

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

J.C., Appellant)
and) Docket No. 10-758
DEPARTMENT OF VETERANS AFFAIRS,) Issued: March 15, 2011
VETERANS ADMINISTRATION MEDICAL)
CENTER, Sheridan, WY, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 18, 2010 appellant filed a timely appeal from the November 4, 2009 decision of the Office of Workers' Compensation Programs denying her request for merit review. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's November 12, 2008 decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 30, 2007 appellant, then a 34-year-old temporary nursing assistant, filed an occupational disease claim alleging that she sustained a herniated disc due to the work requirements of her position. The Office accepted her claim for an aggravated herniated disc at L5-S1, aggravation of degenerative lumbar herniated disc, urinary incontinence and surgical intervention on February 6, 2007.²

On July 24, 2007 the employing establishment offered appellant a limited-duty job as a full-time medical clerk. The job duties were considered sedentary to light in nature and occasionally required walking or carrying light objects. Appellant commenced work but subsequently resigned from the employing establishment. She notified the employer on August 29, 2007 that she had found a medical billing position in the private sector which she would soon start and her last day would be on September 1, 2007.

In a September 7, 2007 letter, the Office advised appellant that the medical clerk position offered by the employing establishment was found to be suitable. It noted that the position was still currently available to her. The Office provided appellant 30 days to return to the medical clerk position or to provide a valid reason for abandoning this position. Appellant was advised that if she did not provide a valid reason for abandoning suitable work all future entitlement that might be forthcoming for wage loss or schedule award compensation would not be allowed.

In a September 13, 2007 letter, appellant advised the Office that she had started new employment in the private sector on September 5, 2007 as an accounts receivable clerk for a company called Renew.

On September 20, 2007 the Office advised appellant that it had considered the reasons she provided for not continuing in the modified clerk position but did not find them to be valid. The letter referenced section 8106(c)(2) of the Act and advised her that if she did not accept the position within 15 days her benefits would be terminated. Appellant did not return to the medical clerk position.

In an October 18, 2007 decision, the Office terminated appellant's entitlement to monetary compensation effective October 18, 2007 on the grounds that she abandoned suitable work. It noted that it had advised her that her reasons for abandoning the medical clerk position were not valid.

In a September 24, 2008 letter, appellant requested reconsideration of her claim. She stated that she did not realize the consequences of quitting her job at the employing establishment and that she still had extreme back pain because her L5-S1 disc was not adequately fused. Appellant submitted medical reports concerning the treatment of her back condition.

² On February 6, 2007 appellant underwent a laminectomy, facetectomy and foraminotomy bilaterally at L5-S1 with instrumentation.

In a November 12, 2008 decision, the Office affirmed the October 18, 2007 termination of appellant's compensation for abandoning suitable work. It noted that it had advised her that her reasons for abandoning her medical clerk position were not valid.

In an October 1, 2009 letter, appellant requested reconsideration of her claim and advised that her work-related L5-S1 condition continued to cause her chronic pain. She noted that her employment injury prevented her from continuing in the private-sector job for which she left the employing establishment. Appellant stated:

"I know the DOL is hooked on my leaving the position I was offered but I had no future and no one advised me that I would be treated this way and not compensated. The job I left for was because they were aware of my surgeries and did accommodate my needs and it was more money, \$12 an hour versus \$10 dollars an hour at the Sheridan VA."³

In a November 4, 2009 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that her application for review did not raise any substantive legal questions or include new and relevant evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁴ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁷

The Office's procedure manual provides that an acceptable reason for refusing an offer of suitable work is that the employee has found other work which fairly and reasonably represents her earning capacity.⁸ When such a reason is offered, the Office is required to make a determination

³ Appellant submitted numerous medical reports concerning the treatment of her back condition between November 2008 and October 2009.

⁴ 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(2) (July 1996).

on actual earnings in the new job representing the employee's wage-earning capacity such that compensation should be adjusted.⁹

ANALYSIS

The Office accepted appellant's claim for an aggravated herniated disc at L5-S1, aggravation of degenerative lumbar herniated disc, urinary incontinence and surgery on February 6, 2007. The employing establishment offered her a limited-duty position as a medical clerk. Appellant started work in the position but later stopped and obtained employment in the private sector. The Office terminated her monetary compensation effective October 18, 2007 on the grounds that she abandoned suitable work.

Following a November 12, 2008 merit decision, affirming the termination of her compensation, appellant requested reconsideration of her claim on October 1, 2009. Appellant explained the basis for her leaving the offered position: "The job I left for was because they were aware of my surgeries and did accommodate my needs and it was more money, \$12 an hour versus \$10...."

Appellant's letters to the Office clearly argued the fact that she had actual earnings in a new position she commenced on September 5, 2007. The decisions of the Office have been silent on this matter. As noted, an acceptable reason for refusing an offer of suitable work is that the employee has found other work which fairly and reasonably represents her earning capacity.¹⁰

The Board finds that appellant's request for reconsideration raised a relevant argument not previously considered or addressed by the Office. It is sufficient to warrant reopening her claim for further merit review. The Office abused its discretion by denying appellant's request for further review of the merits of her claim. The case is remanded to the Office for consideration of the merits of her claim to be followed by the issuance of a merit decision.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The case is remanded to the Office for further development.

⁹ *Mary E. Woodward*, 57 ECAB 211 (2005).

¹⁰ See *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2009 decision of the Office of Workers' Compensation Programs is set aside and case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board