U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR HALL and DEPARTMENT OF JUSTICE,
FEDERAL CORRECTIONAL INSTITUTION, Pleasanton, CA

Docket No. 00-1747; Submitted on the Record;
Issued November 9, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error; and (2) whether the Office properly reduced appellant's compensation from May 1, 1994 to July 23, 1995 based on his capacity to earn wages in the selected position of a mechanical drafter.

On January 10, 1986 appellant, then a 48-year-old food service supervisor, filed a traumatic injury claim, alleging that he injured his lower back while lifting a food cart on August 22, 1985. The Office accepted the claim for cervical and lumbar strains.

In a report dated November 14, 1988, appellant's rehabilitation counselor confirmed that appellant had completed vocational training and that he possessed the skills needed to secure employment as a mechanical drafter. She advised that job placement assistance had been provided to appellant for 60 days, that there were available jobs for mechanical drafters in appellant's commuting area, but that he was not motivated to participate in the job search.

In a July 27, 1993 report, a rehabilitation specialist indicated that the job of mechanical drafter was deemed sedentary under the Dictionary of Occupational Titles (DOT) and that appellant had completed the drafting program and gained entry-level skills sufficient to perform tasks paying at least $7.00 an hour. It was noted that mechanical drafter jobs were being performed in a sufficient number and that they were reasonably available on a full-time basis.[1]

On August 3, 1993 appellant accepted employment as a sales associate for an orchard supply hardware, working part time for 16 to 24 hours a week at the rate of $6.00 an hour.

[1] The record indicates that appellant held assorted part-time positions between January 1993 and August 1988. The rehabilitation counselor noted that appellant had actual earnings between $7.00 to $9.50 per hour on an intermittent basis; therefore, he thought that $7.00 per hour appeared to represent appellant's wage-earning capacity.

In order to ascertain whether appellant had any continuing disability causally related to his work injury, the Office requested a report from appellant's treating physician, Dr. John M. Knight, a Board-certified orthopedic surgeon.

In a September 8, 1993 report, Dr. Knight noted that appellant continued to be bothered by pains in both the upper back and neck with some occasional radiation to the extremities consistent with mild degenerative disc disease "that were aggravated or brought about by the injury in 1985." Dr. Knight further noted that appellant continued to work part time, finding that any work involving lifting or carrying increases his pain. He concluded that appellant was reasonably stable and expressed his opinion that there was no need to change appellant's disability status.

The Office referred appellant for a second opinion evaluation with Dr. James E. Damon, a Board-certified orthopedic surgeon on May 12, 1994. Dr. Damon was provided a copy of the medical record, a statement of accepted facts and a description of the vocationally selected job of a mechanical drafter. He opined that appellant had no residuals of his work-related injuries that precluded him from returning to his prior job as a food service supervisor. Dr. Damon stated that appellant had no objective findings referable to the cervical or lumbar spines. He concluded that appellant's work-related back condition had completely resolved and that he was capable of performing the full-time position of a mechanical drafter, eight hours per day, five days per week. The work restrictions imposed by Dr. Damon included no lifting over 20 pounds and no pushing or pulling.

In a May 19, 1994 decision, the Office reduced appellant's compensation effective May 1, 1994 based on his actual earnings as a sales associate. The Office determined that appellant's wage-earning capacity was $144.00 per week based on 24 hours of work at $6.00 per hour. Appellant's compensation was changed from $657.60 per week, his pay rate as determined for compensation purposes, to $540.78, the difference between the former compensation rate and his ability to earn wages in his new position.

In a June 20, 1995 report, Dr. Knight advised that appellant had been to his office on June 20, 1995 complaining of pain. He found no change in appellant's physical findings and noted that appellant had minimal limitations in mobility in the cervical and lumbar spines. Negative straight leg raising and a normal neurological examination was reported with respect to appellant's extremities. Dr. Knight opined that appellant was disabled due to pain. He further stated that he saw no substantial change in appellant's condition that would indicate that appellant could perform his prior job.

On July 18, 1995 the Office issued a notice of proposed termination of compensation on the grounds that appellant no longer had disability or residuals causally related to his August 22, 1985 work injury.

In a July 18, 1995 decision, the Office terminated appellant's compensation effective July 23, 1995. The Office found that the weight of the medical evidence resided with the opinion of Dr. Damon.

In a September 28, 1998 decision, the Board reversed the Office decisions of May 19, 1994 and July 18, 1995. The Board found that the Office erred by not determining whether the position of sales associate fairly and reasonably represented appellant's wage-earning capacity.[2] The Board further found that a conflict existed between the opinion of Drs. Damon and Knight on whether appellant had any continuing disability or residuals due to his August 22, 1985 work injury. Therefore, the Office had not met its burden of proof in terminating appellant's compensation or in reducing appellant's compensation based on his wage-earning capacity.

On September 30, 1998 the Office filed a petition for reconsideration of the Board's decision, arguing that the Board had exceeded its jurisdiction in reviewing the propriety of the Office's July 18, 1995 decision. The Office noted that appellant's appeal had been filed prior to the July 18, 1995 decision terminating appellant's compensation.

On March 29, 1999 the Board granted the Office's motion and modified its decision to reflect that it did not have jurisdiction to review the merits and reverse the Office's July 18, 1995 decision.

On April 22, 1999 appellant filed a request for reconsideration of the July 18, 1995 decision. He argued that the Office clearly erred in terminating his compensation because a conflict existed in the record between Drs. Damon and Knight as to whether he had any residuals or continuing disability causally related to his work injury.

In a decision dated May 11, 1999, the Office determined that appellant's April 22, 1999 reconsideration request was untimely filed and that appellant failed to establish clear evidence of error.

On January 20, 2000 the Office issued a notice of proposed reduction of compensation for the period of May 1, 1994 to July 23, 1995. The Office noted that earnings information from the Social Security Administration had been obtained for the period of 1988 to 1995, but that the actual wages received by appellant from May 1, 1994 to July 23, 1995 did not fairly and reasonably represents his wage-earning capacity. Based on a rehabilitation report dated July 27, 1993, the Office determined that appellant had been capable of performing full-time work from May 1, 1994 to July 23, 1995 in the sedentary position of a mechanical drafter with a minimum wage of $7.00 an hour for 40 hours a week.

In a February 24, 2000 decision, the Office adjusted appellant's compensation for the period May 1, 1994 to July 23, 1995 based on a finding that appellant had the capacity to earn wages in the position of a mechanical drafter, for which he received vocational rehabilitation training, at the rate of $280.00 per week.

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.[3] As

[2] The Board noted that there was no separate confirmation of appellant's wages for the period in question as the Office did not reference any W2 forms or an itemized statement of earnings from the Social Security Administration to establish appellant's exact hours of work or an average of his weekly wages. *Id*.

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed his appeal with the Board on April 26, 2000, the only decisions properly before the Board are those dated May 11, 1999 and February 24, 2000.

With respect to the May 11, 1999 decision, the Board concludes that the Office properly determined that appellant filed an untimely reconsideration request on April 22, 1999.

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[8] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

In this case, appellant's April 22, 1999 reconsideration request was filed almost four years after the July 18, 1995 decision. Thus, appellant's reconsideration request exceeded the one-year limitation and was properly found to be untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[10] In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

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[4] 5 U.S.C. § 8128(a).

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

[6] 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 his own motion or on application."

[7] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

[8] 20 C.F.R. § 10.607(a) (1999).

[9] *See Leon D. Faidley, Jr.*, *supra* note 5.

[10] *Leonard E. Redway*, 28 ECAB 242 (1977).

[11] 20 C.F.R. § 10.607(b) (1999); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16]

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.[17] 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.[18]

In support of his reconsideration request, appellant argued that the Office's decision to terminate his compensation was erroneous because a conflict existed in the medical opinion evidence between his treating physician and the Office's second opinion physician on whether he had any continuing disability or residuals due to his work injury. The Board has held that, while medical opinions may be construed as being of equal weight to create a conflict, this is not sufficient to establish clear evidence of error. A conflict in medical opinion does not establish that the Office's decision was erroneous because the weight of the evidence rests with neither side of the conflict.[19] The Board, therefore, finds the appellant has failed to submit clear evidence of error.

The Board further finds that the Office properly adjusted appellant's compensation from May 1, 1994 to July 23, 1995 to reflect that he had the capacity to earn wages as a mechanical drafter.

In the January 20, 2000 notice of proposed reduction of compensation, the Office found that appellant's actual earnings for work performed from 1988 to 1995 did not "fairly and

[12] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[13] *See Leona N. Travis*, 43 ECAB 227 (1991).

[14] *See Jesus D. Sanchez*, *supra* note 5.

[15] *See Leona N. Travis*, *supra* note 13.

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

[17] *Leon D. Faidley, Jr.*, *supra* note 5.

[18] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[19] *Fidel E. Perez*, 48 ECAB 663 (1997).

reasonably" reflect his wage-earning capacity because of the intermittent and probative nature of the work, his ability to work full time and his vocational training. The Office then properly proceeded with a constructed wage-earning capacity determination.

Appellant had been approved for eight hours of work by Dr. Damon who indicated that appellant could perform light duty with lifting restrictions. Appellant's vocational rehabilitation counselor determined that although appellant was working part-time as a sales associate, he was capable of working full time. The counselor reported that there were full-time mechanical drafting positions available in sufficient numbers in appellant's commuting area to make the position reasonably available to him and that the minimum wage for such a job was $7.00 an hour.

The rehabilitation counselor stated that he had located several jobs for appellant but that appellant had not followed through with the placement process. A job description for the mechanical drafter position was also provided to Dr. Damon, who concurred that appellant could perform the work required of the position. According to vocational rehabilitation specialist, the job of a mechanical drafter as described in DOT was reasonably available with the general labor market of appellant's commuting area.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications in determining that the selected position of mechanical drafter represented appellant's wage-earning capacity from May 1, 1994 to July 23, 1995.[20] The weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the duties of a mechanical drafter as described in the DOT. The rehabilitation counselor also verified that such position was reasonably available within appellant's commuting area. Therefore, the Office properly determined that appellant had the ability to earn wages as mechanical drafter at the rate of $7.00 an hour.

[20] Appellant returned to work as a sales associate on May 1, 1994. Termination of his compensation became effective on July 23, 1995.

The February 24, 2000 and May 11, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 9, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member