

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GINA MITCHELL and U.S. POSTAL SERVICE,
BLUEGRASS STATION, Lexington, KY

*Docket No. 02-852; Submitted on the Record;
Issued April 21, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

On November 15, 1996 appellant, then a 36-year-old casual clerk, filed a notice of traumatic injury alleging that on November 14, 1996 she was struck in the right arm and wrist by a moving mailcart. The Office accepted that, as a result of the injury, appellant sustained a right shoulder sprain and rotator cuff tear. She underwent surgery on April 10, 1997.

On September 11, 1997 appellant, at the request of Dr. Ben W. Kibler, a Board-certified orthopedic surgeon, underwent a functional capacity evaluation. On September 16, 1997 Dr. Kibler released appellant to modified-duty work for 4 1/2 hours per day, 6 days per week, with restrictions of sitting and standing for 4 to 5 hours daily, walking for 1 to 2 hours, lifting under 10 pounds occasionally, carrying under 10 pounds rarely, pulling under 5 pounds occasionally and occasional bending, reaching, twisting the body and rotating the wrists.

On September 22, 1997 the employing establishment offered appellant the limited-duty position of account clerk, consistent with the restrictions set forth by Dr. Kibler. Appellant did not return to work and by decision dated November 13, 1997, the Office terminated appellant's compensation benefits on the basis that she refused an offer of suitable employment. She disagreed with the decision and requested an oral hearing. By decision dated September 28, 1998, the hearing representative set aside the November 13, 1997 decision and ordered reinstatement of appellant's benefits.

On October 30, 1998 the employing establishment advised the Office that there was no longer a modified-duty position available for appellant at the employing establishment and appellant was referred for vocational rehabilitation services in order to assist her in returning to work.

The record indicates that at her initial vocational rehabilitation evaluation on November 30, 1998, appellant was very pleasant and cooperative. However, appellant did not keep her scheduled appointments for vocational evaluations on December 28, 1998 or February 8, 1999. She claimed that the job opportunities with the post office had not been adequately researched and that her current medical information should have been requested from her physician.

By letter dated February 11, 1999, the Office informed appellant of the consequences of her refusal to keep her appointments, which included the possible reduction of her compensation benefits to zero and stated that she must submit medical or factual information to support her inability to participate in the rehabilitation.¹

By decision dated March 15, 1999, the Office notified appellant that her compensation had been reduced to zero effective March 11, 1999, as a result of her refusal to participate in vocational rehabilitation. Appellant disagreed with the decision and requested an oral hearing, held on August 24, 1999. By decision dated November 17, 1999, the Office hearing representative affirmed the previous decision reducing her compensation benefits. The Office also granted appellant a schedule award of 17 percent for the permanent impairment of her right upper extremity.

By letter dated November 2, 2000, appellant requested reconsideration and submitted a copy of her schedule award.

In a nonmerit decision dated November 19, 2001, the Office denied appellant's request for reconsideration of the November 17, 1999 decision, finding that she did not identify the grounds upon which she was requesting reconsideration and did not submit any new and relevant evidence or present any new legal contentions to warrant merit review.

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.² Because more than one year has elapsed between the issuance of the Office's November 17, 1999 merit decision and February 21, 2002, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the November 17, 1999 decision and any preceding decisions. Therefore, the only decision before the Board at this time is the Office's November 19, 2001 nonmerit decision denying appellant's application for review.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration of the merits.

¹ Appellant submitted a January 8, 1999 report from Dr. Paul V. Brooks, but the report was in regards to a schedule award and was irrelevant to the underlying issue.

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.³ When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.⁴

In this case, the Board finds that appellant did not submit any new and relevant evidence or raise any legal contentions to warrant merit review. Appellant's November 2, 2000 letter is unclear and she did not identify the grounds upon which she was requesting reconsideration. She indicated that she was writing in response to the Office's November 17, 1999 letter, which contained her right to request reconsideration. However, the body of appellant's letter discussed her impairment rating and did not address the underlying issue in this case. The underlying issue is whether appellant submitted sufficient factual and or medical evidence to justify her refusal to attend her vocational rehabilitation. In her letter she discussed a physician's findings concerning her impairment rating and indicated that she had been receiving compensation benefits since February 10, 2000. Information regarding her impairment rating and her disability benefits is irrelevant to the underlying issue in this case, which is appellant's refusal to attend her vocational rehabilitation.

In support of her request, appellant also submitted the Office's June 29, 2000 decision awarding her a 17 percent schedule award for the right upper extremity. In the decision of *Edward Matthew Diekemper*,⁵ the Board held that the submission of argument or evidence which does not address the particular issue involved does not constitute a basis for reopening a case. Appellant's schedule award does not address the underlying issue in this case of appellant's refusal to attend vocational rehabilitation. She specifically indicated in her letter that she was writing in response to the Office's November 17, 1999 decision. Appellant did not indicate that she was appealing the Office's decision regarding her schedule award. The information appellant submitted with her request for reconsideration is irrelevant to the issue being appealed and is insufficient to reopen the case for merit review. Appellant did not submit any other evidence or raise any legal contentions related to the reduction of her compensation benefits or her refusal to attend vocational rehabilitation.

Since appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant, and pertinent new evidence not previously considered by the Office, she did not establish that the Office abused its discretion in denying her request for reconsideration.

³ 20 C.F.R. § 10.606(a); *see generally* 5 U.S.C. § 8128.

⁴ 20 C.F.R. § 10.608(a).

⁵ 31 ECAB 224, 225 (1979).

The November 19, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
April 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member