

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY W. DUNCAN and DEPARTMENT OF THE ARMY,
WALTER REED ARMY MEDICAL CENTER, Washington, DC

*Docket No. 03-604; Submitted on the Record;
Issued June 10, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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 June 27, 1997 appellant, then a 38-year-old medical technologist, filed a notice of occupational disease, alleging that on June 2, 1997 she sustained injuries to her upper extremities as a result of her federal employment, which involved repetitive motions in handling medical specimens, small test tubes and medical containers. The Office accepted that appellant developed bilateral rotator cuff tendinitis as a result of her federal employment. Following the injury, appellant came under the care of Dr. David Dorin, a Board-certified orthopedic surgeon, who treated her with anti-inflammatory medication and physical therapy. Appellant stopped work on June 4, 1997 and returned to part-time limited-duty work on December 4, 1997. On February 27, 1998 the employing establishment could no longer accommodate her medical restrictions and she was reinstated on total disability.

On June 11, 1998 appellant was offered a limited-duty position as a library technician. The Office found that the medical evidence of record demonstrated that appellant could perform the requirements of the position. She claimed that she did not accept the position because of insufficient and ambiguous details of the job description. The Office further reduced the physical requirements of the offered position according to the recommendations of Dr. Dorin.

By letter dated February 1, 1999, the Office issued a notice of proposed termination of compensation benefits noting that the reasons appellant gave for declining the offered position were unacceptable. The Office stated that her physicians found the position to be suitable and informed appellant that she had 15 additional days to accept the offered position.

On February 1, 1999 appellant was referred for a second opinion evaluation to determine her medical and disability status.

By decision dated February 24, 1999, the Office terminated appellant's disability compensation and compensation for permanent partial impairment to a scheduled member, on the grounds that appellant failed to accept a suitable offer of employment.¹

Appellant did not attend the second opinion examination scheduled for February 22, 1999.² The Office notified appellant that she had 15 days to present her reasons for refusing to attend the examination, otherwise suspension of her compensation benefits may occur.

By decision dated March 24, 1999, the Office suspended appellant's compensation benefits on the grounds that she refused to attend the medical examination.

Appellant disagreed with the Office decision terminating her compensation benefits and requested an oral hearing.

By letter dated August 3, 1999, appellant requested reconsideration of the March 24, 1999 decision suspending her compensation benefits. She submitted a physical therapy note from Howard University Hospital dated February 22, 1999, the same day as the second opinion examination.

By decision dated March 10, 2000, the Office vacated the previous decision suspending appellant's compensation benefits, finding that they failed to consider the physical therapy note in the February 24, 1999 decision.

An oral hearing was held on November 10, 1999 regarding appellant's refusal to accept the offered position of library technician. She reiterated that she refused the offer because the physical requirements were unclear.

By decision dated March 13, 2000, the Office hearing representative affirmed the February 24, 1999 decision terminating appellant's compensation benefits on the grounds that the medical evidence demonstrated that she was capable of performing the position and refused the position without justification.

By letter dated January 13, 2001, appellant requested reconsideration of the prior decision. She disagreed with the outcome of the hearing representative's decision and submitted various correspondence, a copy of the decision and medical reports and progress notes in support of her request.

In reports dated December 18, 1998, January 25, May 12 and July 21, 1999, Dr. Carlo Tornatore, a Board-certified psychiatrist and neurologist, indicated that the findings of an magnetic resonance imaging performed in July 1998 and appellant's Bell's palsy condition pointed to a diagnosis of neurosarcoidosis. He noted that she had been on disability for the past year and a half. In a follow-up report, Dr. Tornatore indicated that appellant had frequent

¹ The Office did not terminate appellant's medical benefits.

² Appellant argued that it was premature for her to attend the examination before her own physician had fully assessed her condition

burning dysesthesia of the extremities as well as radicular pain in the lumbosacral spine, but noted that MRI's of the lumbosacral and thoracic spine were within normal limits. In his last report, he noted that appellant complained of right hip pain but that an x-ray of the right hip was within normal limits.

Appellant also submitted reports dated July 17 and 22 and August 21, 1998 from Dr. Fredric K. Cantor, a Board-certified psychiatrist and neurologist, who discussed appellant's Bell's palsy condition and noted that she had an increase in chronic pain in her posterior head and neck. He also stated that she had worked very little in 1998. In a report dated January 7, 1998, Dr. Richard W. Barth stated that appellant had "much more" than a rotator cuff problem, most likely a "systemic inflammatory process." He noted that appellant believed that the symptoms in her neck, shoulders and upper extremities were related to her work, which involved a significant amount of repetitive use of the extremities. The remaining medical reports were repetitive of reports already in the record.

By decision dated November 8, 2002, the Office denied appellant's request for reconsideration on the grounds that she neither raised substantive legal arguments nor included new and relevant evidence with her request. The Office noted that she discussed arguments previously addressed by the Branch of Hearings and 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.³ Because more than one year has elapsed between the issuance of the Office's March 13, 2000 merit decision, affirming the termination of appellant's compensation benefits and January 6, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 13, 2000 decision and any preceding decisions. Therefore, the only decision before the Board at this time is the Office's November 8, 2002 nonmerit decision denying appellant's application for review.

The Board finds that the Office's refusal to reopen appellant's case for further consideration of the merits of her claim did not constitute an abuse of discretion.

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.⁴ 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.⁵

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

⁵ 20 C.F.R. § 10.608(a).

In this case, appellant requested reconsideration of the decision affirming the termination of her compensation benefits on the grounds that she failed to accept an offer of suitable employment. Her benefits were terminated on February 24, 1999 based on the medical evidence of record, which indicated that she was physically capable of performing the selected position of library technician. A job description was sent to Dr. Dorin and he approved the position. The underlying issue in this case, therefore, is a medical one, whether appellant could perform the position of library technician at the time it was offered.

Appellant alleged in her request that the Office hearing representative misinterpreted the factual and medical evidence. Her own opinion on the outcome of an Office decision is irrelevant to the underlying issue, which is medical and must be resolved by probative medical evidence and is insufficient to warrant merit review. Appellant also submitted medical reports and progress notes with her request. She claimed that the new medical evidence would show that her medical condition had deteriorated at the time the library technician position was offered and that she was unable to perform the selected position.

The Board has reviewed the evidence submitted and finds that the medical reports do not address the issue of whether appellant could perform the position of library technician, at the time it was offered in June 1998. Dr. Tornatore discussed appellant's Bell's palsy and neurosarcoidosis conditions and noted that she had been on disability for the past year and a half, however, he did not discuss appellant's physical restrictions or mention the offered position of library technician. In the same vein, Dr. Cantor confirmed that appellant suffered from Bell's palsy and noted that she had increased pain in her head and neck, yet he also did not mention the offered position of library technician or discuss whether the offered position was suitable. Dr. Barth noted that appellant believed that her current symptoms in her neck, shoulders and upper extremities were related to her work as it involved a significant amount of repetitive movements, however, he did not provide his own medical opinion on the cause of appellant's condition. He also did not discuss the offered position of library technician or opine whether the position was suitable at the time it was offered. These reports appellant submitted with her request are irrelevant to the underlying issue in this case, which is whether appellant could perform the position of library technician at the time it was offered and are, therefore, insufficient to warrant merit review. As appellant did not submit any new and relevant evidence or meet any of the other requirements for obtaining a merit review, the Office properly denied her request.

Accordingly, the November 8, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 10, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member