

**United States Department of Labor
Employees' Compensation Appeals Board**

D.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 10-1062
Issued: January 18, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2010¹ appellant filed a timely appeal of a September 3, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her untimely request for reconsideration and finding that it failed to establish clear evidence of error. As over one year has passed between the last merit decision in this case, dated September 14, 2001, and the filing of this appeal on March 1, 2010, the Board lacks jurisdiction over the merits of this case.² Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerits of this case.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error. On appeal appellant contends that the Office

¹ The date of the appeal was determined by the date on the envelope containing appellant's appeal to the Board. See 20 C.F.R. § 501.3(f)(2).

² For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. See 20 C.F.R. § 501.3(d)(2). An appeal of final adverse Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

erred in terminating her benefits on the grounds that she had refused an offer of suitable work as the offered job was not medically suitable. She also contends that the Office erred in changing the date of injury for her right carpal tunnel syndrome claim.

FACTUAL HISTORY

On April 21, 1997 appellant, then a 46-year-old mail processor clerk, filed an occupational disease claim alleging that her bilateral carpal tunnel syndrome and lateral epicondylitis were employment related. She noted that she first became aware of these conditions on March 20, 1997, but did not realize the relationship to her employment until November 1, 1997. Appellant stopped work on February 18, 1997. The Office accepted the claim for left carpal tunnel syndrome and left lateral epicondylitis.³ By decision dated October 6, 1997, it denied appellant's claim for employment-related right carpal tunnel syndrome.

By decision dated August 12, 1999, the Office terminated appellant's compensation effective August 4, 1999 pursuant to 5 U.S.C. § 8106(c) based on her refusal to accept an offer of suitable work.⁴ This decision was affirmed by a hearing representative on July 31, 2000.

By decision dated September 14, 2001, the Office denied modification of the August 12, 1999 decision.

On February 15, 2002 appellant filed an occupational disease claim alleging that her right carpal tunnel condition was employment related.⁵ The Office initially accepted the claim for bilateral tunnel syndrome, which was subsequently changed to acceptance for right carpal tunnel syndrome.⁶ In a January 3, 2003 letter, it also noted that, under claim number xxxxxx394, it had accepted the condition of left carpal tunnel syndrome and that her compensation was terminated for failure to accept an offer of suitable work. Appellant was also informed that her claim for wage-loss compensation for the period August 17, 1999 through August 12, 2001 had been denied under claim number xxxxxx394. The Office advised appellant to follow the appeal rights

³ The Office assigned claim number xxxxxx394.

⁴ The Office rejected appellant's contention that her right carpal tunnel syndrome made the offered position unsuitable. It noted that it had previously rejected her claim that she had an employment-related right carpal tunnel condition. The Office also reviewed a June 16, 1999 electromyographic (EMG) evaluation and nerve conduction study and a July 29, 1999 report from Dr. Kasturi B. Puri, a treating Board-certified physiatrist, which diagnosed moderate compression of the left median nerve and mild to early carpal tunnel syndrome of the right. In addition, the Office relied on the May 20, 1999 addendum report from Dr. Joseph Salama, an impartial Board-certified orthopedic surgeon, who reported on May 20, 1999 that work restrictions were only required for the left upper extremity.

⁵ The Office assigned claim number xxxxxx913. It combined claim numbers xxxxxx394 and xxxxxx913, with claim number xxxxxx394 listed as the master file number.

⁶ In a letter dated January 3, 2003, the Office informed appellant that the date of injury was changed from May 1, 1999 to August 13, 2001. The reasons for the change in date of injury were due to appellant's returning to work with the employing establishment on or about August 13, 2001 and that her claim for right carpal tunnel syndrome was denied by decision dated October 6, 1997 under claim number xxxxxx394. The Office stated that the condition of left carpal tunnel syndrome had been accepted under claim number xxxxxx934, and that her compensation for this condition was terminated for failure to accept an offer of suitable work.

accompanying that decision if she disagreed with the denial of claim for wage-loss compensation for that time period.

In a letter dated June 7, 2009, appellant requested that the Office reconsider everything pertaining to her claims. She submitted reports dated November 22, 2005 and January 22, 2007 from Dr. Scott T. Monsoon, a second opinion Board-certified orthopedic surgeon. In his reports, Dr. Monsoon diagnosed bilateral carpal tunnel syndrome based on a review of EMG studies and that work restrictions were required. He noted restrictions were necessary to prevent the use of power tools and repetitive gripping.

Notes dated December 19, 2007 and January 22, 2009 from Dr. Sally S. Young, a treating Board-certified physiatrist, provided work restrictions of no repetitive movement, grasping, pulling, pushing or vibratory machines and no lifting more than 20 pounds.

On March 8 and April 3, 2006 Dr. Saul I. Weingarden, a treating Board-certified physiatrist, reported the results of electromyographic (EMG) evaluation and nerve conduction studies. On October 26, 2006 he provided restrictions involving grasping and lifting.

By letter dated July 28, 2009, the Office informed appellant that it was unclear exactly what she was requesting the Office to reconsider. It advised her to specifically identify the decision for which she was requesting reconsideration and noted the most recent decisions issued.

On July 6, 2009 appellant requested reconsideration of the August 12, 1999 decision terminating her compensation benefits pursuant to 5 U.S.C. § 8106(c) due to failure to accept a suitable job offer.

By decision dated September 3, 2009, the Office denied appellant's request for a merit review as her request was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁷ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁸ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁹ The Board has found that the imposition of the one-year limitation

⁷ 5 U.S.C. § 8101 *et seq.*

⁸ 20 C.F.R. § 10.605.

⁹ *Id.* at § 10.607(a).

does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.¹⁰

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹¹ The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.¹² 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.¹³

ANALYSIS

The Board finds that the Office properly determined appellant's application for review was untimely. 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.¹⁴ However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁵ The last merit decision in this case was the Office's September 14, 2001 decision, which denied modification of the August 12, 2009 decision terminating her wage-loss compensation because she had refused an offer of suitable work. As appellant's letters dated June 7 and July 6, 2009, which were received by the Office on June 22 and August 11, 2009, were submitted more than one year after the last merit decision of record, they were untimely.

As appellant's requests were filed more than one year after the Office's September 14, 2001 decision, she must demonstrate clear evidence of error on the issue which was decided by the Office. The term clear evidence of error is intended to represent a difficult standard.¹⁶

¹⁰ 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *D.O.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *See E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *James R. Mirra*, 56 ECAB 738 (2005).

¹³ *See W.G.*, 60 ECAB ____ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁴ *D.E.*, 59 ECAB 438 (2008); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 765 (1993).

¹⁶ *D.L.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

Appellant's request would have to establish on its face that the Office's termination of her wage-loss compensation because she refused an offer of suitable work was erroneous. It cannot be a matter of opinion; it must be a matter of proof.

The Board finds that appellant's request for reconsideration does not establish clear evidence or error. The Office found that appellant failed to accept an offer of suitable work under the claim which accepted the conditions of left carpal tunnel syndrome and left lateral epicondylitis. In support of her request, appellant submitted November 22, 2005 and January 22, 2007 reports from Dr. Monsoon, a second opinion Board-certified orthopedic surgeon; notes dated December 19, 2007 and January 22, 2009 from Dr. Young, a treating Board-certified physiatrist; and an April 3, 2006 note and March 8, 2006 chart note from Dr. Weingarden, a treating Board-certified physiatrist. The Board finds that appellant has not demonstrated any error in the Office's issuance of the August 12, 1999 decision terminating compensation for failure on her part to accept an offer of suitable work. As the reports from Drs. Monsoon, Weingarden and Young offered no new evidence on the issue in question, which was whether the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work, they are not sufficient to raise a substantial question as to the correctness of the Office's decision and, thus, do not substantiate clear evidence of error.¹⁷ To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁸ Appellant did not submit such evidence. Thus, the Board finds appellant failed to demonstrate clear evidence of error.

On appeal appellant contends that she rejected the offered position because it was not medically suitable due to her restrictions and references a June 16, 1999 EMG test as supportive of contention that the job was not suitable. Specifically, she contends that she had a right carpal tunnel syndrome which the Office failed to consider when it found the offered job suitable. Appellant also contends the Office erred in changing the date of injury for her right carpal tunnel condition from May 1, 1999 to August 13, 2001. Neither contention is relevant to the issue of whether the job offer was suitable. At the time the Office terminated appellant's wage-loss compensation benefits, the only accepted conditions were for left carpal tunnel syndrome and left lateral epicondylitis.¹⁹ Moreover, a limited review of the record does not show that the Office failed to determine whether the subsequently acquired medical condition prevented her from performing the position. In its August 12, 1999 decision, the Office noted that the claim for an employment-related right carpal tunnel syndrome had been previously denied by the Office and that Dr. Salama, the impartial Board-certified orthopedic surgeon, had concluded that work restrictions were only required for the left upper extremity. In addition, the issue of the change in the date of injury for her accepted right carpal tunnel syndrome has no bearing on the issue at hand, which is her refusal of a suitable job pursuant to 5 U.S.C. § 8106(c), as it is not relevant to her refusal of the offered job. Lastly, the June 16, 1999 EMG was considered by the Office in its August 12, 1999 and September 14, 2001 decisions and it was found insufficient to establish that the offered position was not medically suitable.

¹⁷ *Thankamma Mathews*, 44 ECAB 764 (1993).

¹⁸ *Robert F. Stone*, *supra* note 11.

¹⁹ *S.G.*, 60 ECAB ____ (Docket No. 08-1992, issued September 22, 2009); *N.J.*, 59 ECAB 171 (2007); *Richard P. Cortes*, 56 ECAB 200 (2004) (it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position).

CONCLUSION

The Board finds that the Office properly determined that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 3, 2009 is affirmed.

Issued: January 18, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board