

claim for left ankle strain and approved surgery, including a tendo-Achilles lengthening, left. Appellant received a schedule award for an 11 percent impairment of his left lower extremity.

On January 24, 2003 the employing establishment offered appellant a position as a modified clerk. The position required lifting and carrying one to four hours a day. Appellant's physician's reviewed the position and rejected it. He limited appellant to lifting and carrying one to one and a half hours a day. The employing establishment advised OWCP that the January 24, 2003 offer was within appellant's restrictions and requested a suitability determination.

On August 29, 2003 OWCP notified appellant that the position offered on January 24, 2003 was suitable to his work capabilities and remained available. It gave him 30 days to accept the position or provide an explanation for refusing it, and informed him of the consequences for refusing suitable work.

On October 7, 2003 the employing establishment extended appellant a new offer of limited duty. Appellant accepted this offer on October 14, 2003.

In a decision dated October 9, 2003, after the employing establishment confirmed that the position was still available and that appellant had not returned to work, OWCP terminated wage-loss compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2). OWCP observed that appellant did not respond to the 30-day notice. Appeal rights attached to the decision notified appellant that he had one calendar year to request reconsideration.

Appellant requested reconsideration on February 3, 2011. He informed OWCP that he had accepted a modified assignment on October 14, 2003 and did not receive OWCP's decision terminating compensation until after the acceptance. Appellant took the language of section 8106(c)(2) to mean that he did not need to reply to OWCP because he accepted the work assignment and did not stop work. He believed his acceptance of the modified assignment nullified all previous correspondence.

In a decision dated February 15, 2011, OWCP denied appellant's request for reconsideration. It found that his request was untimely and did not present clear evidence of error. OWCP noted that appellant's acceptance of a modified position on October 14, 2003 came after its October 9, 2003 termination decision.

On appeal, appellant submitted timekeeping records to show that he was continuously employed from December 14, 2002 through December 12, 2003, either working in a full-time status or on approved leave.² He stated that at no time did he leave or abandon the position he was working during that time. Appellant adds that the information upon which OWCP based its original decision was faulty.

² The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

The term “clear evidence of error” is intended to represent a difficult standard.⁵ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁶

ANALYSIS

Appellant had one calendar year from OWCP’s October 9, 2003 decision, or until October 9, 2004, to request reconsideration. His February 3, 2011 request is therefore untimely. The question for determination is whether this request shows clear evidence of error in OWCP’s October 9, 2003 decision to terminate compensation under 5 U.S.C. § 8106(c)(2).

Appellant explained in his request for reconsideration that he had accepted a modified job offer on October 14, 2003, something he believed nullified all previous correspondence. The Board notes that on October 7, 2003 two days before OWCP terminated his compensation for refusing the January 24, 2003 job offer, the employing establishment extended appellant a new offer. This new offer superseded the first job offer and with it came new due process rights and new procedural requirements. OWCP did not learn of the new offer until after it terminated

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁶ *Id.* at Chapter 2.1602.3.d(1).

compensation, but the effect of that termination was to deny appellant the protections set forth by Board case law and OWCP regulations as they related to the new offer.⁷

The situation is similar to that of *S.G.*, Docket No. 06-706 (issued August 14, 2006). There, OWCP terminated the claimant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused a December 19, 2003 offer of suitable employment. Before it issued its decision on December 29, 2004; however, the employing establishment extended a new job offer to the claimant on July 8, 2004. The Board found that OWCP did not meet its burden of proof to terminate compensation because it failed to follow established procedures with respect to the new offer.

The Board finds that appellant's February 3, 2011 request for reconsideration showed clear evidence of error in OWCP's October 9, 2003 decision terminating compensation. The employing establishment had recently replaced the offer upon which OWCP based its decision with a new offer, one that afforded appellant new due process rights, and one that he accepted, as he explained. Accordingly, the Board will reverse OWCP's February 15, 2011 decision denying appellant's request for reconsideration and will remand the case for a merit review.

CONCLUSION

The Board finds that OWCP improperly denied appellant's February 3, 2011 request for reconsideration. The request shows clear evidence of error in OWCP's October 9, 2003 decision. Appellant is entitled to a merit review of his case.

⁷ *Juan A. Dejesus*, 54 ECAB 721 (2003) (essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c)); 20 C.F.R. § 10.516.

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2011 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this opinion.

Issued: January 6, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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