U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LOIS F. COOPER and U.S. POSTAL SERVICE,
PRESTWOOD STATION, Dallas, TX

*Docket No. 01-2097; Submitted on the Record;*
*Issued March 6, 2003*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs' October 3, 2000 refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion; (2) whether the Office's March 2, 2001 refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion; and (3) whether the Office properly denied appellant's request for an oral hearing before an Office representative.

On February 9, 1993 appellant, then a 45-year-old letter carrier, filed a claim for a traumatic injury, alleging that on that date she twisted her back while loading the mail truck.

The Office accepted appellant's claim for herniated lumbar disc and subsequently expanded its acceptance to include an exacerbation of preexisting herniated lumbar disc at L5.

In a July 19, 1999 duty status report, Dr. Daniel A. Boudreau, appellant's treating osteopath, indicated that appellant could return to work 4 hours a day and could lift 15 pounds continuously or 23 pounds intermittently, sit or stand intermittently for 3 hours, walk intermittently for 2 hours, twist intermittently for 1 hour and pull or push 15 pounds intermittently for 4 hours. In a work capacity evaluation form dated July 27, 1999, Dr. Boudreau indicated that appellant was limited to four hours of lifting, climbing, pulling, or pushing, three hours of sitting or standing, two hours of walking, reaching or driving and one hour of twisting per each four-hour day. He did not state that these duties were to be performed intermittently. In a narrative report dated August 11, 1999, Dr. Boudreau stated that appellant could intermittently lift, sit, stand, walk, climb, kneel, bend, stoop, twist, pull, push, reach and drive throughout the four-hour workday.

By letter dated August 24, 1999, the employing establishment offered appellant the position of modified letter carrier. The position description provided that appellant would work four hours a day and listed the specific duties to be performed. The position description further specified that the physical requirements were within the restrictions set forth by Dr. Boudreau in his July 19, 1999 report and specifically stated that they would include lifting up to 10 pounds,

standing up to 3 hours per day, walking up to 1 hour per day and sitting up to 2 hours per day. The position description did not state whether the sitting and standing duties were to be performed intermittently or continuously.

In a report dated September 9, 1999, Dr. Boudreau noted that appellant had received a job offer from the employing establishment and that he would review the report and submit his comments.

In a September 15, 1999 letter, the Office advised appellant that the employing establishment's job offer was suitable for her medical restrictions and that the specific duties and physical limitations of the position were described in the attached letter. The Office added that appellant had 30 days, in which to accept the offered position or to provide an explanation of the reasons for refusing the job. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Federal Employees' Compensation Act.

On October 7, 1999 appellant responded that there was no letter attached to the September 15, 1999 letter from the Office.

In an October 21, 1999 letter, the Office informed appellant that her reasons for rejecting the offered position were unacceptable and that she had 15 days, in which to accept the offered position.

On October 27, 1999 Dr. Boudreau returned a copy of the August 24, 1999 job offer, on which he had written: "Not able to do this job at this time." The physician did not indicate why appellant could not perform the job. In an accompanying treatment note dated October 7, 1999, but also received by the Office on October 27, 1999 Dr. Boudreau stated in pertinent part: "[Appellant] is the same. I have turned down a job offer because there was no provision for intermittent standing, sitting or walking."

In a letter dated October 30, 1999, appellant stated that she had not refused the offered position and reiterated that she had never received a copy of the job offer as there was no letter attached to the Office's September 15, 1999 letter.

By decision dated November 23, 1999, the Office terminated appellant's compensation effective December 5, 1999, on the grounds that she had refused suitable work. The Office noted that the job offer had been sent to the correct address and had also been provided to appellant's vocational rehabilitation counselor and to Dr. Boudreau. The Office further noted that the offered position adhered to the restrictions provided by Dr. Boudreau and that appellant had provided no additional medical evidence that supports that she cannot perform the listed duties.

By letter dated December 10, 1999, appellant requested reconsideration of the Office's November 23, 1999 decision. She reiterated that she had not timely received the job offer, but had since received it. Appellant stated that she was willing to work within her medical restrictions, but that the job offer was not intermittent enough for her restrictions and needed to be more specific. In support of her request, appellant submitted several reports from Dr. Boudreau. In a November 9, 1999 report, the physician stated that the August 24, 1999, job offer needed clarification as the standing and sitting elements were not specified to be

intermittent, which they must be. In a report dated December 7, 1999, Dr. Boudreau noted that the Office had not yet responded to his request that the terms of the job offer be clarified. In a letter to the Office dated December 15, 1999, Dr. Boudreau stated that he had advised appellant not to return to work until the modified job offer could be clarified with respect to the physical restrictions.

In a decision dated February 3, 2000, after a full merit review the Office found the newly submitted evidence and arguments insufficient to warrant modification of the prior decision. The Office found that Dr. Boudreau's reports lacked probative value and that as he was faxed a copy of the job offer on September 3, 1999 that was the time for him to make any changes or request clarification. The Office reiterated that the offered position was within the physical restrictions previously specified by Dr. Boudreau.

By letter dated September 20, 2000, appellant requested reconsideration of the Office's decision. In support of her request, appellant submitted reports from Dr. Boudreau dated January 11, February 15 and March 14, 2000, in which he stated that he still had not heard from the Office or the employing establishment as to whether the standing requirement of the offered position was intermittent. He further stated that appellant's physical condition was essentially the same and that she could return to work when the outstanding issues were resolved. In additional treatment notes dated March 28, April 18, May 2 and June 6, 2000, Dr. Boudreau discussed appellant's condition but did not otherwise discuss the job issue. In a report dated August 1, 2000, he stated that appellant wanted to return to work and that she could perform the duties she had performed in a previous modified position. In a report dated August 22, 2000, Dr. Boudreau stated that he was still looking for a response to his question of whether the standing element of the offered position was constant or intermittent.

By decision dated October 3, 2000, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant neither raised substantial legal questions nor included new and relevant evidence and thus, it was insufficient to warrant review of the prior decision.

On January 26, 2001 appellant again requested reconsideration and submitted, in addition to copies of evidence previously submitted, new reports from Dr. Boudreau dated October 24 and December 28, 2000. In his reports, Dr. Boudreau reiterated that appellant was not working because the Office had not yet responded to his earlier requests for clarification of the job description and stated that her condition was unchanged and that she could return to work when the issues were resolved.

By decision dated March 2, 2001, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant neither raised substantial legal questions nor included new and relevant evidence and thus, it was insufficient to warrant review of the prior decision.

On April 10, 2001 appellant requested an oral hearing before an Office representative.

In a decision dated June 15, 2001, the Office denied appellant's request for an oral hearing. The Office found that, as appellant had previously requested reconsideration, she was

not, as a matter of right, entitled to a hearing. However, the Office reviewed appellant's request in its discretion and denied the hearing request for the reason that the issue in this case could equally well be addressed by requesting reconsideration from the district Office.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on October 3, 2000 and March 2, 2001.

The only decisions before the Board in this appeal are those dated October 3, 2000 and March 2, 2001, in which the Office denied appellant's application for review and June 15, 2001, in which the Office denied appellant's request for an oral hearing. As more than one-year had elapsed between the date of the Office's most recent merit decision dated February 3, 2000 and the filing of appellant's appeal on August 14, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

Section 10.608(a) of the Code of Federal Regulations provides that 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 the standards described in section 10.606(b)(2).[2] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

In this case, appellant did not assert that the Office erroneously applied or interpreted a specific point of law and neither advanced a relevant legal argument not previously considered by the Office, nor submitted relevant and pertinent new evidence not previously considered by the Office. In support of her requests for reconsideration, appellant simply reiterated her prior assertion, previously considered by the Office in its October 3, 2000 decision, that the offered job position was not in fact suitable, as the described job duties did not conform to the medical requirements set forth by Dr. Boudreau. In addition, while appellant did submit two new medical reports from Dr. Boudreau, these reports essentially mirror Dr. Boudreau's prior reports, already considered by the Office. In his October 24, 2000 medical report, Dr. Boudreau stated that appellant's condition was unchanged and that he is still waiting for clarification of the offered position. As this report simply repeats the opinion expressed by Dr. Boudreau, in his

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record, which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; *see Marlene K. Cline*, 43 ECAB 580 (1992).

[2] 20 C.F.R. § 10.608(a) (1999).

[3] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

[4] 20 C.F.R. § 10.608(b) (1999).

November 9 and December 7, 1999 reports and his December 15, 1999 letter, each of which is already contained in the record, these reports, while new, are repetitious and cumulative and, therefore, are insufficient to warrant further merit review by the Office.[5] With respect to Dr. Boudreau's new December 28, 2000 report, as this report simply documents appellant medical condition at the time of his recent examination and does not address appellant's ability to perform the position described in the August 24, 1999 job offer, it does not constitute a basis for reopening appellant's case.[6]

The Board further finds that the Office properly denied appellant's request for a hearing.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision, for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.[7] In addition, the claimant must not have previously submitted a reconsideration request, whether or not it was granted, on the same decision. However, the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[8] In this case, the Office found that appellant's case could be equally well considered if she requested reconsideration and submitted new evidence showing that she did not refuse a suitable job offer. There is no evidence that the Office's refusal to conduct a hearing was an abuse of its discretion. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for review of the written record.

[5] The submission of evidence or legal argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. *Linda I. Sprague*, 48 ECAB 386 (1997); *Bertha J. Soule, (Ralph G. Soule)*, 48 ECAB 314 (1997).

[6] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *Linda I. Sprague, id.*; *Alton L. Vann*, 48 ECAB 259 (1996).

[7] 20 C.F.R. § 10.616(a) (1999).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.2(a) (October 1992).

The June 15 and March 2, 2001 and October 3, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 6, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas, Alternate Member, dissenting:

A necessary perquisite to invoking section 8106(c) of the Federal Employees' Compensation Act is that the Office of Workers' Compensation Programs prove that the partially injured employee refuse or neglects to work after suitable work is offered to, procured by or secured for him or her. In the instant case, the employing establishment offered appellant the position of modified letter carrier. Appellant's treating physician, Dr. Daniel A. Boudreau, returned a copy of job offer to appellant on which he had written: "Not able to do this job at this time." In a treatment note dated October 7, 1999, Dr. Boudreau stated: "[Appellant] is the same. I have turned down a job offer because there was no provision for intermittent, standing, sitting or walking."

Section 8106 is a penalty provision of the Act and requires the Office to insure that the job is suitable. There is not a single medical opinion in this record, which meets the criteria of section 8106(c). In short, no showing of the suitability of the job offer has been established. For the foregoing reason, I must respectfully record this dissent.

Willie T.C. Thomas
Alternate Member