U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MILTON LINDSEY and U.S. POSTAL SERVICE,
POST OFFICE, Inglewood, CA

*Docket No. 98-35; Submitted on the Record;*
*Issued August 12, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he had a total disability on or after October 17, 1995 that was causally related to his July 13, 1990 employment injuries; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's June 30, 1997 request for reconsideration of his schedule award was untimely and failed to show clear evidence of error.

In the present case, the Office accepted that appellant sustained thoracic and right shoulder strains in the performance of duty on July 13, 1990 as a result of reaching and bending. Appellant returned to work in a light-duty position on July 31, 1990 and continued to work in a modified position. On February 2, 1995 appellant accepted a limited-duty job offer as a mailhandler equipment operator.

By decision dated June 12, 1995, the Office issued a schedule award for a six percent permanent impairment to the right arm.

The record indicates that appellant stopped working and filed claims for continuing compensation on account of disability (Form CA-8) commencing October 17, 1995. By decision dated January 23, 1997, the Office denied appellant's claim for compensation.[1]

In a letter dated June 30, 1997, appellant requested reconsideration of his schedule award. By decision dated July 31, 1997, the Office determined that the request was untimely and failed to show clear evidence of error.

The Board has reviewed the record and finds that appellant has not established an employment-related total disability on or after October 17, 1995.

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[1] The Office erroneously found that appellant continued to work until January 31, 1996 and then filed CA-8's; the record clearly indicates that appellant filed CA-8 forms for disability commencing October 17, 1995.

When an employee, who is disabled from the job he held when injured on account of employment related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof the employee must show either a change in the nature and extent of the injury related condition, or a change in the nature and extent of the light duty requirements.[2]

It appears from the record that appellant had been working in a modified position based on the work restrictions of the attending physician, Dr. Michael P. Acord, a specialist in physical medicine.[3] Appellant then stopped working and claimed compensation for total disability as of October 17, 1995. It is his burden of proof to submit medical evidence establishing that he had total disability on or after that date causally related to the employment injury.

The medical evidence of record, however, is of little probative value in establishing appellant's claim. There is no reasoned medical opinion with respect to disability causally related to the employment injury on or after October 17, 1995. The treating physician, Dr. Acord, submitted duty status reports (Form CA-17) dated October 19 and December 13, 1995, March 7 and April 4, 1996, all of which report restrictions that were essentially unchanged from prior reports and indicate appellant would be capable of working in the modified-duty position.[4] The only reference to a total disability is found in form reports (CA-20) commencing January 31, 1996, which state that appellant is totally disabled and check "yes" that the diagnosed condition of chronic thoracic spine pain was causally related to the employment injury. The CA-20's are not only inconsistent with the CA-17's, but are generally of limited probative value without additional explanation and detail.[5]

None of the narrative reports from Dr. Acord contain a reasoned medical opinion establishing that appellant's employment-related condition had worsened and resulted in a period of total disability commencing on or after October 17, 1995. It is, as noted above, appellant burden to establish his claim and the Board finds that appellant has not met his burden in this case.[6]

The Board further finds that the Office properly found appellant's June 30, 1997 request for reconsideration was untimely and failed to show clear evidence of error.

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[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] The record indicates that the employing establishment offered appellant a modified job on September 11, 1995, that was approved by Dr. Acord but rejected by appellant.

[4] For example, the duty status reports commencing October 19, 1995 are substantially similar to a duty status report dated April 24, 1995, except for a 10-pound lifting maximum, as opposed to a 15-pound limitation. The 10-pound lifting restriction had been previously recommended in an August 2, 1995 work restriction evaluation (OWCP-5) and was within the light-duty job available to appellant when he stopped working.

[5] *See Barbara J. Williams*, 40 ECAB 649, 656 (1989).

[6] The Board notes that it is limited to review of evidence that was before the Office at the time of the final decision under review. 20 C.F.R. § 501.2(c).

Section 8128(a) of the Federal Employees' Compensation Act[7] 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 under 5 U.S.C. § 8128(a).[10] 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.[11] 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).[12]

In this case, the schedule award was issued by decision dated June 12, 1995 and appellant's request for reconsideration was dated June 30, 1997. Since this is more than one year after the decision, the Office properly found that it was untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[13] In accordance with this holding the Office has stated in its Procedure Manual that it will reopen a claimant's case for merit review, notwithstanding the one year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[14]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

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[7] 5 U.S.C. § 8128(a).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] 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."

[10] 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 point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[11] 20 C.F.R. § 10.138(b)(2).

[12] *See Leon D. Faidley, Jr.*, *supra* note 8.

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

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

establish clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] 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.[19] 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.[20] 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.[21]

In the June 30, 1997 request for reconsideration appellant indicated that he felt he should have been awarded more than six percent permanent impairment, but he did not submit any evidence or argument establishing error in the June 12, 1995 decision. Accordingly, the Board finds that appellant has not established clear evidence of error in this case and the Office properly denied merit review of the schedule award.

[17] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[18] *See Leona N. Travis*, *supra* note 16.

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

[20] *Leon D. Faidley, Jr.*, *supra* note 8.

[21] *Gregory Griffin*, 41 ECAB 458 (1990).

The decisions of the Office of Workers' Compensation Programs dated July 31 and January 23, 1997 are affirmed.

Dated, Washington, D.C.
August 12, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member