

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFREDO F. WATSON and DEPARTMENT OF THE NAVY,
PUBLIC WORKS CENTER, San Diego, CA

*Docket No. 99-2589; Submitted on the Record;
Issued January 8, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's April 22, 1999 request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

On March 31, 1993 appellant, then a 43-year-old pipefitter, sustained a lumbosacral strain while in the performance of duty. Although appellant returned to work, he subsequently sustained a similar injury a year later which precluded him from resuming his regular duties as a pipefitter.

On December 12, 1994 appellant returned to work in a permanent, light-duty capacity as a clerk. The Office subsequently issued a March 14, 1995 decision finding that appellant's position as a clerk fairly and reasonably represented his wage-earning capacity. Appellant received appropriate wage-loss compensation based on the difference between his prior earnings as a pipefitter and his recent earnings as a clerk.¹ He continued to work as a clerk until April 24, 1998 when he was terminated due to a reduction-in-force. Following his separation from service, appellant continued to receive wage-loss compensation based on his loss of wage-earning capacity as determined by the Office in its March 14, 1995 decision.

On April 22, 1999 appellant requested reconsideration. In a decision dated May 7, 1999, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's April 22, 1999 request for reconsideration.

¹ The Office determined that appellant had prior weekly earnings of \$618.80 as a pipefitter and current weekly earnings of \$365.09 as a clerk. Accordingly, the Office found that appellant had a loss of wage-earning capacity of \$253.71 per week.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

In this case, appellant's April 22, 1999 request for reconsideration post-dated the Office's March 14, 1995 decision by more than four years. Accordingly, appellant's April 22, 1999 request for reconsideration is untimely.

When a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.⁷ The Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.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 it must be apparent 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 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.¹³

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

⁶ 20 C.F.R. § 10.607(a) (1999).

⁷ 20 C.F.R. § 10.607(b) (1999).

⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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 Leona N. Travis*, *supra* note 10.

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

In this case, appellant failed to demonstrate clear evidence of error. On reconsideration, appellant contended that his light-duty clerk position was a makeshift or odd-lot job, but he did not offer any evidence in support of his contention. Consequently, the Office denied appellant's untimely request for reconsideration.

On appeal, appellant provided some context to his earlier assertion that his December 1994 light-duty assignment was a "make-shift, odd-lot" job. He argued that while this assignment was classified as a clerk position, his actual responsibilities fit more appropriately into the job classification of quality assurance evaluator. Appellant explained that he unsuccessfully attempted to have his position reclassified to reflect his additional responsibilities. He alleged that while the employing establishment acknowledged that his actual duties differed somewhat from those outlined in the clerk position description, he was nonetheless denied a promotion beyond the GS-5 level.

Section 8115(a) of the Act provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."¹⁴ Generally, wages actually earned are the best measure of wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.¹⁵

Appellant's position is that the wages he earned as a so-called "clerk" do not fairly and reasonably represent his wage-earning capacity because the employing establishment should have paid him a higher salary for the additional duties he performed.¹⁶ He successfully performed his assigned duties for more than three years. Appellant's belief that he should have received a higher salary during that time does not establish that the clerk position was either makeshift or odd-lot job.

Moreover, the possibility that appellant may have been assigned additional responsibilities outside the scope of his original position description would not, of itself, establish that appellant's position was makeshift work designed for his particular needs. Inasmuch as there is no evidence that the clerk position was seasonal, temporary, less than full-time or make-shift work designed for appellant's particular needs, appellant has failed to establish that the earnings he received as a clerk do not fairly and reasonably represent his wage-earning capacity.¹⁷

¹⁴ *George E. Williams*, 44 ECAB 530, 533 (1993).

¹⁵ 5 U.S.C. § 8115(a).

¹⁶ The record on appeal includes evidence that was not submitted to the Office prior to the issuance of its May 7, 1999 decision. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

¹⁷ *Elbert Hicks*, 49 ECAB 283 (1998).

Accordingly, appellant has failed to submit evidence of sufficient probative value to *prima facie* shift the weight of the evidence in his favor. The Office, therefore, properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The May 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 8, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member