

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of MARTIN A. ARMIJO and DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 97-2528; Submitted on the Record;  
Issued March 17, 2000*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review of its decisions dated February 24 and November 14, 1995 under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On January 12, 1992 appellant, then a 28-year-old maintenance mechanic, filed a claim for a traumatic injury occurring on January 8, 1992 in the performance of duty. The Office accepted appellant's claim for low back strain and a herniated lumbar disc. Appellant stopped work on March 30, 1992.

On August 5, 1993 the employing establishment offered appellant a limited-duty assignment while "looking for a permanent medical placement position if your condition does not allow you to return to the full duties of a maintenance mechanic. Light-duty job assignments will allow you to try different jobs which can lead to a permanent medical placement."

The record indicates that appellant returned to limited-duty employment on August 16, 1993 for four hours per day.

By letter dated September 3, 1993, the Office requested additional information from the employing establishment regarding the light-duty position offered appellant effective August 16, 1993. Specifically, the Office noted that it had not received a description of the job duties required by the position.

By decision dated October 13, 1993, the Office reduced appellant's compensation effective August 22, 1993 on the grounds that his actual earnings as a modified duty maintenance mechanic fairly and reasonably represented his wage-earning capacity.

In a memorandum dated June 13, 1994, the employing establishment informed the Office that appellant was now working four hours per day four days per week rather than four hours per day five days per week.

By letter dated August 22, 1994, the Office noted that appellant had submitted claims for continuing compensation on account of disability (Form CA-8) requesting compensation for 24 hours of wage loss per week. The Office indicated that it was treating his request as a claim for a recurrence of disability.

By decision dated February 24, 1995, the Office denied appellant's claim on the grounds that he did not establish an increase in disability causally related to his employment injury.

By letter dated March 16, 1995, appellant requested a hearing before an Office hearing representative. In a decision dated November 14, 1995 and finalized November 20, 1995, a hearing representative affirmed the Office's February 24, 1995 decision, after finding that appellant had not established a material change in the nature and extent of his injury-related disability.

Effective April 1, 1996, the employing establishment terminated appellant due to a reduction-in-force.

In letters dated March 11, 1997, appellant, through his congressional representative, requested reconsideration of the Office's October 13, 1993, February 24 and November 14, 1995 decisions.<sup>1</sup> In support of his request for reconsideration, appellant submitted a letter from the employing establishment dated July 17, 1995 which indicated that due to the closing of the premises all light-duty positions were temporary. Appellant further submitted copies of Office actions regarding other claimants at the employing establishment.

By decision dated April 15, 1997, the Office found that appellant had established clear evidence of error in the Office's October 13, 1993 wage-earning capacity determination. The Office found that the position offered by the employing establishment did not fairly and reasonably represent appellant's wage-earning capacity as the record contained no written job description or formal reassignment of appellant to the position, and as the position was temporary in nature. The Office further found that appellant had not established clear evidence of error in the Office's February 24 and November 14, 1995 decisions denying appellant's claim for four hours additional compensation per week.

The Board finds that the issue of whether the Office abused its discretion by refusing to reopen appellant's case for merit review of its decisions issued February 24 and November 14, 1995 is moot.

The only decision before the Board on this appeal is the Office's April 15, 1997 decision in which the Office found that appellant had established clear evidence of error in its October 13,

---

<sup>1</sup> In a letter dated November 29, 1996, appellant requested reconsideration of an April 9, 1996 decision. By letter dated December 12, 1996, the Office informed appellant that it had not issued a decision on April 9, 1996 and advised him to resubmit his request with a copy of the pertinent decision.

1993 wage-earning capacity determination. The Office further found that appellant had not established clear evidence of error in its February 24 and November 14, 1995 decisions which denied his request for modification of the Office's October 13, 1993 wage-earning capacity determination. Because more than one year has elapsed between the issuance of the Office's February 24 and November 14, 1995 decisions and August 1, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 24 and November 14, 1995 Office decisions.<sup>2</sup>

In the present case, the Office found that appellant did not establish clear evidence of error in its February 24 and November 14, 1995 decisions. In these decisions, the Office found that appellant had not submitted sufficient medical evidence to establish that he sustained an increase in his injury-related disability beyond that found by the Office in its October 13, 1993 wage-earning capacity determination. However, the Office, in its most recent decision dated April 15, 1997, vacated the October 13, 1993 wage-earning capacity decision. Thus, the February 24 and November 14, 1995 Office decisions denying modification of the October 13, 1993 wage-earning capacity decision are no longer of any legal effect and rendered moot. The Office's April 15, 1997 decision, therefore, is modified to reflect that the February 24 and November 14, 1995 decisions are moot as these decisions were premised on the October 13, 1993 wage-earning capacity determination that has been vacated.

The decision of the Office of Workers' Compensation Programs dated April 15, 1997 is hereby affirmed, as modified.

Dated, Washington, D.C.  
March 17, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

---

<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).