

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TANYA MARIE BASSETT and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 03-1651; Submitted on the Record;
Issued December 3, 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 refused to reopen appellant's case for further review of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error.

On November 15, 1995 appellant, then a 39-year-old modified mail processor, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she suffered from tendinitis due to the repetitive stretching and reaching involved in her federal employment. By letter dated November 13, 1996, her claim was accepted for bilateral sprain/strain of both hands and wrists and right shoulder. On May 18, 1997 appellant filed a notice of traumatic injury and claim for continuation of pay compensation (Form CA-1) alleging that, on April 19, 1997, she sustained an injury to her left shoulder, arms and hand as a result of her federal duties. Her claim was accepted for sprain, tendinitis left arm/shoulder. These claims were combined on May 31, 2002. Appellant received compensation for wage loss and medical benefits.

On September 15, 1999 appellant received a limited-duty job offer for a position as a modified mail processor with the employing establishment. This position was identical to the one previously approved by her treating Board-certified orthopedic surgeon, Dr. Errol J. Stern, on December 7, 1998.¹ On October 14, 1999 appellant declined this position on the basis that she still suffered from the injuries. In a decision dated November 18, 1999, the Office terminated her compensation for the reason that she failed to accept suitable employment.

By letter dated December 11, 1999, appellant requested review of the written record. In further support of her claim, appellant submitted reports by appellant's new Board-certified

¹ In a note dated March 11, 1999, Dr. Stern indicated that appellant could be actively employed in a sitting, sedentary type of work activity. In a report dated July 8, 1999, Dr. Stern indicated that nothing had changed in appellant's condition.

orthopedic surgeon, Dr. John D. Wyrick, wherein he indicated that appellant was still having problems with her left shoulder and that he was waiting for approval for a magnetic resonance imaging (MRI) scan of her right shoulder. By decision dated April 24, 2000, the hearing representative affirmed the Office's November 18, 1999 decision.

By letter dated December 3, 2000, appellant requested reconsideration. In support thereof, appellant submitted, *inter alia*, more reports by Dr. Wyrick, including an August 8, 2000 report, wherein he indicated that, due to appellant's bilateral shoulder problems, she would not be able to perform her duties as a mail processor which involved a lot of sorting and reaching as well as repetitive wrapping. He indicated that appellant could be considered for a part-time sedentary-type job which did not require a lot of repetitive use of appellant's upper extremities. In a letter dated January 29, 2001, Dr. Wyrick indicated that, to his knowledge, the Office had not provided her a position within her work restrictions. By decision dated March 2, 2001, the Office denied appellant's request for reconsideration, after a review on the merits. The Office noted that Dr. Wyrick failed to provide any indication that he had reviewed the limited-duty job offer, nor did he provide any discussion explaining why appellant could not perform the offered limited-duty assignment.

By letter dated October 22, 2002, appellant requested reconsideration. In support thereof, she submitted more progress notes from Dr. Wyrick, dated from January 10 through November 20, 2001, indicating that appellant continued to seek treatment from Dr. Wyrick during this time. By decision dated November 18, 2002, the Office denied appellant's request for reconsideration for the reason that it was untimely filed and did not present clear evidence of error.

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on June 10, 2003, the only decision before the Board is the November 18, 2002 decision denying appellant's petition for reconsideration.

Section 8128(a) of the Federal Employees' Compensation 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 compensation at any time or on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."

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

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation, 20 C.F.R. § 10.607(a), provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. In the instant case, the last decision on the merits was issued on March 2, 2001, whereas appellant's petition for reconsideration was filed on October 22, 2002. Accordingly, appellant's petition for reconsideration was not timely filed. However, the Office will reopen a claimant's case for merit review notwithstanding the one-year filing limitation if the claimant's application for review shows clear evidence of error.³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁴ This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office.⁵ 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 a merit review in the face of such evidence.⁶

In the instant case, appellant submitted, in support of her request for reconsideration, medical evidence that had not previously been reviewed. However, this evidence was not sufficient to establish clear evidence of error. Appellant's benefits for wage-loss compensation were terminated because she failed to accept suitable employment. None of the medical reports in support of appellant's most recent request for reconsideration are sufficient to establish clear evidence of error. The reports of Dr. Wyrick are basically just progress notes indicating that appellant received further treatment. The Board notes that appellant's case was not terminated for medical benefits; there is no dispute that appellant will require continuing medical treatment. Dr. Wyrick's notes, however, do not provide clear evidence of error because they do not address the subject at hand, *i.e.*, whether appellant properly refused suitable alternate employment. The Board further notes that fear of future injury is not a basis for an award of benefits.⁷ Accordingly, appellant has failed to show clear evidence of error and the Office properly denied her request for reconsideration.

³ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Id.*

⁵ *Id.*

⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁷ See *Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazzara*, 31 ECAB 1169, 1174 (1980).

The November 18, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member