

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH R. DIDOMENICO and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 03-511; Submitted on the Record;
Issued May 21, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On July 2, 1987 appellant, then a 27-year-old machinist filed a traumatic injury claim alleging that on June 10, 1987 he twisted his knee and sprained his back while stepping in water during the course of his federal duties. The Office accepted the claim for internal derangement of the left knee joint.¹ Appellant stopped work on June 17, 1987 and returned on June 22, 1987. As a result of his work-related injury, the employing establishment determined that appellant was physically disqualified for the position of marine machinery mechanic and therefore placed him in a claims clerk position effective December 17, 1989.² The Office paid appellant compensation for loss of wage-earning capacity beginning April 8, 1990.

On February 2, 2001 the Office issued appellant a notice of proposed reduction of compensation to zero. The Office found that the evidence of record established that appellant had the capacity to earn wages as a program analyst, based on information supplied by appellant in a CA-816 form on January 31, 2001. The Office advised appellant that the proposed reduction would not effect his entitlement to medical benefits for his work-related injury.

By final decision dated March 9, 2001, the Office reduced appellant's monthly compensation to zero effective March 25, 2001 for the reason that appellant was working in a career field different than that previously rated in and was earning more in his current position than he would now earn in his date-of-injury position.

¹ By decision dated August 22, 1991, the Office issued appellant a schedule award for a 28 percent impairment for loss of use of the left lower extremity from May 4, 1989 to November 19, 1990.

² Appellant took a downgrade to GS/4 effective December 17, 1989.

In a letter dated September 24, 2002, appellant requested reconsideration of the March 9, 2001 decision. He indicated that his yearly pay increases were by cost-of-living adjustments and that, although his duties increased and the title of his position changed, his job never changed. Appellant argued that, based on this information, he believed that there was clear evidence of error in the modification of his loss of wage-earning capacity compensation to zero on March 26, 2001.

In a letter dated October 24, 2002, appellant submitted the facts of another case regarding a reduction of compensation benefits in support of his request. Appellant indicated that his circumstances were similar to the facts of this case and that, because his increase in pay resulted from an increase in duties, not a change in position, his loss of wage-earning capacity compensation should not have been reduced to zero.

By decision dated December 13, 2002, the Office denied appellant's request on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decision before the Board on appeal is dated December 13, 2002 denying appellant's request for reconsideration. Because more than one year has elapsed between the Office's last merit decision dated March 9, 2001 and the filing of this appeal on December 23, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.³

Section 8128(a) of the Federal Employees' Compensation Act⁴ 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.”⁵

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁶ This section does not mandate that the Office review a final decision simply upon request by a claimant.

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8128(a).

⁶ *Diane Matchem*, 48 ECAB 532-33 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷

In this case, appellant's request for reconsideration dated September 24, 2002, was more than one year from the Office's March 9, 2001 decision and was, therefore, untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.¹²

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.¹³ 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.¹⁴

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.607(b).

⁹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² *Annie Billingsley*, 50 ECAB 210, 212, n.12 (1998); see Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

In this case, appellant asserted arguments, which do not establish clear evidence of error. Appellant's October 24, 2002 letter submitted in support of his request discussed that he received an increase in pay based on cost-of-living adjustments and an increase in duties. He indicated that his job never changed. The Board finds however that this evidence is insufficient to establish any error by the Office in determining that his compensation should be reduced to zero. The Office based its March 9, 2001 reduction of compensation decision on the fact that appellant was promoted to program analyst at the rate of \$44,350.00 per year effective December 17, 2000 and that his earnings were no longer less than his current pay scale. The evidence submitted on reconsideration has not established that this decision was made in error. Appellant further outlined in some detail the events of another loss of wage-earning capacity case on reconsideration, but similarly failed to establish that the Office erred in the March 9, 2001 decision. This case has no relevance to appellant's reduction in compensation and cannot establish any clear evidence of error.

Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

The decision of the Office of Workers' Compensation Programs dated December 13, 2002 is affirmed.

Dated, Washington, DC
May 21, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member