United States Department of Labor
Employees' Compensation Appeals Board

THELMA K. JOHNSON, Appellant	)	
and	)	**Docket No. 05-205**
	)	**Issued: March 28, 2005**
U.S. POSTAL SERVICE, NORTH ATLANTA STATION, Atlanta, GA, Employer	)	

Appearances:
Thelma K. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 27, 2004 appellant filed a timely appeal from the August 19, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. The record also contains the Office's merit decisions dated June 23 and November 9, 2004, finding that appellant was not entitled to a schedule award because she refused an offer of suitable work. 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.[1] As appellant filed her appeal with the Board on October 27, 2004 the only decisions properly before the Board are the Office's June 23 and November 9, 2004 merit decisions and August 19, 2004 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly denied appellant's claim for a schedule award because she refused an offer of suitable work; and (2) whether the Office properly denied

[1] 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On July 21, 1997 appellant, then a 40-year-old distribution clerk, filed a traumatic injury claim alleging that on July 19, 1997 she experienced pain radiating from her lower back down through her right thigh when she lifted a flat box weighing 25 to 45 pounds out of an all-purpose container. Appellant stopped work on July 21, 1997. By letter dated October 28, 1997, the Office accepted her claim for a lumbosacral strain.

In a decision dated May 22, 1998, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work as a modified distribution clerk pursuant to 5 U.S.C. § 8106(c). By letter dated June 22, 1998, appellant, through her attorney, requested a review of the written record by an Office hearing representative.

In a November 12, 1998 decision, the Office hearing representative affirmed the Office's May 22, 1998 decision. The hearing representative found that the medical evidence of record sufficient to establish that appellant could perform the duties of the offered position and that the Office properly followed its procedures in terminating her compensation.

On April 10, 2004 appellant filed a claim for a schedule award (Form CA-7). In response, the Office advised her, in a letter dated June 23, 2004:

> "Your entitlement to wage[-]loss and schedule award compensation benefits under the Federal Employees' Compensation Act (FECA) was terminated by decision dated May 22, 1998, because the evidence establishes that you refused to accept suitable work. This decision was upheld by our Branch of Hearings and Review in their decision dated November 12, 1998.
>
> "5 U.S.C. [§] 8106(c)(2) provides that a partially disabled employee who refuses to accept suitable work is not entitled to wage[-]loss and schedule award compensation, therefore, you are not entitled to further compensation under this claim. No further action will be taken by this office.
>
> "If you disagree with this decision, you should carefully review the appeal rights that were issued to you with your previous decisions and pursue whichever avenue is appropriate to your situation."

In an August 2, 2004 letter, appellant requested reconsideration of the hearing representative's November 12, 1998 decision. She submitted an August 10, 2004 attending physician's report from a physician whose signature is illegible, which indicated that July 19, 1997 was the date of injury and provided a history that appellant was exposed to second hand smoke and chemicals used to clean mail sorting machines while working at the employing establishment. The physician diagnosed severe obstructive lung disease and indicated with an affirmative mark that appellant's condition was caused by the employment activity which included exposure to dust, cigarette smoke and cleaning chemicals. The physician further

indicated that appellant had not been advised that she could return to work. Appellant also submitted page two of an undated and unsigned pulmonary function report, which found a minimal obstructive lung defect confirmed by the decrease in flow rate at peak flow and flow at 50 percent and 75 percent of the flow volume curve and an increased residual value (RV). An August 8, 2004 magnetic resonance imaging (MRI) scan report of appellant's cervical spine from Dr. Monica B. Umpierrez, a Board-certified radiologist, revealed small focal central protrusion at C3-4, C4-5 and C5-6 without evidence of spinal stenosis or neuroforaminal narrowing. Dr. Umpierrez' August 8, 2004 MRI scan of appellant's brain was normal.

By decision dated August 19, 2004, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

On September 1 and 28, October 10 and November 1, 2004 appellant filed CA-7 forms for a schedule award. In a response dated November 9, 2004, the Office reiterated that appellant was not entitled to wage-loss or schedule award compensation because she refused an offer of suitable work verbatim as provided in its June 23, 2004 letter.

LEGAL PRECEDENT -- ISSUE 1

The Office's regulation provides that in termination under section 8106(c) of the Act[2] a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107[3] of the Act, which includes payment of continuing compensation for permanent impairment of a scheduled member.[4] The Board has found that a refusal to accept suitable work constitutes a bar to receipt of a schedule award for any impairment which may be related to the accepted employment injury.[5]

ANALYSIS -- ISSUE 1

Appellant requested a schedule award due to her accepted lumbosacral strain on July 19, 1997. The Office did not issue a final decision addressing her entitlement to a schedule award prior to the Office's May 22, 1998 termination of her compensation on the grounds that she refused an offer of suitable work.

In letters dated June 23 and November 9, 2004, the Office found that as a consequence of refusing a suitable work position, appellant was not entitled to payment of a schedule award.[6]

[2] 5 U.S.C. § 8106(c).

[3] 5 U.S.C. §§ 8105, 8106, 8107.

[4] 20 C.F.R. § 10.517.

[5] *See Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[6] The Board notes that a schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulation provide for a schedule award for impairment to the back or cervical spine or to the body as a whole. *Francesco C. Venezian*, 48 ECAB 572 (1997)*; Gary L. Lose*r, 38 ECAB 673 (1987). Furthermore, the back is specifically excluded from the definition of organ under the Act. *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

Although appeal rights were apparently not included with the Office's June 23 and November 9, 2004 letters, the Board considers the Office's June 23 and November 9, 2004 letters to be appealable decisions, over which the Board has jurisdiction, as the letters made reference to the appeal rights that accompanied a prior decision and also apprised appellant of an adverse action, *i.e.*, that she was not entitled to any compensation including, wage-loss or schedule award compensation due to the termination of her compensation pursuant to section 8106(c) of the Act.[7]

The Board has held that termination of compensation under section 8106(c) for refusal of suitable work serves as a bar to receipt of schedule award compensation for any period after the termination decision has been reached.[8] As the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work in its May 22, 1998 decision, which was affirmed by an Office hearing representative in a November 12, 1998 decision, she is not entitled to a schedule award.

However, appellant may still be entitled to benefits under section 8107 of the Act for the period prior to the termination. The Office has the obligation to develop the claim under section 8107 in order to determine the date of maximum medical improvement and to determine appellant's possible entitlement to benefits pursuant to the schedule award, which may have arisen prior to the Office's termination under section 8106.[9] In this case, it has yet to be determined whether the medical evidence supports an employment-related permanent impairment, with a date of maximum medical improvement that is prior to May 22, 1998. On return of the case record, the Office should adjudicate this aspect of the claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[10] does not entitle a claimant to a review of an Office decision as a matter of right.[11] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[12]

Section 10.607(a) of the Office's implementing regulation states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of

[7] *Julius Cormier*, 47 ECAB 465 (1996).

[8] *Pete F. Dorso*, 52 ECAB 424, 428 (2001).

[9] *Stephen R. Lubin*, *supra* note 5 at 573.

[10] 5 U.S.C. § 8128(a).

[11] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[12] 20 C.F.R. § 10.607(a).

error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[18]

To show clear evidence of error, 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.[19] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[20]

ANALYSIS -- ISSUE 2

In this case, the Office properly determined that appellant failed to file a timely application for review of the hearing representative's November 12, 1988 decision which terminated her compensation on the grounds that she refused an offer of suitable work. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[21]

The last merit decision in this case regarding the termination of appellant's compensation was issued by the Office hearing representative on November 12, 1998. As her August 2, 2004

[13] 20 C.F.R. § 10.607(b).

[14] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[15] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[16] *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

[17] *Leona N. Travis*, *supra* note 15.

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

[19] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

[21] *Larry L. Litton*, 44 ECAB 243 (1992).

letter requesting reconsideration was made more than one year after the hearing representative's November 12, 1998 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the Office's decision to terminate her compensation benefits on the grounds that she refused an offer of suitable work as a modified distribution clerk.

In support of her request for reconsideration, appellant submitted an attending physician's report from a physician whose signature is illegible. This report is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant as it does not constitute probative medical opinion as the preparer cannot be identified as a physician.[22]

The undated and unsigned pulmonary function report which found a minimal obstructive lung defect does not raise a substantial question as to the correctness of the Office hearing representative's November 12, 1998 decision as it is not signed by a physician. The Board has consistently held that unsigned medical reports are of no probative value.[23]

Dr. Umpierrez' MRI scan report regarding appellant's cervical spine revealed small focal central protrusion at C3-4, C4-5 and C5-6 without evidence of spinal stenosis or neuroforaminal narrowing. Her MRI scan report concerning appellant's brain provided normal results. The Board finds that Dr. Umpierrez' reports are insufficient to establish that the hearing representative's termination of appellant's compensation was erroneous as they do not address the relevant issue of whether appellant was able to perform the duties of the offered position of modified distribution clerk.

The Board, therefore, finds that the medical evidence submitted by appellant does not raise a substantial question as to the correctness of the hearing representative's termination of her compensation on the grounds that she refused an offer of suitable work.

CONCLUSION

The Board finds that the Office properly determined that appellant was not entitled to a schedule award because she refused an offer of suitable work. The Board further finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

[22] *See Merton J. Sills*, 39 ECAB 572 (1988).

[23] *See George E. Williams*, 44 ECAB 530 (1993); *id.*

ORDER

IT IS HEREBY ORDERED THAT the November 9, August 19 and June 23, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 28, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member