

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WADE E. HUTTO and DEPARTMENT OF THE ARMY,
TOOLE ARMY DEPOT, Utah

*Docket No. 97-2160; Submitted on the Record;
Issued June 15, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to section 8128 of the Federal Employees' Compensation Act as untimely and lacking clear evidence of error.

On March 4, 1987 appellant, then a 25-year-old mechanic, filed a notice of traumatic injury and claim, alleging that he sustained injury to his lower back while in the performance of duty. Appellant stopped work. By decision dated April 24, 1987, the Office accepted appellant's claim for low back strain and herniation of the nucleus pulposus of the L4-5. Appellant returned to work on January 4, 1988, however, he sustained a recurrence of disability beginning March 4, 1988. Appellant underwent surgery related to his accepted condition on May 30, 1987, March 29, 1988 and February 5, 1991. Appellant received appropriate compensation for all periods of temporary total disability.

Although appellant participated in a vocational rehabilitation program beginning March 3, 1989, rehabilitation efforts were stopped on August 13, 1991 due to appellant's medical instability. On March 25, 1993 appellant again began participation in a vocational rehabilitation program. In a letter dated February 17, 1995, the Office notified appellant of a proposed reduction in compensation on the grounds that he was no longer totally disabled and had the capacity to earn wages as an assembler of hospital supplies. In a decision dated July 11, 1995, the Office determined that appellant's wage-earning capacity was \$165.68 per week as represented by the position of assembler of hospital supplies and adjusted his compensation for total disability to that for partial disability effective July 23, 1995. By decision dated March 6, 1997, the Office denied appellant's request for reconsideration which was dated December 19, 1996 as untimely and lacking clear evidence of error in the Office's July 11, 1995 merit decision.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration on the grounds that it was untimely and lacked clear evidence of error.¹

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those

Under section 8128(a) of the Act,² the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations³ which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that “the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.”⁴ In *Leon D. Faidley, Jr.*⁵ the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office’s procedure manual provides:

“The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees’ Compensation Appeals Board, but does not include precoupment hearing/review decisions.”⁶

The Office issued its last decision modifying appellant’s benefits, *i.e.*, a merit decision, on July 11, 1995. Inasmuch as neither the Office nor the Board issued a merit decision thereafter and since the Office did not receive an application for review dated December 19, 1996 until December 23, 1996, this application was dated over one year following the last merit decision and therefore, it was not timely filed.⁷ Consequently, the Office properly found that appellant had filed an untimely request for reconsideration.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a properly exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must

final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on June 9, 1997, the only decision before the Board is the Office’s March 6, 1997 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ 41 ECAB 104 (1989).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a)(May 1991).

⁷ *Id.*

nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which 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 to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹³ To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 fundamental question as to the correctness of the Office decision.¹⁴ 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.¹⁵

In the present case, counsel for appellant contends that the Office did not meet its burden of proof as its definition of the duties assigned to an assembler, hospital supplies, differed markedly from the definition set forth in the *Dictionary of Occupational Titles* at number 712.687-010. Specifically, counsel argues that the Office did not indicate that appellant might be required to stack filled cartons or assembled products or to lift and carry these cartons to sterilization chambers. In the February 17, 1995 letter of proposed reduction of compensation the Office set forth the following description for the position of assembler, hospital supplies:

“[T]he job is performed indoors in a climate controlled environment and is light in nature, with lifting requirements of ten pounds or less -- training provided on the job by the company -- performs inspection and assembles small parts and supplies, visually inspects and assembles products, packages and packs products into plastic bags or cartons, labels packages and/or cartons -- no climbing,

⁸ *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); see e.g. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(b) which states: “the term ‘clear evidence of error’ is intended to present a difficult standard. The claimant must present evidence which on its face shows that the Office made an error.

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon Faidley*, *supra* note 5.

¹⁵ *Gregory Griffin* *supra* note 8.

balancing, stooping, kneeling, crouching or crawling; some reaching, handling, fingering and feeling -- no exposure to electric shock, radiation, explosion hazard, toxic/caustic chemicals or high places.”

Counsel argues that given appellant’s restriction of lifting, pushing and pulling in excess of 10 pounds, he was not capable of performing the assembler position because he would have to carry the cartons to the sterilization chambers and exert force to close the hatch on the sterilization machine. However, there is no factual evidence to support this supposition. The descriptions provided by appellant’s counsel from D.O.T. No. 712.687-010 and that included in the proposed letter of reduction of compensation are substantially similar, the letter from the Office specifies that appellant will not be required to lift in excess of 10 pounds and there is no evidence submitted by appellant that establishes he would be required to lift, carry, push or pull an amount in excess of his physical restrictions in a position as an assembler of hospital supplies. Thus, appellant has not established clear evidence of error with respect to this argument.

Appellant also submitted medical evidence attempting to establish that he had an “increasing degenerative change” in the area of the accepted injury in the form of a medical report dated June 5, 1996 by Dr. Jonathan H. Horne, a Board-certified orthopedic surgeon. While this evidence may be relevant to establishing that modification of the formal loss of wage-earning capacity determination is warranted, it is not relevant to the issue of whether the Office erred in determining appellant’s wage-earning capacity in July 1995 as it is not medical evidence of incapacity at that time. Therefore, this evidence is not sufficient to establish clear evidence of error. The Office properly denied appellant’s request for reconsideration as untimely filed and lacking clear evidence of error.

The decision of the Office of Workers’ Compensation Programs dated March 6, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 15, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member