

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGORY C. SCRIVENER and U.S. POSTAL SERVICE,
POST OFFICE, St. Petersburg, FL

*Docket No. 03-333; Submitted on the Record;
Issued March 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' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On September 30, 1996 appellant, then a 40-year-old mail processor, sustained an employment-related cervical strain and right shoulder contusion when he was struck by a door while at work. He stopped work on October 25, 1996 and was placed on the periodic rolls on February 8, 1997. The Office continued to develop the claim and on May 21, 1999 referred appellant to Dr. Larry Fishman for a second opinion evaluation. Finding that a conflict in the medical opinion existed between the opinions of Dr. Fishman and that of Dr. Jorge J. Inga, appellant's treating physician, by letter dated May 21, 1999, the Office referred appellant to Dr. Tomas E. Delgado for an impartial medical evaluation.¹

On July 29, 1999 the employing establishment offered appellant the position of modified manual distribution clerk. In a letter dated August 30, 1999, the Office advised appellant that the position offered on July 29, 1999 was suitable. Appellant was notified of the penalty provisions of section 8106² and given 30 days to respond. On September 27, 1999 appellant refused the job offer, and by letter dated October 7, 1999, the Office advised him that his reasons for refusing the offered position were not acceptable. He was given an additional 15 days to respond. By decision dated October 27, 1999, the Office terminated appellant's wage-loss compensation on the grounds that he declined an offer of suitable work.

Appellant, through his attorney, requested a hearing that was held on April 13, 2000. By decision dated August 1 and finalized August 4, 2000, an Office hearing representative affirmed the prior decision. On May 11, 2001 appellant, through counsel, requested reconsideration and

¹ All three physicians are Board-certified neurosurgeons. Drs. Fishman and Delgado were furnished with the medical record, a statement of accepted facts and a set of questions.

² 5 U.S.C. § 8106.

submitted additional evidence. In a decision dated September 10, 2001, the Office denied modification of the prior decision.

On August 27, 2002 appellant, again through his attorney, requested reconsideration and submitted three character statements and a videotaped personal statement. By decision dated September 11, 2002, the Office denied appellant's reconsideration request, finding the evidence submitted repetitious and immaterial to the issue in the instant case, *i.e.*, whether he refused an offer of suitable work in 1999.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

The only decision before the Board in this appeal is the decision of the Office dated September 11, 2002 denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated September 10, 2001 and the filing of appellant's appeal with the Board on November 12, 2002, the Board lacks jurisdiction to review the merits of his claim.³

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).⁴ 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.⁵ 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.⁶

In the August 27, 2002 reconsideration request, appellant repeated his contentions that the Office erred in terminating his compensation based on his refusal of suitable employment. He further submitted statements from Sean Murphy, dated May 15, 2002, Sheryl Ann Gietzer, dated June 24, 2002, and Renee A. Kelly, dated August 12, 2002, who attested that appellant was of good character, had limitation of neck motion and was in pain.

The Board finds the evidence submitted with appellant's reconsideration request immaterial and irrelevant regarding the merit issue in the instant case, whether he refused an

³ 20 C.F.R. § 501.3(d)(2).

⁴ 20 C.F.R. § 10.608(a) (1999).

⁵ 20 C.F.R. § 10.608(b)(1) and (2) (1999).

⁶ 20 C.F.R. § 10.608(b) (1999).

offer of suitable work in 1999.⁷ As appellant submitted no new relevant evidence or argument in support of his request for reconsideration, the Board finds that the Office properly denied merit review of his claim.⁸

The decision of the Office of Workers' Compensation Programs dated September 11, 2002 is hereby affirmed.

Dated, Washington, DC
March 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation." To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified. Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.

⁸ *Sherry A. Hunt*, 49 ECAB 467 (1998).