

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JESSE F. ABNER and U.S. POSTAL SERVICE,  
POST OFFICE, Seattle, WA

*Docket No. 02-1304; Submitted on the Record;  
Issued June 5, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's October 25, 2001 request for reconsideration.

In a decision dated August 24, 2000, the Office reduced appellant's compensation to reflect his capacity to earn wages in the constructed position of restaurant manager (trainee).

On September 14, 2000 appellant advised as follows:

"I would like to exercise my right to [an] oral hearing, to present oral testimony and written evidence in further support of my claim, at [the Office] Seattle, WA office. I understand I have 30 days after the date of [the Office's] decision to make this request, I [a]m well within that time frame and would appreciate your consideration in this matter."

In a decision dated September 21, 2000, the Office set aside the August 24, 2000 decision and determined that appellant had no loss of wage-earning capacity based on his actual earnings as an assistant manager for Northwest Restaurants from October 18 to December 30, 1999.

The Office transferred appellant's case file to the Branch of Hearings and Review, which scheduled a hearing. In February 2001, however, appellant advised as follows:

"I no longer desire a hearing on the above case, as I have come to believe that it would be a waste of time for all concerned. So I [a]m withdrawing my request and canceling the hearing set for March 6, 2001."

On February 28, 2001 the Branch of Hearings and Review notified appellant that it had received his request to withdraw his hearing request. The Branch of Hearings and Review accepted appellant's request for withdrawal of the hearing and returned the case file to the Office.

On September 27, 2001 appellant wrote to the Office as follows:

"Last March (2001) I had a scheduled hearing with [the Office] to have my pay benefits reinstated but had to decline because I could not find legal representation and I did not have any new evidence to make my case. Since then, I have relocated to the D.C. [District of Columbia] area. I have undergone a series of medical examinations and found that I am not able to work due to my continuing deteriorating condition from my on-the-job injury.

"I have been without an income for over a year. I have tried to work but my medical problems have kept me from holding a job. I am requesting a rescheduling of the hearing for reinstatement of my pay benefits. Your help in this matter will be greatly appreciated."

On October 25, 2001 appellant followed up on his request:

"In my letter of September 27, 2001 to [the claims examiner], I indicated that last March [2001] a hearing was scheduled with [the Office] to review reinstatement of my pay benefits. At that time I declined the hearing, because I could not find legal representation and I did not have any new evidence. Since then, I have relocated to the D.C. area. I have undergone a series of medical examinations and found that I am not able to work due to my continuing deteriorating condition from my on-the-job injury.

"I am requesting a motion for reconsideration of my appeal rights and an oral hearing, based on new information in my medical records. After a series of medical examinations related to my original on-the-job injury, findings are that my deteriorating condition leaves me unable to attain and hold a job. My left leg has begun to atrophy and is so weak I am only able to stand for short periods. The damage to my left leg is the result of a nerve blockage, which according to my doctor is common with back injury patients. There is other related medical evidence that will support my case at the oral hearing.

"I look forward to your positive response to this request. I am available at the address and/or telephone number above."

On December 10, 2001 appellant wrote "to inquire as to the status of my request for an oral hearing. I have not had a reply to my letters of September and October."

By decision dated February 6, 2002, the Office denied appellant's request for reconsideration of the decision dated September 21, 2000. The Office found that appellant's October 25, 2001 letter was not dated within one year of the September 21, 2000 decision and was therefore untimely. The Office also found that appellant had presented no clear evidence that the Office's most recent merit decision was erroneous.

The Board finds that the Office properly denied appellant's October 25, 2001 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation 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."<sup>1</sup>

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. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>2</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>3</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>4</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>5</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.607 (1999).

<sup>3</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>4</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>5</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>6</sup> See *Leona N. Travis*, *supra* note 4.

<sup>7</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>8</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.<sup>9</sup>

In his October 25, 2001 request for reconsideration, appellant stated that he had undergone a series of medical examinations, findings from which showed that his deteriorating condition left him unable to attain and hold a job. He stated that his left leg had begun to atrophy and was so weak that he was able to stand for only short periods. Appellant explained that the damage to his left leg was the result of a nerve blockage, which, according to his doctor, was common with back injury patients.

The Board finds that appellant's October 25, 2001 request for reconsideration fails to show clear evidence of error in the Office's September 21, 2000 decision. In that decision, the Office determined that appellant had no loss of wage-earning capacity based on his actual earnings as an assistant manager for Northwest Restaurants from October 18 to December 30, 1999. Although appellant claimed that his deteriorating condition had now left him without a wage-earning capacity, he offered no proof, no evidence manifesting on its face that the Office's September 21, 2000 decision was in error. Appellant's account of the referenced medical examinations is insufficient to establish clear evidence of error in the Office's wage-earning capacity determination. The Board will affirm the Office's decision to deny his October 25, 2001 request for reconsideration.

The Board finds, however, that the case must be remanded for consideration of appellant's September 27, 2001 request for an oral hearing before an Office hearing representative.

On September 27, 2001 appellant made clear his intent to seek a rescheduling of the oral hearing previously scheduled before an Office hearing representative in March 2001. He repeated his request for an oral hearing on October 25, 2001, and on December 10, 2001 he wrote "to inquire as to the status of my request for an oral hearing. I have not had a reply to my letters of September and October." In both letters appellant explained that a hearing was scheduled in March 2001 but that he had declined the hearing because he could not find legal representation and had no new evidence. Subsequent medical examinations, however, found that he was not able to work due to the continuing deterioration of his injury-related condition. Appellant requested a rescheduling of the March 2001 oral hearing and indicated that he would submit additional medical evidence to support his case "at the oral hearing."

Although the Office properly denied appellant's request for reconsideration, it must adjudicate the outstanding request for an oral hearing before an Office hearing representative. The Board will remand the case for proper adjudication of this request.<sup>10</sup>

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<sup>9</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

<sup>10</sup> In addition to requesting an oral hearing, appellant made clear in his September and October 2001 letters that he was seeking modification of the Office's September 21, 2000 determination of wage-earning capacity because new medical evidence showed that his injury-related condition had deteriorated to the point that he could no longer hold a job. Should the Office deny appellant's request for an oral hearing, the Office should properly develop and adjudicate whether appellant has met his burden of proof to show that modification of the September 21, 2000 wage-earning capacity determination is warranted.

The February 6, 2002 decision of the Office of Workers' Compensation Programs is affirmed and the case remanded for further action consistent with this opinion.

Dated, Washington, DC  
June 5, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member