United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 07-2267**
	)	**Issued: April 22, 2008**
U.S. POSTAL SERVICE, FORT DEARBORN STATION, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from the June 13, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit denial. The Board has no jurisdiction to review the Office's July 31, 2003 merit decision terminating compensation for refusing suitable work, as appellant filed his appeal to the Board more than one year after the date of that decision.

ISSUE

The issue is whether the Office properly denied appellant's April 9, 2007 request for reconsideration.

FACTUAL HISTORY

On November 13, 1999 appellant, then a 52-year-old custodian, sustained an injury in the performance of duty when he tripped on a metal rod hanging from an all-purpose container and fell. The Office accepted his claim for left knee contusion, bilateral wrist contusion and right

forearm contusion. The Office also accepted de Quervain's contracture (bilateral) and authorized surgical release. Appellant underwent a work hardening program to increase his physical capabilities and tolerances in order to return to work as a custodian. The work hardening discharge report on March 30, 2001 recommended that he return to work as a custodian. Effective April 2, 2001, Dr. Scott A. Rubinstein, an orthopedist, released appellant to return to work with restrictions: no lifting over 40 pounds, no push/pull over 500 pounds, avoid repetitive motion activities and medium work level per U.S. Department of Labor standards.[1]

On August 9, 2000 appellant filed a claim alleging that his bilateral foot problems were a result of his federal employment. The Office accepted his claim for bilateral plantar fasciitis and bilateral pronation syndrome. Effective April 9, 2001, Dr. John M. Wray, a podiatrist, released appellant to return to work in a sedentary position with no standing, lifting or walking. On May 22, 2001 he limited appellant to walking and standing for two hours.[2]

On July 23, 2001 appellant accepted a limited-duty job offer. The offer specified a work schedule of eight hours per day sedentary work duties with "standing and walking (2) hours per day." Appellant reported for work on July 28, 2001. On August 18, 2001 he stopped. Appellant informed his supervisor on September 6, 2001 that he was unable to perform the duties of his limited-duty position due to the pain in both his thumbs, wrists, forearms, feet, ankles and legs. He asked to retire on disability.

In a decision dated July 31, 2003, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c) for refusing suitable work. The Office found that the weight of the medical opinion rested with Dr. Wray, who issued restrictions on May 22, 2001. The Office noted that the limited-duty position appellant accepted on July 23, 2001 adhered to those restrictions and was suitable. After providing appellant due process and finding that the position remained open and available, the Office determined that appellant refused suitable work. In an attached statement of appeal rights, the Office notified appellant that he had one year from the date of the decision to request reconsideration.

On April 9, 2007 appellant requested reconsideration:

> "I am sending this letter to request that you reconsider your decision in the matter of my able to work and not being totally disabled due to the injuries I received while an employee of the United States Postal Service. In going over my records and your decision, I found that your agency failed to consider the total restriction from both of the injuries I suffered in making their decision. Attached you will find evidence of a hand restriction that was not taken into consideration when the decision was made; therefore I am requesting this reconsideration and further request that while this matter is being decided that I receive compensation, that was not paid to me for my hand injury, as to the fact that this is a separate matter and these funds should have been paid to me prior the injury of my feet. I am not a lawyer and must depend on your agency examining all matters with the intent of

[1] OWCP File No. 100493296.

[2] OWCP File No. 100503564. The Office doubled appellant's case records.

aiding and informing an injured worker as to what steps he must take to receive proper benefits. Please read the letter that I send to the District Director Ms. Joan Rosel, which goes into the matter in more detail. I hope that in correcting these error that I will receive the benefits that I have been denied and eliminate the at least the financial stress that I have had to live under.

"Please forward your agencies decision in this matter to the above address."[3]

In a decision dated June 13, 2007, the Office denied appellant's request for reconsideration without reviewing the merits of his case. The Office found that he filed his request more than one year after the July 31, 2003 decision terminating his compensation. The Office further found that appellant did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office 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."[4]

The Office, through regulations, has imposed limitations on the exercise of its discretion 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 the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[5]

"Clear evidence of error" is intended to represent a difficult standard.[6] If clear evidence of error has not been presented, the Office should deny the application by letter decision, which

[3] Appellant stated the following in his January 8, 2007 letter to Ms. Rosel: "The job offered required full custodian duties for two (2) hours and then sitting at a table sorting mail and magazines, then stamping the mail or magazine with various rubber stamps which directed how it is to be handled, then I would place each letter or magazine into a tray and walk it over and placed them on a rack to be picked up."

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.607 (1999).

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

includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[7]

ANALYSIS

Appellant had one year, or until July 31, 2004, to request reconsideration of the Office's July 31, 2003 decision terminating his compensation. He did not make his request until April 9, 2007. Appellant's request is therefore untimely. This means that the standard for reviewing timely requests does not apply.[8] To obtain a merit review of his case, appellant's April 9, 2007 request for reconsideration must establish, on its face, that the Office's July 31, 2003 decision was erroneous.

Appellant argues in his request for reconsideration that the Office failed to consider the restrictions from both injuries when it terminated his compensation. Specifically, he argues that the Office failed to take his hand restriction into account. The record shows that appellant did sustain a bilateral de Quervain's contracture on November 13, 1999 when he tripped and fell. He underwent surgery. Effective April 2, 2001, Dr. Rubinstein, the orthopedist, released appellant to work with the following restrictions: no lifting over 40 pounds, no push/pull over 500 pounds, avoid repetitive motion activities, and medium work level per U.S. Department of Labor standards. But this, by itself, does not show that the limited duty appellant accepted on July 23, 2001 was not medically suitable.

Appellant's request for reconsideration does not present clear evidence that the limited duty violated Dr. Rubinstein's restrictions. This is critical. Any failure by the Office to consider these restrictions becomes immaterial if the duties were nonetheless consistent with the restrictions. Appellant made no showing in his April 9, 2007 request for reconsideration that he was required to lift over 40 pounds, to push or pull over 500 pounds, to perform repetitive motion activities or to engage in anything other than medium-level work. He referred to a letter he wrote to the District Director, which described his sedentary duties. But this information does not demonstrate that his limited duty violated Dr. Rubinstein's restriction on repetitive motion activities. Without more detail, and without an opinion from Dr. Rubinstein directly addressing the issue, it is not clearly established that the activities appellant described violated the restrictions reported on April 2, 2001.

Medical restrictions change, sometimes month to month. For example, Dr. Wray, the podiatrist, released appellant to return to sedentary duty effective April 9, 2001 with no standing or walking whatsoever. A month and a half later, Dr. Wray allowed appellant to stand and walk for two hours a day. Appellant's request for reconsideration does not show that the restrictions Dr. Rubinstein reported on April 2, 2001 were still fully operative when he reported to work on July 28, 2001.

[7] *Id*. at Chapter 2.1602.3.d(1).

[8] *See* 20 C.F.R. § 10.608(a) (1999) (a *timely* request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in § 10.606(b)(2)). (Emphasis added.)

Appellant accepted the job offer. If he believed the offer was inconsistent with any hand restriction related to his November 13, 1999 employment injury, he did not express that belief on July 23, 2001 when he signed his name to accept. Appellant was free to reject the offer, but he did not. In the absence of any objection or protest by him at that time, it is reasonable to infer that he believed the position was medically suitable, not just with respect to the restrictions imposed by Dr. Wray, but with respect to the restrictions earlier reported by Dr. Rubenstein. This makes appellant's current argument appear inconsistent with his actions.

It is not enough for appellant to argue that the Office failed to consider the April 2, 2001 hand restrictions when it terminated his compensation. This, alone, does not establish that the limited duty was not in fact suitable or that the Office's July 31, 2003 decision to terminate compensation was clearly erroneous. The Board will therefore affirm the Office's decision to deny appellant's untimely request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's April 9, 2007 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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