United States Department of Labor
Employees' Compensation Appeals Board

ALBERT S. BECKER, Appellant	)	
and	)	**Docket No. 04-574**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, New Meadows, ID, Employer	)	**Issued: September 6, 2005**

Appearances:
Albert S. Becker, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument July 12, 2005

DECISION AND ORDER

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

JURISDICTION

On December 24, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated October 1, 2003 which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated June 12, 1989 to the filing of this appeal on December 24, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, but has jurisdiction over the nonmerit issue.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On April 10, 1985 appellant, then a 32-year-old ranger, filed a traumatic injury claim alleging that he had sustained head and neck injuries when struck by a rock in the performance of duty. On the reverse of the form, the employing establishment indicated that appellant was earning $13.90 per hour at the time of his injury. The Office accepted appellant's claim for severe head trauma on May 6, 1985. On June 20, 1985 the Office entered appellant on the periodic rolls.

The employing establishment provided information that appellant was working as a supervisory range conservationist, a GS-454-11 position, at the time of his injury. Appellant returned to work on March 3, 1986. The employing establishment indicated that appellant was performing approximately 75 percent of his job duties and would increase his duties as he became able. Appellant worked 40 hours a week and earned $13.90 an hour making his gross weekly pay rate $556.00.

Peter J. Walker, appellant's supervisor, completed an assessment of appellant's employment skills and promotion potential on September 28, 1988. He noted that appellant's mental reaction times had slowed and concluded that appellant would not be competitive in becoming a district ranger, a position for which he was qualified prior to the accident. Mr. Walker noted that in 1985 appellant was very highly ranked on the roster of individuals best suited for district ranger. Mr. Walker stated that, at that point, the odds were in appellant's favor of becoming a district ranger, but that he did not believe that opportunity would be available again.

In a letter dated May 9, 1989, appellant's representative argued that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity. He stated that, even though appellant continued to earn the equivalent of his preinjury earnings, his wage-earning capacity had been significantly impaired as, based on his preinjury performance and capabilities, he would have advanced to a much higher employment status.

The Office responded on May 19, 1989 and informed appellant that preinjury earning potential was not a basis for compensation. Appellant's representative completed a form on May 31, 1989 alleging that appellant's wage-earning capacity was significantly impaired.

By decision dated June 12, 1989, the Office denied appellant's claim for additional compensation.[1] Appellant, through his representative, requested an oral hearing on June 27, 1989. He withdrew the request for an oral hearing on January 8, 1990.

[1] The record before the Board does not contain a formal loss of wage-earning capacity decision in which the Office made a finding that appellant's current position fairly and reasonably represented his wage-earning capacity and applied the regulatory formula to determine whether he had any loss of wages. The Office appears to have relied on the fact that appellant returned to his date-of-injury position at the same wages he was earning prior to his injury in terminating appellant's compensation benefits.

On April 23, 1992 the employing establishment informed appellant that there was no provision for compensating him for career advancement that might have occurred except for his injury.

Appellant requested a schedule award on November 1, 1993. On November 29, 1993 the Office informed him that the head or brain were not listed as scheduled members under 5 U.S.C. § 8107 and, therefore, he was not entitled to a schedule award for his brain injury unless it resulted in permanent impairment to another schedule member.

On June 11, 2003 appellant filed a recurrence of disability claim for wage loss to request "ethical compensation for my lost wage-earning capacity from the consequence of the severe brain injury I sustained." Both forms indicated that appellant returned to work 40 hours a week at the same grade level as his date-of-injury position. He attached a synopsis depicting what his career wage-earning capacity would likely have been had the injury not occurred.

Appellant submitted a letter dated November 1984 from Kenneth D. Weyers, forest supervisor, stating that appellant had the knowledge and ability to succeed as a district ranger. Mr. Weyers stated that appellant served as acting district ranger for approximately six months and received a performance award. He concluded that appellant had all the knowledge and ability necessary to be an outstanding line officer.

The Office responded on July 3, 2003 and informed appellant that his claim did not meet the definition of a recurrence of disability.

By letter dated August 19, 2003, appellant requested reconsideration of the June 12, 1989 decision denying compensation for loss of wage-earning capacity. He again argued that his actual earnings did not fairly and reasonably represent his preinjury wage-earning capacity. Appellant submitted statements from his supervisors and physicians supporting that prior to his injury he had great potential for promotion beyond his date-of-injury position and grade level.

By decision dated October 1, 2003, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his claim was not timely filed and failed to establish clear evidence of error on the part of the Office.[2]

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against

[2] Following the Office's October 1, 2003 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews,* 44 ECAB 765, 768 (1993).

compensation.[5] The Office, through regulations, 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.[6] 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).[7]

The Office's regulations require that an application for reconsideration must be submitted in writing[8] and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."[9] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."[10]

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulations.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record

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[5] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[6] 20 C.F.R. §§ 10.607; 10.608(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).

[7] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 3 at 769; *Jesus D. Sanchez, supra* note 4 at 967.

[8] 20 C.F.R. § 10.606.

[9] 20 C.F.R. § 10.605.

[10] 20 C.F.R. § 10.607(b).

[11] *Thankamma Mathews, supra* note 3 at 770.

[12] *Id.*.

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

[14] *Jesus D. Sanchez, supra* note 4 at 968.

[15] *Leona N. Travis, supra* note 12.

and whether the new evidence demonstrates clear error on the part of the Office.[16] 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's decision.[17] 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 abused its discretion in denying merit review in the face of such evidence.[18]

ANALYSIS

The Board finds that appellant's August 19, 2003 request for reconsideration of the June 12, 1989 decision denying additional wage-loss compensation was not timely filed within one year as required by the Office's regulations.[19]

The Board further finds that appellant has not submitted evidence establishing clear error on the part of the Office in denying his claim for additional compensation benefits. The record establishes that appellant was working as a ranger earning $13.90 per hour at the time of his injury in a GS-11 position. He returned to work on March 3, 1986 performing approximately 75 percent of his job duties working 40 hours a week and earning $13.90 an hour. On appeal, appellant alleged that, but for his severe head injury, he would have had great potential for promotion and would be earning considerably more than his current GS-11 salary.

The Board has repeatedly held that the probability that an employee, if not for his injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.[20] The Act makes no provision for an assumed monthly pay corresponding to a probable increased wage-earning capacity were it not for the injury as the base wage rate for comparison in determining wage-earning capacity.[21] The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge upon the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute. Unless appellant's contentions are in keeping with the scope or intent of the Act, *i.e.,* unless the statute authorizes payment of the kind demanded by appellant, the Office's denial of such demands must be affirmed.[22] Appellant's arguments and evidence are based on the premise that,

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[16] *Nelson T. Thompson,* 43 ECAB 919, 922 (1992).

[17] *Leon D. Faidley, Jr.,* 41 ECAB 104, 114 (1989).

[18] *Gregory Griffin*, *supra* note 5.

[19] 20 C.F.R. § 10.607.

[20] *William A. Archer*, 55 ECAB ___ (Docket No. 04-1138, issued August 27, 2004).

[21] *Francis X. Milesky,* 13 ECAB 128, 131 (1961). *See also Domenick Pezzetti,* 45 ECAB 787 (1994); *Jules B. Counts,* 23 ECAB 44 (1971); *Nathaniel E. Bingham,* 16 ECAB 229 (1964).

[22] *Dempsey Jackson, Jr.,* 40 ECAB 942, 947 (1989).

but for his injury, he probably would have been promoted to a higher wage rate. This argument does not conform with Board case precedent such as to establish clear evidence of error on the part of the Office. The Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that appellant's request for reconsideration was not timely filed and his arguments do not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: September 6, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board