her to work. Appellant reiterated that her physician had recommended a work hardening program, which had not yet been approved by the Office. In addition, she asked that the Office reconsider her claim for total disability compensation beginning October 4, 1998.

By decision dated June 26, 2001, the Office found the newly submitted evidence insufficient to warrant modification of the decision terminating appellant's benefits for refusal of suitable work. With respect to appellant's request for total disability compensation beginning

[2] In a report dated August 25, 1998, Dr. Keith S. Schauder, a Board-certified orthopedic surgeon and Office second opinion physician, diagnosed chronic lumbar and cervical strains with incomplete rehabilitation and recommended that appellant continue to work four hours a days and, after work hardening, return to work eight hours a day. In a report dated February 8, 2000, appellant's treating physician recommended that appellant undergo physical therapy and a work hardening program.

October 4, 1998, the Office noted that appellant's request was not timely filed and failed to present clear evidence of error.

The Board finds that the Office properly terminated appellant's compensation benefits effective February 26, 2001 on the grounds that she refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] Section 10.517(a) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified[5] and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[6] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[7]

The initial question in this case is whether the Office properly determined that the position was suitable. The Board finds that the weight of the medical evidence establishes that the modified mailhandler position was within appellant's physical limitations. In a report dated December 7, 2000, Dr. Charnov, appellant's treating physician, stated that she could perform sedentary work, eight hours a day, with restrictions on lifting more than 10 to 20 pounds. While appellant refused the position on the grounds that she had not undergone a work hardening program, Dr. Charnov did not mention a work hardening program in his December 7, 2000 report releasing appellant to work and she did not submit any supporting medical evidence. Therefore, the Office properly found that the limited-duty position offered by the employing establishment was within the work restrictions set forth by Dr. Charnov. While appellant subsequently submitted form reports from Dr. Charnov dated January 23 and April 6, 2001, in which he again restricted her to six hours of work a day, as Dr. Charnov did not offer any rationale for the change in his opinion or otherwise explain why appellant could not perform sedentary work eight hours a day, as previously indicated, his opinion is of insufficient probative value to warrant modification of the Office's prior decision.[8]

[3] 5 U.S.C. § 8123(a).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[6] 20 C.F.R. §§ 10.516, 10.517(a); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[8] Appellant also submitted reports from Dr. Charnov dated March 26 and October 1, 1999. The Board notes, however, that as both of these reports were completed almost two years prior to the Office's January 10, 2001 job offer and the Office's February 26, 2001 decision, they do not address the relevant issue in this case and are, therefore, of little probative value. *See Betty G. Myrick*, 35 ECAB 922 (1984).

The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[9] The weight of the medical evidence in this case establishes that appellant was capable of performing the position offered to her on January 10, 2001. The Board finds that the Office properly relied on Dr. Charnov's December 7, 2000 report. While appellant submitted additional evidence from him restricting her to working six hours a day, as Dr. Charnov does not explain the reasoning behind his change of opinion or indicate that appellant's condition has worsened, there was insufficient support for her stated reasons in declining the job offer. Therefore, the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation. Accordingly, the Board finds that the Office properly terminated her compensation benefits on the basis that she refused on offer of suitable work.

The Board further finds that the Office properly refused to reopen appellant's claim for further consideration of the merits of her claim under 5 U.S.C. § 8128(a) of the Act, on the basis that her April 24, 2001 request for reconsideration of the Office's September 29, 1999 decision was not timely filed and failed to present clear evidence of error.

With respect to the issue of whether appellant established that she was entitled to total disability compensation beginning October 4, 1998, the only decision before the Board on this appeal is the Office's June 26, 2001 decision, which denied appellant's request for a review of the merits of this aspect of her case because her request for review was not timely and because it did not establish any evidence of error. As more than one year elapsed from the Office's most recent merit decision on the issue of appellant's alleged total disability beginning October 4, 1998, dated September 29, 1999 and the date of the filing of appellant's appeal on January 18, 2002 the Board lacks jurisdiction to review the prior decisions on this issue.[10]

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Board has found that the imposition of this one-

[9] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

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

year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[11]

With respect to the present issue, the most recent merit decision by the Office was September 29, 1999. As appellant's request for reconsideration, received by the Office on April 27, 2001, was not filed within one year from the date of the most recent merit decision, the Office properly determined that appellant's application for review was not timely filed pursuant to 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[12] Office procedures state 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.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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

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

[12] 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996), 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 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 development, is not clear evidence of error and would not require a review of the case...."

[14] *See Jimmy L. Day*, 48 ECAB 654 (1997); *Fidel E. Perez*, 48 ECAB 663 (1997); *Dean D. Beets*, 43 ECAB 1153 (1992).

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

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

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

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

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.[19] 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.[20]

In support of her request for total disability compensation beginning October 4, 1998, appellant submitted additional medical reports from her treating physician, Dr. Charnov. In a March 26, 1999 report, he noted that appellant had been evaluated in a pain clinic in October 1998 and had received a series of epidural steroid injections and lumbar nerve root blocks throughout November and December 1998. Dr. Charnov stated that he believed appellant's treatment, including her pharmacologic trials of epidural steroid injections and therapy, were medically appropriate for her pain condition, but he did not address whether this treatment or the underlying condition, rendered appellant totally disabled for work beginning October 4, 1998. In a follow-up report dated October 1, 1999, Dr. Charnov again confirmed that appellant presented at his office in October 1998. He noted that appellant had not received complete rehabilitation for her 1996 employment injuries and continued to have chronic pain. Dr. Charnov added that the job appellant was performing at the time required that she hold her head in a downward position and this aggravated the injury causing her pain to increase. He explained that in order to combat this increased pain, he placed her on medication, which had the side effect of causing drowsiness and slower mental alertness. Dr. Charnov did not state, however, whether the effects of appellant's treatment or underlying condition, caused her to be totally disabled from her employment beginning October 4, 1998. The only other reports submitted with appellant's request for reconsideration are the form reports dated January 23 and April 6, 2001, in which Dr. Charnov restricted appellant to six hours of work a day, but did not discuss any past periods of disability. As the reports of Dr. Charnov do not offer any discussion as to whether appellant's medical conditions or their treatment, caused her to become totally disabled from her work beginning October 4, 1998 and, therefore, are not relevant to the issue decided by the Office, the Board finds that these reports do not raise a substantial question as to the correctness of the Office's September 29, 1999 merit decision and are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's September 29, 1999 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

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

[20] *Gregory Griffin*, *supra* note 12.

The decisions of the Office of Workers' Compensation Programs dated June 26 and February 26, 2001 are hereby affirmed.[21]

Dated, Washington, DC
August 16, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[21] Subsequent to the Office's June 26, 2001 decision, by letter dated August 7, 2001 appellant requested reconsideration and submitted additional medical evidence in support of her request. The Board cannot address appellant's reconsideration request, as this issue had not yet been finally adjudicated by the Office at the time of appellant's appeal and the Board's jurisdiction to consider and decide appeals extends only to final decisions of the Office. *Algimantas Bumelis*, 48 ECAB 679 (1997).