United States Department of Labor
Employees' Compensation Appeals Board

GLORIA R. ROLLF, Appellant	)	
and	)	**Docket No. 04-494**
	)	**Issued: May 11, 2004**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Gloria R. Rollf, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 16, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 10, 2003, which denied reconsideration on the grounds that the request was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated April 1, 2002 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUE

The issue on appeal is whether the Office properly determined that appellant's August 21, 2003 request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On November 12, 1997 appellant, then a 39-year-old air rural carrier, filed a claim alleging that she developed bone spurs while performing her duties as a letter carrier, which

included walking in excess of five miles to deliver her mail route. The Office accepted that appellant had a permanent aggravation of bilateral heel spurs, bilateral plantar fasciitis and authorized a right plantar fasciotomy on March 12, 1999 and right and left tarsal tunnel releases on December 21, 1999 and February 21, 2000. Appellant worked intermittently until stopping completely on November 16, 1998.[1]

Thereafter, in the course of developing the claim, the Office referred appellant for several examinations.[2]

On October 31, 2001 the employing establishment offered appellant a modified limited duty, rural carrier position, for eight hours a day, Monday from 5:00 a.m. to 2:00 p.m. with a one hour lunch, Tuesday through Friday from 6:00 a.m. to 3:00 p.m. with a one half hour lunch and Saturday from 6:00 a.m. to 12:00 p.m. The duties included sedentary work in an office setting, sitting at a desk for one to eight hours, performing administrative duties within physical limitations such as answering the telephone, writing mail delivery notices and data input, preparing loop mail and missent mail and casing mail. This job was subject to the medical restrictions from Dr. Philip G. George, the impairment medical specialist of record, who recommended lifting of no greater than 15 pounds, no climbing, squatting, or kneeling, standing and walking up to 1 hour per day intermittently, pushing and pulling no greater than 25 pounds sitting up to 8 hours per day and reaching above the shoulder up to 3 hours per day.

By letter dated November 2, 2001, the Office informed appellant that it had reviewed the position description and found the job offer suitable, within her physical limitations and in compliance with the medical restrictions as set forth by the impartial medical specialist. Appellant was advised that she had 30 days to accept the position or offer her reasons for refusing. She was apprised of the penalty provision of the Federal Employees' Compensation Act if she did not return to suitable work.

[1] On November 16, 1998 appellant filed a Form CA-2a, notice of recurrence of disability. By decision dated February 16, 1999, the Office denied appellant's claim for recurrence of disability. In a letter dated March 10, 1999, appellant requested reconsideration of the Office decision. In a decision dated June 25, 1999, the Office affirmed the previous decision on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

[2] On July 31, 2000 the Office referred appellant for a second opinion to Dr. Michael C. Chabot, an osteopath and Board-certified orthopedic surgeon. In reports dated August 21 and November 27, 2000, Dr. Chabot diagnosed bilateral foot pain and advised that he would not recommend any further treatment for appellant's condition and that she could return to work as a limited-duty modified rural carrier subject to various restrictions. Appellant submitted various records from her treating podiatrist, Dr. Robert Simpson, who advised that appellant was on hydrocodone due to the persistent bilateral foot pain and could not drive and was totally disabled from work. The Office determined that a conflict of medical opinion had been established between Dr. Simpson, appellant's treating podiatrist and Dr. Chabot, an Office referral physician and thereafter appellant was referred to a referee physician, Dr. Philip G. George, a Board-certified orthopedic surgeon, who diagnosed status post multiple surgical treatments for plantar fasciitis, bilaterally and noted that appellant reached maximum medical improvement. He reviewed the job description for a limited-duty rural carrier, which involved sitting for up to 8 hours a day, standing and walking no more than 1 hour per day, occasional pulling/pushing limited to 25 pounds, no climbing, squatting, kneeling and standing up to 1 hour per day. The physician advised that appellant could perform this job and noted that her medication would not prevent her from driving.

In a letter dated December 1, 2001, appellant declined the job offer and noted that she could not drive or operate machinery because of the pain medication she was taking.

By letter dated February 6, 2002, the Office informed appellant that her refusal of the offered position was found to be acceptable. The Office indicated that the position was within the restrictions as set forth by the referee physician, Dr. George. The Office provided appellant with 15 days to accept the job.

By decision dated April 1, 2002, the Office terminated appellant's compensation, finding that she refused an offer of suitable work.

Appellant submitted various letters dated February 19 to May 11, 2002, inquiring as to reimbursement for prescription expenses. In a letter dated May 14, 2002, appellant advised that she experienced debilitating pain due to her work-related injuries and took pain medication to function. Appellant again advised that she could not drive due to the effects of the pain medication and requested that her compensation be restored.

In a letter dated July 1, 2002, the Office indicated that it was in receipt of appellant's letters and advised her that if she disputed the Office decision she must follow the appeal rights which accompanied the April 1, 2002 decision.

By letter dated August 21, 2003, appellant requested reconsideration of the Office's April 1, 2002 decision and submitted additional medical evidence. Appellant indicated that she was crippled due to the work-related injury and that she experienced chronic pain syndrome. Appellant indicated that she was aware that her request for reconsideration was filed past the deadline as set forth in the notice of appeal rights, but she had contacted her union representative, who advised her to request restoration of her compensation benefits. In reports dated September 4 and October 2, 2002, Dr. Wynndel Buenger, a Board-certified anesthesiologist, indicated that he treated appellant for neuropathic pain of her bilateral heels and advised that the best chance of getting appellant back to work was to perform a spinal cord stimulator. The physician advised that he did not believe appellant could return to work secondary to the sedation related to her medications. In reports dated April 25 to May 13, 2002, Dr. Simpson noted that appellant fractured a toe and sought treatment. In a report dated April 1, 2003, Dr. John C. Wuellner, a Board-certified internist, advised that appellant may have osteoporosis and recommended a bone density test to confirm this diagnosis. Also submitted was a letter from the U.S. Merit System Protection Board advising appellant that her appeal of her removal from the employing establishment was filed prematurely as no removal action had been effected.

By decision dated October 10, 2003, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and that appellant did not establish clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[4] The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[5] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[6] In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.[7] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[9] The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.[10] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[13]

ANALYSIS

In the October 10, 2003 decision, the Office properly determined that appellant failed to file a timely request for reconsideration. The Office rendered its merit decision on April 1, 2002 and appellant's request for reconsideration was dated August 21, 2003, which was more than one

---

[3] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.607 (1999).

[6] 20 C.F.R § 10.607(a) (1999).

[7] 20 C.F.R § 10.607(b) (1999).

[8] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[9] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[10] *See Leona N. Travis*, 43 ECAB 227 (1991).

[11] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[12] *See Leona N. Travis*, *supra* note 10.

[13] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

year after April 1, 2002. Accordingly, appellant's request for reconsideration was not timely filed.

The Board has reviewed evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error. The reports from Dr. Buenger advised that he treated appellant for neuropathic pain of her bilateral heels. He further advised that the dosage of appellant's pain medication caused drowsiness and he did not believe appellant could return to work secondary to the sedation related to her medications. The Board finds that this evidence does not establish that the job offer of October 31, 2001 was not suitable or that the termination of appellant's compensation benefits due to her refusal of suitable work was improper.

Other reports from Dr. Simpson and Dr. Wuellner noted that appellant fractured a toe and sought treatment and was treated for possible osteoporosis. However, none of these records indicate that these conditions were employment related.[14] Moreover, these reports are irrelevant to the refusal of suitable work issue in this case and the physicians did not review nor address the job offer. It cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decisions.

Also submitted was a letter from the U.S. Merit System Protection Board, however, this evidence is of no value in establishing that the termination of appellant's compensation benefits due to her refusal of suitable work was improper. Appellant's narrative statement reiterated the same information she provided in prior statements considered by the Office and is insufficient to show clear evidence of error in this case. Thus, this evidence was insufficient to show clear evidence of error in the Office's October 10, 2003 decision.

The Board, therefore, finds these records are insufficient to raise a substantial question as to the correctness of the Office's merit decision and the Office properly denied appellant's reconsideration request.

CONCLUSION

The Board, therefore, finds that the Office properly determined that appellant's request for reconsideration dated August 21, 2003 was untimely filed and did not demonstrate clear evidence of error.

[14] *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member