



## **FACTUAL HISTORY**

This is the third appeal before the Board in this case. In a decision dated February 2, 1996, the Board found 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.<sup>2</sup> The Board issued a March 27, 2002 decision,<sup>3</sup> finding 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 circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.<sup>4</sup>

Appellant requested reconsideration of the Board's March 27, 2002 decision regarding rate of pay on February 3 and March 31, 2003. The Office declined to reopen appellant's claim for consideration of the merits, by decision dated April 1, 2003, on the grounds that the arguments submitted were repetitious and did not warrant review of the merits of appellant's claim. By decision dated April 10, 2003, the Office again declined to reopen appellant's claim for consideration on the grounds that his March 31, 2003 request for reconsideration was untimely and he failed to establish clear evidence of error. Appellant requested reconsideration of the Office's decisions on April 10, 2003 and submitted documentation. 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 by decision dated April 23, 2003.<sup>5</sup>

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

## **LEGAL PRECEDENT -- ISSUE 1**

The Office's regulation 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

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<sup>2</sup> Docket No. 94-2407 (issued February 2, 1996).

<sup>3</sup> Docket No. 00-2644 (issued March 27, 2002).

<sup>4</sup> In an order dated December 22, 2003, the Board vacated a prior decision dated September 2, 2003, Docket No. 03-1405, finding that this decision was issued improperly. The Board then proceeded to further adjudicate appellant's claim and issue a decision on the merits.

<sup>5</sup> 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 will not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

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.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

On February 3, 2003 appellant requested reconsideration of the Board's March 27, 2002 pay rate decision. In support of his request, he alleged that he had sustained a recurrence of disability on May 5, 1981 and as a result was entitled to compensation at the recurrent pay rate. The record establishes that appellant's initial employment injury was on October 16, 1980 and that he returned to work on January 5, 1981 in a light-duty capacity. Appellant resigned from the employing establishment on February 20, 1981. Appellant further 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.

The Board found in the March 27, 2002 decision that appellant worked for less than 11 months in his date-of-injury position and that, therefore, he had not worked for "substantially the whole year." Appellant started work on June 30, 1979, but he did not work from October 16, 1979 through January 18, 1980.<sup>7</sup> As the Board addressed appellant's argument regarding his period of work in the March 27, 2002 decision, appellant's continued pursuit of this legal argument is not persuasive.

Appellant submitted a new argument 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."<sup>8</sup> The evidence in the record establishes that appellant did not return to regular full-time employment with the United States in January 1981, or any time thereafter. As noted previously, appellant returned to light-duty work on January 5, 1981. As he was not performing all the duties of his usual work as a part-time flexible mail handler, appellant did not return to regular full-time employment and he could not have sustained a recurrence of disability more than six months after such a return to regular full-time employment with the United States.<sup>9</sup> Due to the factual insufficiencies, 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.

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

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<sup>6</sup> 5 U.S.C. §§ 10.609(a) and 10.606(b).

<sup>7</sup> 5 U.S.C. § 8114(d).

<sup>8</sup> 5 U.S.C. § 8101(4).

<sup>9</sup> *Jeffrey T. Hunter*, 52 ECAB 503, 507 (2001).

## LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act<sup>10</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>11</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>12</sup> The Office, through regulation 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.<sup>13</sup> 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).<sup>14</sup>

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.<sup>15</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>16</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>17</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>18</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>19</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>20</sup> 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.<sup>21</sup> To show clear

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<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>12</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>13</sup> 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).

<sup>14</sup> *Thankamma Mathews*, *supra* note 11 at 769; *Jesus D. Sanchez*, *supra* note 12 at 967.

<sup>15</sup> *Thankamma Mathews*, *supra* note 11 at 770.

<sup>16</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>17</sup> *Thankamma Mathews*, *supra* note 11 at 770.

<sup>18</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>19</sup> *Jesus D. Sanchez*, *supra* note 12 at 968.

<sup>20</sup> *Leona N. Travis*, *supra* note 18.

<sup>21</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.<sup>22</sup> 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 improperly denied merit review in the face of such evidence.<sup>23</sup>

### **ANALYSIS -- ISSUE 2**

On February 4, 2003 appellant requested reconsideration of the May 3, 1999 merit decision terminating his compensation benefits. As 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 requested reconsideration regarding his pay rate on both March 31 and April 10, 2003. As appellant made these reconsideration requests more than one year from the last merit decision, March 27, 2002, the Board finds that the Office properly determined that these requests were untimely.

The underlying merit issue in the case is whether the Office met its burden of proof to terminate appellant's compensation benefits. The Board must make an independent determination of whether the Office committed clear error in declining to reopen appellant's claim for merit consideration of whether his benefits were properly terminated. 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 further alleged that his physician was entitled to the weight of the medical evidence as the second opinion physician and the impartial medical examiner did not provide an accurate history of injury nor medical rationale. He 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. Appellant addressed these assertions and arguments previously before the Office and the Board. The Board has issued final decisions regarding these issues. These arguments 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. Appellant has not submitted sufficient evidence to establish that these decisions of the Office and the Board were clearly erroneous.

Appellant asserted that the Board had previously failed to consider his attorney's arguments on appeal. These arguments were that the Office asked inappropriate questions of the impartial specialist, that his report was confusing and not rationalized, that the impartial medical

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<sup>22</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>23</sup> *Gregory Griffin*, *supra* note 13.

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. These arguments are not of sufficient probative value to 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. Appellant has not submitted sufficient evidence in support of his arguments to provide probative value and to establish that these decisions of the Office and the Board were clearly erroneous. Neither appellant nor his attorney has established clear error in the Office's May 3, 1999 decision through these arguments.

Appellant also asserted that 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 that medical evidence 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 alleged procedural errors arise to the standard applicable in this 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.

Appellant requested reconsideration of the Board's March 27, 2002 decision, determining his rate of pay for compensation purposes on March 31, 2003. He asserted that he was entitled to a greater pay rate as the Office did not apply his date-of-injury pay rate. 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. There is no evidence to substantiate these arguments and, therefore, these arguments are not 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 merit decision and establish clear evidence of error in the Board's March 27, 2002 decision.

On April 10, 2003 appellant again requested reconsideration and alleged that he was entitled to a recurrent pay rate or his pay rate at his date of injury. He resubmitted a form dated December 1, 1980. The Board addressed this issue in its March 27, 2002 decision and clearly explained how appellant's appropriate pay rate was determined by applying section 8114(d)(2) of the Act.

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." As appellant was disabled for the period in question, 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....”<sup>24</sup> Appellant was not considered to have worked for “substantially the whole year” prior to his injury and the Board properly determined his pay rate under this section of the Act in its March 27, 2002 decision. Appellant has not submitted any argument nor evidence establishing error in the March 27, 2002 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.

**CONCLUSION**

Appellant did not submit relevant new argument to require the Office to reopen his claim for consideration of the merits of his pay rate decision on April 1, 2003. Appellant further failed to submit clear evidence of error that the Office failed to meet its burden of proof to terminate his compensation benefits on May 3 and December 28, 1999. He also failed to submit clear evidence of error on the part of the Office in determining his pay rate.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers’ Compensation Programs dated April 23, 10 and 1 and March 10, 2003 are affirmed.

Issued: April 9, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>24</sup> 5 U.S.C. § 8114(d)(2).