

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL E. CLEARY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, MO

*Docket No. 99-642; Submitted on the Record;
Issued December 19, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation on the grounds that his actual earnings in the position of practice manager fairly and reasonably represented his wage-earning capacity; and (2) whether the Office properly denied appellant's October 20, 1998 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

Appellant sustained an injury while in the performance of his duties as a dentist. The Office accepted his claim for bilateral carpal tunnel syndrome and authorized surgeries. He remained disabled from performing any dentistry involving fine motor skills. As a result of his medical restrictions, the employing establishment offered him the position of practice manager. Appellant accepted and performed the duties of this position beginning January 20, 1998. The pay rate of this position was greater than the current pay rate of the position appellant held at the time of injury.

In a decision dated March 24, 1998, the Office determined that the position of practice manager fairly and reasonably represented appellant's wage-earning capacity and terminated his compensation for wage loss. In a decision dated October 1, 1998, a hearing representative affirmed the Office's decision.

The Board finds that the Office properly reduced appellant's compensation.

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.¹ Because the Office accepted appellant's claim, it has the burden to justify its reduction of his compensation for temporary total disability.

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.²

The record in this case contains no evidence that appellant's actual earnings as a practice manager did not fairly and reasonably represent his wage-earning capacity. Physicians reviewed the position and reported that it would be appropriate and safe so long as appellant's medical restrictions were observed. There is no showing that appellant lacked the skills, education or experience necessary to perform the position. There is no showing that the position was makeshift,³ part-time, seasonal, sporadic or temporary.⁴ Further, when the Office made its determination, appellant had worked in the position for over 60 days.⁵ Because the wages appellant actually earned beginning January 20, 1998 are the best measure of his wage-earning capacity, the Office met its burden of proof to justify the reduction of appellant's monetary compensation.⁶ The Board will affirm the Office's October 1, 1998 decision.

The Board also finds that the Office properly denied appellant's October 20, 1998 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

In a decision dated April 10, 1996, the Office denied an expanded claim by appellant that the duties of his federal employment had caused or aggravated a cumulative trauma disorder or muscle imbalance. The Office found that the weight of the evidence rested with the opinion of the impartial medical specialist, who concluded that appellant's cervical spondylosis, a normal phenomenon of aging and wearing, could certainly be responsible for appellant's neck pain.

On October 20, 1998 appellant advised the Office that he wanted a review of the denial of his claim for cumulative trauma disorder to his upper extremities, shoulders, neck, upper back muscles and muscles related to shoulder abduction. In support, thereof, he submitted copies of documents previously appearing in the record as well as copies of his correspondence and copies of various publications and abstracts.

² *Don J. Mazurek*, 46 ECAB 447 (1995).

³ *William D. Emory*, 47 ECAB 365 (1996).

⁴ *Monique L. Love*, 48 ECAB 378 (1997).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993). See *Beverly Dukes*, 46 ECAB 1014 (1995); *Corlissa L. Sims (Smith)*, 46 ECAB 172 (1995) (claimant did not work the "minimum" 60 days).

⁶ The formula for determining loss of wage-earning capacity based on actual earnings was developed in *Albert C. Shadrick*, 5 ECAB 376 (1953) and codified by regulation at 20 C.F.R. § 10.303. Section (b) of this regulation provides that wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the current salary or pay rate for the job held at the time of injury. *Robin Bogue*, 46 ECAB 488 (1995).

In a decision dated October 29, 1998, the Office denied appellant's request on the grounds that it was untimely and failed to show clear evidence of error.

Section 8128(a) of the Act 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 --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁷

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides 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. Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows “clear evidence of error” on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 that 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 merely 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 reconsideration 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, 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.¹⁴ The Board makes

⁷ 5 U.S.C. § 8128(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

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

¹² See *Travis*, *supra* note 10.

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

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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.¹⁵

Appellant made his October 20, 1998 request more than one year after the Office's April 10, 1996 decision denying his expanded claim of cumulative trauma disorder and such request is, therefore, untimely. The Board has reviewed the evidence submitted in support of appellant's untimely request and finds that it fails to show clear evidence of error in the Office's decision. The argument and evidence submitted does not manifest on its face that the Office committed an error and does not raise a substantial question as to the correctness of the Office's decision. Accordingly, the Board finds that the Office did not abuse its discretion in denying a merit review of appellant's expanded claim. The Board will affirm the Office's October 29, 1998 decision.

The October 29 and 1, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 19, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

¹⁵ *Gregory Griffin*, 41 ECAB 458, 466 (1990).