

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID J. McDONALD and DEPARTMENT OF THE TREASURY,  
CUSTOMS SERVICE, Boston, Mass.

*Docket No. 96-1144; Submitted on the Record;  
Issued December 10, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant was employed in a "learner's capacity" at the time of his injuries so as to entitle him to additional compensation under 5 U.S.C. § 8113(a); and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant was not employed in a "learner's capacity" at the time of his injuries so as to entitle him to additional compensation under 5 U.S.C. § 8113(a).

Under the Federal Employees' Compensation Act, compensation is based on an employee's monthly pay, which is defined under section 8101(4) of the Act as the greatest of the rate of pay at the time of injury, the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time employment with the United States.<sup>1</sup> However, section 8113(a) of the Act provides:

"If an individual --

- (1) was a minor or employed in a learner's capacity at the time of injury; and
- (2) was not physically or mentally handicapped before the injury;

"the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable

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<sup>1</sup> 5 U.S.C. § 8101(4).

for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity.”<sup>2</sup>

In *Carter C. Swinson*, the Board first delineated the circumstances under which an employee would be considered to be in a learner’s capacity. In finding that the employee in that case, who was rerated as a “helper-machinist, trainee” on December 8, 1941, was not in a learner’s capacity when he was injured on December 19, 1941, the Board stated:

“The employing establishment advised that in 1941 the only formal training program for machinists was the apprenticeship program in which appellant was not enrolled; that the job classification of ‘helper-machinist’ was not an ‘in-training’ position; that while some helpers were promoted to machinists on the basis of demonstrated ability, the majority were not so advanced; that there was no specified period in which a helper-machinist attained the rating of a machinist as this depended upon the individual’s qualifications and recommendation of his department; and that appellant’s rerating of December 8, 1941, was based on satisfactory completion of periods of work as a helper rather than because of any advancement under a formal or informal training program.

“There is nothing in the official records to establish that appellant’s designated job was anything other than that of ‘helper-machinist’ when injured. Even though the facts and affidavits presented may warrant a finding that at the time of the injury he was designated a ‘trainee,’ it does not follow that such a designation or the designation ‘helper’ is sufficient to render him a ‘learner’ within the meaning ... of the Act. The title given to a job is not, of itself, determinative of the issue. Nor does the fact that the employee was engaged in an unskilled job, which may or may not ultimately lead to a position in a semiskilled or skilled craft, bring him within the contemplation of the term ‘learner’ as used in the Act. A ‘learner’ under the Act does not contemplate a category in which the worker can remain for the rest of his life. According to the record appellant’s job was such that he could have remained at this ‘helper-machinist, maximum’ rating for an indefinite period, or, in fact, the remainder of his life.”<sup>3</sup>

In *James L. Parkes*, the Board further described the circumstances under which an employee would be considered to be in a learner’s capacity. In finding that the employee in that case, who was employed as a research analyst, was not in a learner’s capacity, the Board stated:

“He was not a participant in a formal training program with a specified period for completion upon which he would have automatically moved to a higher grade; he could have remained at the same GS grade level for an indefinite period and any advancement achieved would have been contingent upon his proven ability, past experience, or other qualifications. Appellant’s status was no different from any

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<sup>2</sup> 5 U.S.C. § 8113(a).

<sup>3</sup> *Carter C. Swinson*, 10 ECAB 281, 282 (1958).

other regular employee in that the opportunity of advancement to a higher grade was dependent upon demonstrated ability, merit, and availability of job. The circumstances here do not warrant a finding that he was a ‘learner’ so as to entitle him to an increase in the ‘monthly pay’ upon which to compute compensation for his disability.”<sup>4</sup>

In the present case, appellant worked as a customs inspector, GS-9, step 3, when he filed a claim in September 1991 alleging that he sustained a disabling heart condition due to employment factors. The Office determined that appellant had sustained a temporary aggravation of his preexisting heart condition that had ceased as of September 30, 1991 and paid appropriate disability compensation. Appellant filed additional claims in April and July 1992 and the Office accepted that he sustained an employment-related myocardial infarction, angina episode and additional aggravation of his preexisting heart condition.<sup>5</sup> Appellant continued to work as a customs inspector, GS-9, step 3, while each of his employment injury claims was accepted. He alleged that he was entitled to a higher rate of compensation because he was employed in a “learner’s capacity” at the time of his injuries within the meaning of 5 U.S.C. § 8113(a). By decision dated February 24, 1995, the Office denied appellant’s claim on the grounds that he was not employed in a learner’s capacity at the time of his injuries so as to be entitled to additional compensation under 5 U.S.C. § 8113(a). By decision dated January 17, 1996, the Office denied appellant’s request for merit review of its February 24, 1995 decision.<sup>6</sup>

As in the *Parkes* case, appellant was not a participant in a formal training program with a specified period for completion at which time he would have automatically been promoted to a higher grade. The record reveals that appellant’s customs inspector position was not a type of position which guaranteed promotion to a higher level after a given period. The employing establishment indicated that advancement from the custom inspectors position required either promotion through competition with other qualified individuals or promotion through “accretion of duties,” a promotion which occurs when an employee has performed certain duties above his or her grade level.<sup>7</sup> Moreover, as appellant had been within grade for several years prior to his employment injuries, he could, conceivably, have remained at the same grade level for an indefinite period and any advancement achieved would have been contingent upon his proven ability, past experience, or other qualifications.<sup>8</sup> Therefore, appellant’s status was not any

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<sup>4</sup> *James L. Parkes*, 13 ECAB 515, 517 (1962); *see also Robert Allan*, 30 ECAB 1154, 1156-57 (1979); *Raymond W. Goodale*, 25 ECAB 350, 353 (1974).

<sup>5</sup> The Office continued to pay appropriate compensation for appellant’s periods of disability.

<sup>6</sup> The record also contains a January 30, 1996 Office decision that concerned the date which fixed appellant’s pay rate for compensation purposes. Appellant did not request appeal of this decision and it is not currently before the Board.

<sup>7</sup> The employing establishment indicated, “The full performance or journeyman level of [appellant’s] position is GS-9 with no further promotion potential in the present position.” The record contains personnel documents which show that the “full performance level” of the custom inspector’s position was GS-9.

<sup>8</sup> *James L. Parkes*, *supra* note 4.

different from any regular employee in that the opportunity for advancement to a higher grade was dependent on his demonstrated ability, merit, and the availability of a position.<sup>9</sup>

In *Deborah D. Jones*, the Board suggested that in some circumstances when an employee can demonstrate the employing establishment had a policy of promoting all employees in a given position after a specified period of successful performance, such a showing would be sufficient to establish that an employee's wage-earning capacity "would probably have increased but for the injury" within the meaning of 5 U.S.C. § 8113(a).<sup>10</sup> On October 6, 1994 the Office requested that the employing establishment indicate whether it had a policy of promoting all employees in appellant's position after a specified period of successful performance. The employing establishment responded on October 12, 1994 by indicating that "the 'culture' of the employment did not and does not guarantee 'promotion to all employees in a position after a certain period of successful performance.'" The employing establishment further indicated that appellant would have been required to compete against other qualified individuals for promotion.

For these reasons, the circumstances in the present case do not warrant a finding that appellant was employed in a "learner's capacity" at the time of his injuries so as to entitle him to additional compensation under 5 U.S.C. § 8113(a).

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>11</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>12</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>13</sup> When a claimant fails to meet one of the above standards, it is a

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<sup>9</sup> *Id.*

<sup>10</sup> *Deborah D. Jones*, 37 ECAB 609, 614 (1986). In *Jones* the employee contended that although her position description indicated her position did not confer a "guarantee of promotion," it was the employing establishment's policy to promote all sheet metal mechanic helpers after six months of successful performance. The employee further alleged that her performance was successful up to the time of her employment injury, that all other employees hired as sheet metal mechanic helpers at the same time as she had been promoted, and that such promotions were not competitive. The Board remanded the case to the Office with directions to obtain comments from the employing establishment regarding these contentions.

<sup>11</sup> 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).

<sup>12</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

<sup>13</sup> 20 C.F.R. § 10.138(b)(2).

matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>14</sup>

In support of his reconsideration request, appellant submitted personnel documents including performance evaluations and a May 13, 1992 letter in which the employing establishment indicated that he was among the “best qualified” for promotion to a higher customs position but that he had not been selected for the position. These documents are not relevant to the main issue of appellant’s claim in that they actually tend to support the Office’s determination that appellant’s position was not a learner’s position; the documents show that appellant was required to compete with other employees for promotion to a higher position. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>15</sup> Appellant also submitted various documents which had previously been considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>16</sup>

In the present case, appellant has not established that the Office abused its discretion in its January 17, 1996 decision by denying his request for a review on the merits of its February 24, 1995 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

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<sup>14</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>15</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>16</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decisions of the Office of Workers' Compensation Programs dated January 17, 1996 and February 24, 1995 are affirmed.

Dated, Washington, D.C.  
December 10, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member