

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT E. SALMERI and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Mare Island, CA

*Docket No. 99-870; Submitted on the Record;
Issued March 20, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138; and (2) whether the Office properly denied appellant's September 10, 1998 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 August 1, 1990 appellant, then a 41-year-old marine machinery mechanic, sustained an employment-related injury, which the Office accepted for subluxations at L5, C7 and T2 and aggravation of degenerative disc disease. After a period of temporary total disability, appellant returned to work in a part-time, limited-duty capacity on January 12, 1993. Following his return to work, appellant continued to receive wage-loss compensation for partial disability.

In March 1995, appellant's treating physician, Dr. Bala C. Marar, a Board-certified orthopedic surgeon, advised that appellant was capable of working full time, albeit in a limited-duty capacity. On April 11, 1995 the employing establishment offered appellant a full-time, limited-duty assignment. The job description explained that appellant would be expected to perform "technical, industrial or general office support," primarily of a sedentary nature. Additionally, the job offer specifically identified the physical restrictions noted by Dr. Marar on March 17, 1995. The employing establishment advised appellant that the work assignment would be within his medical restrictions, as noted by Dr. Marar.

By letter dated May 19, 1995, the Office advised appellant that it had reviewed the employing establishment's April 11, 1995 limited-duty job offer and determined that the position was suitable to appellant's work capabilities. On May 30, 1995 appellant accepted the limited-duty job assignment. Although, he accepted the employing establishment's April 11,

1995 full-time, limited-duty job offer, he continued to work only four hours per day and he requested leave to cover the remainder of his scheduled eight-hour workday.¹

On August 8, 1995 the Office advised appellant that by failing to return to work eight hours per day he had neglected suitable employment. The Office further advised appellant that he had 15 days within which to return to suitable employment or risk forfeiture of any future compensation benefits. As appellant did not resume full-time employment in the allotted timeframe, the Office issued a decision dated October 17, 1995 terminating benefits effective November 12, 1995 on the basis that appellant abandoned suitable employment. The Office's October 17, 1995 decision was later affirmed by an Office hearing representative in a decision dated May 17, 1997 and finalized May 21, 1997.

On May 15, 1998 appellant, with the assistance of his congressional representative, requested reconsideration. Appellant argued, *inter alia*, that the employing establishment's limited-duty job offer was not sufficiently detailed for the Office to render an appropriate determination as to its suitability.

In a decision dated July 14, 1998, the Office denied appellant's request for reconsideration without merit review. The following day, the Office issued a second decision denying appellant's May 15, 1998 request for reconsideration. The Office's July 15, 1998 decision addressed a June 30, 1998 letter submitted on appellant's behalf by his congressional representative.

On September 10, 1998 appellant again requested reconsideration. He argued that the medical evidence, which the Office relied upon in determining his physical limitations, was not sufficiently rationalized; and therefore, the Office erred in concluding that the April 11, 1995 limited-duty job offer was suitable. By decision dated November 24, 1998, 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 exercised its discretion in refusing to reopen appellant's case for reconsideration under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.² Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.³

¹ Appellant was subsequently granted a disability retirement by the Office of Personnel Management and he retired effective July 22, 1995.

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

Appellant's May 15, 1998 and June 30, 1998 requests for reconsideration did not demonstrate that the Office erroneously applied or interpreted a point of law. Additionally, he did not advance a point of law or a fact not previously considered by the Office. The majority of the arguments advanced on reconsideration were merely reiterations of arguments previously considered and rejected by the Office hearing representative. The remainder of the arguments presented on reconsideration pertained to matters that were not before the Office hearing representative, and thus, were not relevant to the issue on reconsideration. Accordingly, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1).

With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the vast majority of evidence submitted on reconsideration consisted of previously submitted evidence. As this evidence was already part of the record when the claim was pending before the Office hearing representative, the evidence is insufficient to warrant reopening appellant's claim for merit review.⁴ Appellant also submitted evidence on reconsideration that consisted of documentation regarding other instances where the employing establishment purportedly failed to provide detailed position descriptions for limited-duty assignments. This evidence, however, did not pertain to appellant's particular claim, but instead involved three other unrelated compensation claims and is not relevant. Accordingly, appellant's evidence is not relevant to the issue on reconsideration, and therefore, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1).⁵

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's May 15, 1998 and June 30, 1998 requests for reconsideration.

The Board also finds that the Office properly denied appellant's September 10, 1998 request for reconsideration.

Section 8128(a) of the Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁸ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁹ One such limitation is that a claimant must file his or her application for review within

⁴ Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *James A. England*, 47 ECAB 115, 119 (1995); *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

⁵ Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁶ 5 U.S.C. § 8128(a).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ 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).

⁹ See 20 C.F.R. § 10.138

one year of the date of the decision denying or terminating benefits.¹⁰ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).¹¹ Appellant failed to meet this particular requirement in that his September 10, 1998 request for reconsideration postdated the Office hearing representative's May 21, 1997 decision by approximately 16 months.

In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."¹² Consistent with Board precedent, Office procedures provide that the Office will reopen a claim for merit review, notwithstanding the one-year filing limitation set forth in section 10.138(b)(2), if the application for review shows "clear evidence of error" on the part of the Office.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹⁴ The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.¹⁵ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸

In determining whether a claimant has demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.¹⁹ The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.²⁰

¹⁰ 20 C.F.R § 10.138(b)(2).

¹¹ See *Leon D. Faidley, Jr.*, *supra* note 7.

¹² *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁷ See *Leona N. Travis*, *supra* note 15.

¹⁸ *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

²⁰ *Thankamma Mathews*, *supra* note 18; *Gregory Griffin*, 41 ECAB 458 (1990).

In the instant case, appellant failed to demonstrate clear evidence of error. He did not submit any new evidence along with his September 10, 1998 request for reconsideration. Although, appellant challenged his treating physician's March 1995 opinion that he could return to work eight hours a day with certain restrictions, he did not submit any evidence demonstrating that the noted restrictions did not accurately reflect his physical abilities at the time. He also did not offer any evidence that his full-time, limited-duty assignment exceeded his physical limitations. Consequently, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The decisions of the Office of Workers' Compensation Programs dated November 24, July 15 and July 14, 1998 are hereby affirmed.

Dated, Washington, DC
March 20, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member