

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN M. REID and DEPARTMENT OF VETERANS AFFAIRS,
VETERERANS ADMINSTRATION MEDICAL CENTER, Louisville, KY

*Docket No. 03-62; Submitted on the Record;
Issued April 11, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On July 27, 1995 appellant, then a 40-year-old patient service assistant, sustained an injury when she slipped on a wet floor at work. She was able to catch herself before hitting the floor but she twisted her low back. The Office accepted her claim for back strain and aggravation of degenerative disc disease at L4-S1 and approved a lumbosacral fusion in February 1996.

On August 13, 1998 the employing establishment notified appellant that her physician, Dr. John R. Dimar, had imposed work limitations on April 28, 1998 showing that she was not totally disabled for work. The employing establishment stated that it had identified a permanent modified-duty assignment that conformed to these medical restrictions and requested that appellant report for duty on the morning of September 14, 1998.

On August 28, 1998 appellant declined the employing establishment's offer. She submitted a copy of a computerized tomography (CT) scan obtained on August 24, 1998. She argued that the scan showed an incomplete fusion. Appellant also argued that she had increasing pain and symptoms, including her legs giving out on her. Appellant noted that Dr. Dimar wanted her to try a work hardening program after an evaluation by Dr. Susanne E. Fix, a neurosurgeon. Dr. Fix, however, wanted to perform a surgical procedure.

On August 31, 1998 the Office advised appellant that the offered position was found to be suitable to her work capabilities and was currently available. The Office advised that appellant had 30 days from the date of the letter either to accept the position or to provide an explanation for refusing it. The Office notified appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2).

On October 1, 1998 the Office advised appellant that it found her reasons for refusing the offer to be unacceptable. The Office noted that the last medical report in the file, dated April 24, 1998, indicated that she was able to work light duty. The Office provided appellant 15 days to accept the position and notified appellant that if she did not respond or continued to refuse the offer, it would proceed with a final decision in the matter. The Office stated that it would not consider any further reasons for refusal.

On October 19, 1998 the Office received an August 26, 1998 treatment note from Dr. Fix, the neurologist. She reported as follows:

“[Appellant] has had a few falls since her last visit and states that her back pain and right leg pain in the L5, S1 distribution is a bit worse. We had gotten a CT scan through her lumbar spine because her workman’s comp[ensation] caseworker had wanted her to go back on light duty. The CT scan still shows that she has only partial fusion at L4-5 and L5, S1, which is most likely why she is having back pain and radiculopathy. We have yet to start her on the cervical epidurals for her cervical spondylosis.

“Physical [e]xamination: [o]n exam[ination] today, she still has a positive straight leg raise on the right with some mild dorsi and plantar flexion weakness. She has some chronic C8 numbness.

“Plan: I do n[o]t think [appellant] can tolerate work hardening at this point. If she does indeed have a nonunion at her twice attempted fusion she may need an anterior approach. I will discuss this [with] Dr. Dimar on Friday when we are both in the office.”

Appellant stated that it was her understanding that she would be having the anterior fusion procedure within the next month or so.

In a decision dated October 20, 1998, the Office terminated appellant’s compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work. The Office stated that it had received no medical request or recommendation for work hardening or further surgery. The only medical report received since April 24, 1998, the Office stated, was the August 24, 1998 CT scan: “We have not received any evidence or argument to support that the position offered to you is not suitable.”

Appellant requested reconsideration. She submitted, among other things, a June 16, 1998 report from Dr. Dimar:

“Surgery date: May 5 1997. [Hardware removal] and refusion L4-S1 for pseudoarthrosis.

“History: She is one year out and she still has back and leg pain. She is a little apprehensive about being able to return to work.

“X-rays: I repeated her x-rays and it appears as if the fusion looks much better than her first surgery and the screws show no halo sign or signs of loosening. On

the plain films the fusion appears to be solid. She may have some chronic fibrosis of the muscle and around the nerve root causing her symptoms.

“Recommendations: I would recommend that we start her on 6 weeks of work hardening to see if we can progress her back to light duty, a half-a-day job, she works at the V[eteran] A[dministration] scheduling patient[s], which should be a fairly light[-]duty job. I gave her [u]ltram 50 milligram [1] every 8 hours prn pain.

“If Dr. Fix feels that it is necessary to do a myelographic CT, this would confirm whether or not a fusion was present, but I will leave this up to her discretion. I will be checking her back as instructed in 6 weeks to see how she does with the work hardening program.

“Working: No.”

Appellant submitted medical evidence showing that she underwent the anterior fusion procedure on June 23, 1999.

In a decision dated April 13, 2000, the Office denied appellant’s request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error in the termination of her compensation. The Office found that none of the medical evidence submitted by appellant specifically commented on her ability to perform the job that was offered to her and, therefore, failed to address the issue on which compensation benefits were denied.

In the prior appeal of this case,¹ the Board found that the Office abused its discretion in denying appellant’s request because the evidence established that she sent her request within one year of the Office’s October 20, 1998 decision termination compensation. The Board set aside the Office’s April 13, 2000 decision and remanded the case for a proper exercise of discretion and an appropriate final decision on appellant’s timely request for reconsideration.

In a decision dated June 27, 2002, the Office denied appellant’s request for reconsideration. The Office detailed the evidence appellant submitted and stated that a review of this evidence showed that it previously existed in the file and was, therefore, considered cumulative and repetitious. The Office stated: “Your evidence does not address or comment on your ability to perform the permanent modified position as a [p]atient [s]ervices [a]ssistant. Because of this, your newly submitted evidence is irrelevant or immaterial, which has no bearing on the issue or inconsequential in regard to the issue.”

The Board finds that the Office improperly denied appellant’s request for reconsideration.

The Federal Employees’ Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the

¹ Docket No. 00-2112 (issued May 3, 2002).

district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”²

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain 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

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁴

In its June 27, 2002 decision, the Office listed the evidence that it had received in support of appellant’s request for reconsideration. This list does not include Dr. Dimar’s June 16, 1998 report. The record shows that the Office received this evidence on February 7, 2000. The Office’s failure to include the report in its listing of evidence, together with its failure to address or acknowledge the report, suggests that it did not consider this evidence in deciding appellant’s request.

The Board finds that Dr. Dimar’s June 16, 1998 report constitutes relevant and pertinent new evidence not previously considered by the Office. When it terminated compensation, the Office explained that the only medical report received since April 24, 1998 was the August 24, 1998 CT scan; it had received no medical request or recommendation for work hardening or further surgery. With Dr. Dimar’s June 16, 1998 report, appellant has now submitted evidence subsequent to April 24, 1998 that recommends work hardening “to see if we can progress her back to light duty, a half-a-day job.”

Appellant also submitted an August 26, 1998 treatment note from Dr. Fix, the consulting neurologist. The Office has not previously considered this evidence. Dr. Fix reported that the CT scan still showed only partial fusion at L4-5 and L5-S1, which was most likely the reason appellant was having back pain and radiculopathy. Findings on physical examination were positive and she concluded: “I do n[o]t think [appellant] can tolerate work hardening at this point. If she does indeed have a nonunion at her twice attempted fusion she may need an anterior approach. I will discuss this [with] Dr. Dimar on Friday when we are both in the office.”

² 20 C.F.R. § 10.605 (1999).

³ *Id.* at § 10.606.

⁴ *Id.* at § 10.608.

Together, Dr. Dimar's June 16, 1998 report and Dr. Fix's August 26, 1998 treatment note tend to document appellant's reason for not accepting the offered position: The physician who indicated that she could work light duty subsequently recommended a work hardening program, which, according to the consulting neurologist, appellant could not tolerate. As this evidence is relevant to the issue of termination and was not previously considered by the Office, the Board finds that appellant is entitled to a merit review of her claim.

The June 27, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this opinion.

Dated, Washington, DC
April 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member