

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR L. ALFORD and U.S. POSTAL SERVICE,
POST OFFICE, Bridgeview, Ill.

*Docket No. 95-1611; Submitted on the Record;
Issued May 7, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied reconsideration of appellant's loss of wage-earning capacity.

This case has previously been before the Board. In a decision issued January 27, 1993, the Board found that appellant had not sustained his burden of proof to establish that the May 2, 1986 loss of wage-earning capacity determination of the Office should be modified. The Office's 1986 determination was based on a finding that appellant's actual earnings in his employment as a part-time distribution clerk fairly and reasonably represented his earning capacity. The factual history of the case, as set forth in the prior decision, are incorporated herein by reference.¹

Following the Board's decision, appellant filed a request for reconsideration on July 26, 1994 and submitted additional evidence to the record. Appellant submitted a copy of a June 1, 1991 limited-duty offer extended by the employing establishment for the part-time position of clerk/carrier working 11:00 a.m. to 3:00 p.m. with Friday and Sunday off. Appellant also submitted medical reports and physical limitation restriction forms from his attending physician, Dr. Arthur C. Connor. In a June 10, 1993 report, Dr. Connor noted that appellant had cervical osteoarthritis with a history of disc at two lower levels of the back. He stated that appellant's working hours should be shifted to the morning, as his condition was getting worse and appellant experienced symptoms progressively through the day. Appellant noted that with his reemployment in the limited-duty position on day tour, he no longer received night differential or Sunday premium pay. He contended that his partial capacity for work had deteriorated such that he now had a 50 percent wage-earning capacity instead of the 57 percent wage-earning capacity previously determined in 1986.

¹ Docket No. 92-747, issued January 27, 1993. Appellant sustained injury on September 20, 1982 accepted by the Office for lumbar myositis, superficial abrasion of the left knee and central bulging of the T1-S1 vertebral discs.

The record contains an Office loss of wage-earning capacity memorandum in which a claims examiner computed appellant's earning capacity effective January 29, 1990 as 50 percent. However, in a February 21, 1995 memorandum, a senior claims examiner noted that appellant had moved to day shift work, such that he no longer received premium pay which had been included in the 1986 wage-earning capacity determination.

By decision dated February 24, 1995, the Office denied appellant's request for reconsideration finding that his request was received outside one year of the Board's January 27, 1993 decision. Despite the untimeliness of appellant's reconsideration request, the Office went on to determine that he failed to submit new and relevant evidence sufficient to require review of the Office's prior decisions.

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration of his claim.

The only decision over which the Board has jurisdiction is the February 24, 1995 decision of the Office which denied appellant's request for reconsideration.²

Under 20 C.F.R. § 10.138(b)(1) a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (i) showing that the Office erroneously applied or interpreted a point of law; or (ii) advancing a point of law or fact not previously considered by the Office; or (iii) submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1) (i) through (iii), will be denied by the Office without review of the merits of the claim.³

In the present case, the last merit decision issued in this case was the Board's January 27, 1993 decision which affirmed the Office's determination of appellant's wage-earning capacity effective May 2, 1986. Appellant did not request reconsideration until July 26, 1994, after more than one year had elapsed following the Board's decision. Accordingly, the Office properly determined that appellant's request for reconsideration was untimely.

However, the Office proceeded to exercise its discretion under section 8128 to entertain appellant's request for reconsideration despite its untimeliness.⁴ The Office stated that the application was reviewed and denied appellant's request for reconsideration on the grounds that the application "neither raised substantive legal questions nor included new and relevant evidence," such that it was insufficient to warrant review of the Office's prior decisions. In this regard, the Board finds that the Office abused its discretion as appellant submitted new evidence to the Office in support of his contention that his capacity for employment had materially

² 20 C.F.R. §§ 501.2(c); 501.3(d).

³ See *Richard L. Ballard*, 44 ECAB 146 (1992).

⁴ See *Odell Thomas*, 42 ECAB 405 (1991).

changed commencing in 1991. This is a new contention which was not addressed by the Board in the prior appeal nor previously considered by the Office. In support of his contention appellant submitted additional medical evidence from his treating physician. The Board has noted that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁵ In this case, appellant has submitted relevant and pertinent evidence not previously considered by the Office.

In view of the foregoing, the case will be remanded to the Office for a review of the case record and the evidence submitted by appellant. After such further development as is deemed necessary, the Office shall issue an appropriate decision on appellant's reconsideration request.

The February 24, 1995 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
May 7, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

⁵ *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).