U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGDALIA BOCANEGRA and U.S. POSTAL SERVICE, POST OFFICE, Bronx, NY

Docket No. 02-639; Submitted on the Record;
Issued August 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

This case has been before the Board in a prior appeal.[1] In a September 10, 1999 decision, the Board found that the Office properly terminated appellant's compensation benefits on the basis that she failed to accept an offer of suitable work and affirmed the Office's September 12, 1997 termination decision. The factual background of the case, as set forth in the September 10, 1999 decision, is hereby incorporated by reference. Appellant filed a petition for reconsideration of the September 10, 1999 decision, which was denied by the Board, in an order dated, December 7, 1999.

On September 21, 2001 appellant, through her attorney, requested reconsideration before the Office, contending she had timely filed a response to the amended limited-duty job sent to her by the employing establishment on August 15, 1997. Appellant noted that she returned to work in a limited-duty capacity on November 10, 1997, following the September 12, 1997 termination decision and increased her workday to six hours before sustaining several recurrences of disability. She contended that the September 12, 1997 decision was clearly erroneous in that she had responded to the job offer.[2]

In a November 2, 2001 decision, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to present clear evidence of error.

[1] Docket No. 98-76 (September 10, 1999). Appellant's claim was for a low back injury sustained on November 12, 1996.

[2] Appellant also addressed her claim pertaining to a March 1, 2000 injury related to an alleged assault sustained while in the performance of duty. This claim was assigned Office No. A0-771098 and is the subject of an appeal in Docket No.02-640 currently pending before the Board.

The Office noted that appellant submitted copies of a letter from the employing establishment to her physician, Dr. Joseph Waltz, dated August 15, 1997 and a copy of the limited-duty job offer dated July 29, 1997, which contained appellant's signature as accepting the job offer and the date "August 25, 1997." The Office addressed appellant's argument, but found that the document submitted by appellant did not establish that she responded to the job offer timely. While the documents contained the notation "August 25, 1997" next to signatures of appellant and Dr. Waltz, such evidence did not support the assertion that they were mailed in a timely manner. The Office found that both documents bore a telefax line at the top captioned "[f]rom: [Dr.] Waltz" and dated "September 19, 1997 10:42 a.m." which post dated the Office's September 12, 1997 termination decision. The Office also noted that the documents submitted were previously made a part of the case record. The Office claims examiner contacted the employing establishment on October 31, 2001 to inquire as to whether a copy of the job offer was received at the employing establishment on or prior to September 12, 1997. He was advised that the employing establishment received a copy on October 16, 1997, which was subsequently transmitted to the Office. Based on this evidence, the Office determined that there was no basis for finding error in the September 12, 1997 termination decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[3] Rather, the statute vests the Office with the discretionary authority to determine when it will review an award for or against compensation.[4] The Office, through its implementing federal regulations, has imposed limitations on the exercise of its discretionary authority.[5] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought.[6]

In this case, the one-year time limitation period began to run the day following issuance of the Board's September 10, 1999 decision, as this constituted the last merit review of the case.[7] As appellant's request for reconsideration was dated September 21, 2001, it was not timely filed before the Office.

In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review of the case record to determine whether the application for review presents clear evidence of error on the part of the Office in its most recent merit decision.[8] In so

[3] *See Leon D. Faidley*, 41 ECAB 104 (1989).

[4] 5 U.S.C. § 8128(a); *see also* 20 C.F.R. §§ 10.606 and 10.608.

[5] 20 C.F.R. § 10.607.

[6] 20 C.F.R. § 10.607(a).

[7] *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997). While appellant filed a petition for reconsideration, that was denied on December 7, 1999, this did not constitute a merit review as the Board did not grant the petition. *See* 20 C.F.R. § 501.6.

[8] 20 C.F.R. § 10.607(b).

doing, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[10] The evidence must be positive, precise and explicit and must establish on its face that the Office's decision was erroneous.[11] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict of 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 doubt as to the correctness of the Office's decision.[14]

In support of her September 21, 2001 request for reconsideration, appellant submitted evidence contending that she had timely responded to the employing establishment job offer and that her response was made prior to the September 12, 1997 termination. Appellant's contention and evidence is insufficient to establish clear evidence of error. By letter dated July 29, 1997, the Office notified appellant that it found that the limited-duty job offer was suitable to her work capabilities. Appellant was notified that she could accept the job without penalty and that she had 30 days from the date of the letter to accept the position or provide explanation to the Office of the reasons for her refusal. Appellant was advised that the Office would consider her reasons for refusing the job and, if she failed to respond, her compensation would be terminated.

Construed most favorably, the evidence submitted by appellant indicates that she may have forwarded a response to Office's July 29, 1997 notification letter to the employing establishment within the 30-day time period. The record does not establish, however, that appellant submitted any response to the Office within that period of time. It is well established that the determination of suitability and the evaluation of an employee's reasons for not accepting an offered position are matters which may not be delegated by the Office to the employing establishment.[15] The evidence submitted by appellant reflects that her "August 25, 1997" acceptance and the similarly dated letter of Dr. Waltz were forwarded to the employing establishment from the office of Dr. Waltz by telefax dated September 19, 1997, a week following the Office's September 12, 1997 termination decision. As such, this evidence is insufficient to establish clear evidence of error on the part of the Office in terminating her

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

[10] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[11] *See Leona N. Travis*, 43 ECAB 227 (1991); *see also* 20 C.F.R. § 10.607(b).

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

[13] *See Leona N. Travis, supra* note 11.

[14] *Thankamma Mathews*, 44 ECAB 765 (1993).

[15] *Eileen R. Kates*, 46 ECAB 573 (1995).

compensation, as it does not raise a substantial question as to the correctness of that decision. For this reason, the Office properly denied further review of appellant's claim.

The November 2, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 19, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member