

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT HOLMES and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 03-1405; Submitted on the Record;
Issued September 2, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the merits of his claim on April 1, 2003; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on March 10, April 10 and 23, 2003, on the grounds that his request was not timely filed and did not contain clear evidence of error.

This case has previously been before the Board on appeal. The Board issued a decision dated February 2, 1996, finding that the Office had not met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as an electronic technician apprentice.¹ In its March 27, 2002 decision,² the Board found that the Office properly determined appellant's rate of pay for purposes of calculating his compensation benefits for the period December 1, 1980 through January 2, 1999 and that the Office did not abuse its discretion by denying appellant's requests for merit review in decisions dated October 28, 1999, January 20, March 9 and 29, 2000 and two decisions dated June 5, 2000. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Following the Board's March 27, 2002 decision, regarding appellant's rate of pay, appellant requested reconsideration of this decision on February 3, 2003. By decision dated April 1, 2003, the Office declined to reopen appellant's claim for consideration of the merits, on the grounds that the arguments submitted were repetitious and did not warrant review of the merits of appellant's claim. Appellant again requested reconsideration on March 31, 2003 and, by decision dated April 10, 2003, the Office again declined to reopen appellant's claim for consideration on the grounds that he failed to establish clear evidence of error. Appellant requested reconsideration of this decision on April 10, 2003 and submitted documentation. By

¹ Docket No. 94-2407 (issued February 2, 1996).

² Docket No. 00-2644 (issued March 27, 2002).

decision dated April 23, 2003, the Office declined to reopen appellant's claim for consideration of the merits of his rate of pay on the grounds that it was not timely filed and did not contain clear evidence of error.³

On February 4, 2003 appellant requested reconsideration of the May 3, 1999 decision, of the hearing representative affirming the Office's December 28, 1998 decision terminating appellant's compensation benefits. By decision dated March 10, 2003, the Office declined to open appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not demonstrate clear evidence of error on the part of the Office.

The Board finds that the Office properly refused to reopen appellant's claim for consideration of the merits on April 1, 2003.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument, which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

Appellant requested reconsideration of the Board's March 27, 2002 pay rate decision on February 3, 2003. He alleged that he had sustained a recurrence of disability on May 5, 1981 and was, therefore, entitled to compensation at the recurrent pay rate. Appellant's initial employment injury was on October 16, 1980 and he returned to work on January 5, 1981 in a light-duty capacity. The record indicates that appellant resigned from the employing establishment on February 20, 1981. Appellant also alleged that he worked for 11 months in his date-of-injury position and that he was entitled to be paid at the hourly date-of-injury pay rate.

In the March 27, 2002 decision, the Board found that appellant had not worked for 11 months in his date-of-injury position and that, therefore, he had not worked for "substantially the whole year" as he started work on June 30, 1979 but he did not work from October 16, 1979 through January 18, 1980.⁵ Therefore, the Board addressed this argument in its decision and appellant's continuing pursuit of this legal argument lacks a reasonable color of validity.

In regards to appellant's allegation that he was entitled to a recurrent pay rate, the Federal Employees' Compensation Act clearly states monthly pay means monthly pay at the time compensable disability recurs, "if the recurrence begins more than [six] months after the employee resumes regular full-time employment with the United States."⁶ In this case, the

³ Following the Office's April 23, 2003 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board cannot consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. §§ 10.609(a) and 10.606(b).

⁵ 5 U.S.C. § 8114 (d).

⁶ 5 U.S.C. § 8101(4).

evidence establishes that appellant did not return to regular full-time employment with the United States in January 1980 or any time thereafter and, therefore, any recurrence of disability could not be more than six months after such a return to regular full-time employment with the United States. Therefore, the Board finds that appellant's argument that he is entitled to pay at the recurrent rate lacks a reasonable color of validity and is not sufficient to require the Office to reopen his claim for consideration of the merits of this issue.

Appellant did not submit relevant new evidence nor relevant new legal argument in compliance with the Office's regulations. The Office was not required to reopen appellant's claim for consideration of the merits.

The Board further finds that the Office properly declined to reopen appellant's claim on the merits on March 10, April 10 and 23, 2003 on the grounds that his requests for reconsideration were not timely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁹ The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.¹⁰ The Board has found that the imposition of this one year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹¹

Appellant requested reconsideration of the May 3, 1999 merit decision, terminating his compensation benefits on February 4, 2003. Since appellant filed his reconsideration request more than one year from the Office's May 3, 1999 merit decision, the Board finds that the Office properly determined that said request was untimely. Appellant also requested reconsideration of the March 27, 2002 decision, of the Board regarding his pay rate on March 31 and April 10, 2003. Since these reconsideration requests are more than one year from the Board's March 27, 2002 merit decision, the Board finds that the Office properly determined that these requests were untimely.

In those cases where requests for reconsideration are not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹² Office procedures state that

⁷ 5 U.S.C. § 8128(a).

⁸ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁹ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

¹⁰ 20 C.F.R. § 10.607(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ *Thankamma Mathews*, *supra* note 8 at 769; *Jesus D. Sanchez*, *supra* note 9 at 967.

¹² *Thankamma Mathews*, *supra* note 8 at 770.

the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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's decision.¹⁹ The Board must make 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.²⁰

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

The Board notes that there are two issues in this case. The initial issue is whether the Office met its burden of proof to terminate appellant's compensation benefits. In his February 4, 2003 request for reconsideration, appellant alleged that the impartial medical specialist did not provide an appropriately rationalized report, that his report was not based on an accurate history of injury as he did not receive an accurate statement of accepted facts, that the employing establishment improperly provided an investigative memorandum to the impartial medical examiner and that the physician did not review appellant's job description prior to issuing his report. Appellant also alleged that his physician was entitled to the weight of the medical

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*: Chapter 2.1602.3(c) (May 1996).

¹⁴ *Thankamma Mathews*, *supra* note 8 at 770.

¹⁵ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁶ *Jesus D. Sanchez*, *supra* note 9 at 968.

¹⁷ *Leona N. Travis*, *supra* note 15.

¹⁸ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²⁰ *Gregory Griffin*, *supra* note 10.

evidence as the second opinion physician and the impartial medical examiner did not provide an accurate history of injury nor medical rationale. Appellant asserted that he was not informed of his right to have his own physician present when examined by the second opinion physician. Appellant also alleged that the Office did not provide him with 30 days to respond to the notice of proposed termination of compensation prior to issuing the December 28, 1998 termination decision. The Board notes that appellant raised these arguments previously and that the Office and the Board addressed these arguments in prior decisions. The arguments submitted are not of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error and do not shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision. The Board and the Office have previously considered these arguments and appellant has not submitted sufficient evidence to establish that these decisions were clearly erroneous.

Appellant also alleged that the Board failed to consider the arguments of his attorney on appeal. Appellant's attorney alleged that the Office asked inappropriate questions of the impartial specialist, that his report was confusing and not rationalized, that the impartial medical examiner did not receive an adequate statement of accepted facts and that he failed to provide medical reasoning that appellant's herniated disc had resolved. The Board notes that these arguments are substantially similar to those raised by appellant in his request for reconsideration and have previously been considered by the Office. Neither appellant nor his attorney submitted any evidence establishing clear error in the Office's May 3, 1999 decision.

Appellant also alleged clear evidence of error as the Office failed to inform him of his right to object to the physician selected as the impartial medical examiner, that the Office did not make a finding of permanent impairment entitling him to a schedule award, that the Office did not inform appellant's representative of the reasons for medical referrals and as he had a current computed tomography scan, which demonstrated that his accepted medical conditions were still present. While appellant has alleged errors in the Office's decisions, appellant has not established that these procedural errors arise to the standard applicable in his case, raising a substantial question as to the correctness of the Office's most recent merit decision and of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. As appellant has not established clear evidence of error, the Office properly declined to reopen his claim for review of the merits.

On March 31, 2003 appellant requested reconsideration of the Board's March 27, 2002 decision, determining his rate of pay for compensation purposes. He alleged that the Office did not properly apply the Act and that he was entitled to a greater pay rate as the Office did not apply his date-of-injury pay rate. The Board notes that appellant has submitted no evidence in support of his allegation that the Office and the Board improperly determined that he was not entitled to be compensated based on his date-of-injury pay rate. Appellant has submitted these arguments to both the Office and the Board and the Board finds that there is no evidence to substantiate these arguments and establish clear evidence of error in the Board's March 27, 2002 decision.

Appellant again requested reconsideration on April 10, 2003 and alleged that he was entitled to a recurrent pay rate or his pay rate at his date of injury. He submitted a copy of a form dated December 1, 1980, previously included in the record. The Board clearly explained in its

March 27, 2002 decision, how appellant's appropriate pay rate was reached applying section 8114(d)(2) of the Act.

The Board notes in that section 8114(b) of the Act states: "In computing monetary compensation for disability or death on the basis of monthly pay, that pay is determined under this section." Appellant does not dispute that he was disabled for the period in question, therefore, his monthly pay must be determined under section 8114. This section defines monthly pay at the time of the injury as "one-twelfth of the average annual earnings of the employee at [the time of injury.]" Section 8114(d) further states how average annual earnings are determined, "If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States....²¹" The Board in its March 27, 2002 decision explained why appellant was not considered to have worked for "substantially the whole year" and properly determined his pay rate under this section of the Act. Appellant has not submitted any argument nor evidence establishing error in the Board's decision. Therefore, the Office properly declined to reopen appellant's claim for consideration of the merits of his claim as he failed to timely file a request for reconsideration and failed to establish clear evidence of error.

The decisions of the Office of Workers' Compensation Programs dated April 23, 10 and 1 and March 10, 2003 are hereby affirmed.

Dated, Washington, DC
September 2, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

²¹ 5 U.S.C. § 8114(d)(2).