U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PASQUALE C. D'ARCO and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Albuquerque, NM

Docket No. 02-1913; Submitted on the Record;
Issued May 12, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

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.

Appellant's traumatic injury claim filed on January 22, 1978 was accepted for a back sprain, which was caused by lifting heavy mailbags at work that day. A subsequent recurrence of disability claim was accepted for aggravation of degenerative disc disease. Appellant retired from the employing establishment and elected compensation benefits. Subsequently, he underwent a total hip replacement, amputation of his right leg above the knee and removal of a malignant kidney.

On August 3, 1990 appellant informed the Office that he had been elected mayor of the city of Rio Rancho, New Mexico, which carried a stipend of $1,016.00 a month. He inquired as to whether this would affect his receipt of compensation. On September 14, 1990 the Office found that the position of Mayor fairly and reasonably represented appellant's wage-earning capacity and adjusted appellant's compensation accordingly.

The Office subsequently issued a preliminary determination that an overpayment of $4,204.82 occurred from March 12, 1990, when appellant was sworn into office, through August 25, 1990. The Office found appellant to be at fault in creating the overpayment because he knew that any earnings from his position as mayor would reduce the amount of compensation he received. Appellant requested a prerecoupment hearing, which was held on May 2, 1991. On July 11, 1991 the hearing representative affirmed the Office's overpayment findings. Appellant appealed and the Board affirmed the Office's decision.[1]

On March 4, 1994 appellant informed the Office that he was no longer mayor and asked that the Office reinstate the full amount of his monthly compensation. The Office responded that

[1] Docket No. 91-1841 (issued August 17, 1992).

its wage-earning capacity determination could be modified in only three circumstances: (1) the original rating was in error; (2) the claimant was vocationally rehabilitated; or (3) the claimant's medical condition had changed.

On July 27, 1994 the Office denied appellant's claim for total disability on the grounds that the medical evidence was insufficient to establish that his work-related back condition had worsened. The Office found that appellant was not precluded by the accepted injury from performing the duties of the mayoral position upon which the wage-earning capacity determination was based.

Appellant requested reconsideration and submitted a June 20, 1994 report from Dr. Robert H. Wilson. On August 10, 1994 the Office denied modification of the July 27, 1994 decision. A second request for reconsideration was denied on March 28, 1995. The Office again considered the medical evidence and found that appellant's level-three spinal disc degeneration had been diagnosed in September 1991 when appellant was working as mayor. The Office noted that the wage-earning capacity of an injured employee, once properly determined, remained undisturbed regardless of actual earnings or lack of them.

By letter dated May 25, 1995, appellant again requested reconsideration, which was denied by decision on June 7, 1995 as insufficient to warrant merit review.

On August 30, 2000 appellant asked for "an appeal" of the wage-earning capacity determination and submitted an August 30, 2000 report from Dr. Travis Fisher. On December 1, 2000 the Office denied appellant's request as untimely filed and lacking clear evidence of error.

On October 31, 2001 appellant's attorney requested reconsideration on the grounds that the Office's decisions on appellant's wage-earning capacity conflicted with established Board precedent, thus establishing clear evidence of error. On June 19, 2002 the Office denied appellant's request as untimely filed and lacking clear evidence of error. The Office did not address the attorney's argument.

The Board finds that the Office improperly denied appellant's request for reconsideration as lacking clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[2] 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 --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[3]

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8128(a).

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).[4] This section does not mandate that the Office review a final decision simply upon request by a claimant.

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.[5]

In this case, the letter from appellant's attorney requesting reconsideration was dated October 31, 2001, more than six years after the Office's March 28, 1995 decision denying modification of its wage-earning capacity determination, 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.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[7] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[8] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] 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.[10]

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.[11] This

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[4] *Diane Matchem*, 48 ECAB 532, 533 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.607(b).

[7] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[8] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[9] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

[11] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.[12] 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 a merit review in the face of such evidence.[13]

In this case, appellant submitted no new evidence with his request for reconsideration. Rather, his attorney argued that the case of *Charles Kitterman*[14] demonstrated that the Office erred in finding that appellant's stipend as an elected mayor represented his wage-earning capacity. The employee in that case was injured in a mine accident and was later terminated by the employing establishment. He received disability compensation until December 1, 1946 when he was elected an official of his local union. The Office determined that the employee had no loss of wage-earning capacity after April 30, 1947 because his income from his union office exceeded his date-of-injury pay. The Board held that the income received during the employee's four-year tenure as an elected official was not "a true basis" for measuring his wage-earning capacity because such income depended on the employee's ability to be elected, not on his ability to work. The Board added that income received by the employee while holding office was not a proper standard to use in determining his wage-earning capacity. The case was remanded for the Office to determine the employee's ability to earn wages in the open labor market.[15]

Appellant's attorney contends that the Office erred in determining appellant's wage-earning capacity based on the mayoral position and stipend starting in March 1990. Therefore appellant is entitled to restoration of total disability compensation from March 4, 1994, when he no longer served as mayor.

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if such earnings fairly and reasonably represent his wage-earning capacity.[16] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[17]

If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his

[12] *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

[13] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[14] 7 ECAB 754 (1955).

[15] *Id*. at 755.

[16] 5 U.S.C. § 8115(a); *Penny L. Baggett*, 50 ECAB 559, 560 (1999).

[17] *Dim Njaka*, 50 ECAB 425, 433 (1999); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[18]

After the Office makes a medical determination of partial disability and specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles.* The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.[19] Also, the selected position must fit that employee's capabilities with regard to his physical limitations, education, age and prior experience.[20] Once this selection is made, a wage rate and the availability of the selected position in the open labor market should be determined through contact with the state employment service or other applicable service.[21]

In this case, appellant was elected mayor of Rio Rancho, New Mexico, in March 1990, when he began receiving a stipend of $1,016.00 a month. He served until he was defeated for reelection in March 1994.

The Board finds that the legal argument presented by appellant's attorney is sufficient to establish that the Office erred in determining appellant's wage-earning capacity based on the monthly stipend provided for the elected mayor. The office of mayor or any other elected position is not found in the *Dictionary of Occupational Titles*. Nor can such office be considered as reasonably available in the open labor market.

As the Board noted in *Charles Kitterman*, running for political office and winning election -- or not -- are hardly measures of an injured employee's ability to earn wages in the open market under normal employment conditions. While the Office properly found an overpayment during the period when appellant received his mayoral stipend and wage-loss compensation, his position as mayor was not the equivalent of an employee holding down a job.

The position upon which a wage-earning capacity determination is based should be one that a claimant can obtain in the open labor market on a permanent basis. Getting elected to public office is not the equivalent of being hired for a job.

Because the Office used an improper basis for determining appellant's wage-earning capacity, the Board finds that appellant has established clear evidence of error under the Act.[22] Therefore, the Board will set aside the Office's June 19, 2002 decision and remand the case for

[18] *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

[19] *Philip S. Deering*, 47 ECAB 692, 699 (1996).

[20] *Dorothy Lams*, 47 ECAB 584, 586 (1996).

[21] *James R. Verhine*, 47 ECAB 460, 464 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[22] *See Joyce A. Fasanello*, 49 ECAB 490, 495 (1998) (finding that the Office abused its discretion in refusing to re-open appellant's claim because the fact that the Office never issued a merit decision after developing the evidence constituted clear evidence of error).

the Office to reconsider appellant's claim on the merits. After such a review and development of the claim as the Office deems necessary, the Office shall issue an appropriate decision.

The June 19, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with opinion.

Dated, Washington, DC
May 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member