U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH REMBERT and U.S. POSTAL SERVICE,
POST OFFICE, Albany, NY

Docket No. 02-2004; Submitted on the Record;
Issued March 5, 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 in refusing to reopen appellant's case for a merit review of her claim under 5 U.S.C. § 8128.

On January 16, 1987 appellant, then a 29-year-old mail carrier, sustained an injury when she slipped on ice and fractured her right ankle. Her claim was accepted for fractured right ankle and open reduction on January 17, 1987. Appellant stopped work on January 17, 1987 and appropriate compensation was paid.[1]

By decision dated May 10, 1988, the Office terminated appellant's entitlement to compensation finding that the evidence supported she no longer was disabled as a result of the work injury.

By letter dated June 2, 1988, appellant requested an oral hearing.[2]

On November 26, 1990 appellant filed a notice of recurrence of disability causally related to the January 16, 1987 fractured right ankle injury.

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[1] The records reflect that appellant was initially treated by Dr. Anthony Guidarelli, a Board-certified orthopedic surgeon. She underwent open reduction and internal fixation with rush rod and two pins on January 17, 1987. Dr. Guidarelli noted that appellant improved following this surgical intervention with improved range of motion, decreased swelling and increased ability to ambulate and, in a report dated September 28, 1997, he released appellant to return to work effective October 1, 1987. Appellant was also examined by Dr. Patrick Albano, an orthopedic surgeon, on December 22, 1987. He noted an accurate history of injury, discussing his findings and examination, and opined that appellant could return to work regular duty.

[2] The record reflects that appellant failed to attend the scheduled hearing or advise the Office of her reasons for failing to attend and the hearing was thus abandoned.

The Office accepted that appellant sustained a recurrence of disability on December 2, 1990 and began paying compensation for wage loss. Appellant was placed on the periodic rolls effective April 7, 1991.

By decision dated August 5, 1998, the Office terminated appellant's compensation based on appellant's refusal to accept suitable employment.[3]

On August 25, 1998 appellant requested a hearing, which was held on October 28, 1999.[4] During the hearing, appellant indicated that she never refused employment, but rather, she indicated that she was unable to find childcare for her two children and was unable to accept a position, as she could not afford daycare.

By decision dated December 9, 1999, an Office hearing representative affirmed the August 5, 1998 decision terminating compensation benefits on the grounds that appellant had refused suitable work.

By letter dated December 27, 1999, appellant requested reconsideration.[5] The request repeated her previous concerns regarding being unable to find or afford appropriate childcare.

On July 18, 2000 the Office received congressional correspondence, which was also treated as a request for reconsideration.

By merit decision dated July 31, 2000 and reissued October 5, 2000, the Office issued a compensation order denying modification of appellant's request for reconsideration on the grounds that the evidence submitted in support of appellant's request was insufficient to warrant modification of the prior decision.[6]

By letters received by the Office on January 25, 2001 and on April 18, 2001, appellant requested reconsideration.

By merit decision dated June 15, 2001, the Office denied appellant's request for reconsideration.

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[3] The record reflects that on June 10, 1998 the employing establishment offered appellant a limited-duty assignment. Appellant responded on June 15, 1998 indicating she was still disabled and might become permanently disabled in the future. She indicated that she had two small children, her household routine would be disrupted and was unable to afford or obtain childcare. On July 16, 1998 the Office advised appellant that her reasons were not acceptable and afforded her another 15 days to accept. The record reflects that appellant signed the limited-duty offer letter on July 22, 1998. However, the employing establishment informed the Office on August 5, 1998 that appellant did not show.

[4] It was scheduled earlier, but due to a mistake as to the date of the hearing, it was rescheduled.

[5] The record reflects that the letter was erroneously addressed to the Branch of Hearings and Review but was received in the district office on January 6, 2000 and no action was taken on the request until a copy was submitted to the Office in July 2000.

[6] The record reflects that the decision was issued as a merit decision due to the fact that the Office had exhausted appellant's appeal time by such a delay on acting on appellant's reconsideration request.

Appellant again requested reconsideration on June 21, 2001. She repeated her previous reasons for being unable to accept the position offered by the employing establishment, mainly that she was unable to obtain or afford childcare.

In a decision dated August 8, 2001, the Office denied appellant's request for a merit review of its June 15, 2001 decision on the grounds that appellant neither raised any substantive legal questions nor submitted new and relevant evidence.

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.[7] As appellant filed her appeal with the Board on July 25, 2002, the only decision properly before the Board is the August 8, 2001 decision.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act[8] 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 payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under section 10.606(b)(2) (1999), appellant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

Appellant in her June 21, 2001 request for reconsideration indicated that the only reason she was unable to accept the employment offered was that she was unable to find childcare or afford it for her children. No additional information accompanied appellant's request.

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[7] *Oel Noel Lovell,* 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

[8] 5 U.S.C. § 8101 *et seq.*

[9] 20 C.F.R. § 10.608(b) (1999).

In its August 8, 2001 decision, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review.[10] Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

The August 8, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] The record reflects that appellant's reasons for not accepting employment offered remained consistent with being unable to find or afford childcare.