United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 07-2265**
	)	**Issued: April 28, 2008**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, San Bernardino, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 26, 2007, denying his request for reconsideration. The record also contains a schedule award decision regarding appellant's left eye dated November 8, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant was entitled to an augmented compensation rate pursuant to the November 8, 2006 schedule award; and (2) whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review of his occupational disease claim pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

FACTUAL HISTORY

The Office accepted that appellant sustained a left shoulder separation and left eye detached retina in the performance of duty on August 6, 1996. On November 29, 2005 appellant

filed an occupational disease claim alleging that he had developed closed angle glaucoma and loss of sight in his left eye as a result of the detached retina. On the claim form, he did not indicate that he had any dependents.

Appellant was referred to Dr. Edward J. Puttre, a Board-certified ophthalmologist, for a second opinion examination. In a report dated August 3, 2006, Dr. Puttre indicated that appellant had an old retinal detachment and ischemic optic neuropathy which had caused blindness in the left eye. The Office requested an opinion from Dr. Robert Rosenquist, Jr., an ophthalmologist, with respect to permanent impairment. In a report received by the Office on September 15, 2006, Dr. Rosenquist opined that appellant had no useful vision in his left eye and the date of maximum medical improvement was November 18, 2005.

On October 4, 2006 appellant filed a claim for compensation (Form CA-7) and requested a schedule award. With respect to dependents, he reported his former spouse, as well as his current fiancée and her son. According to appellant, his fiancée and her son lived with him. He submitted a judgment issued by the California Superior Court dissolving his marriage effective June 8, 2003. The stipulation for judgment agreement indicated that appellant was to pay his former spouse $500.00 per month in support.

By decision dated November 8, 2006, the Office issued a schedule award for a 100 percent permanent impairment for loss of vision in the left eye. The period of the award was 160 weeks commencing November 18, 2005. The compensation rate was 66 2/3 of appellant's weekly pay rate.

In a letter dated November 19, 2006, appellant requested reconsideration of the claim. He argued that his former spouse was a dependent because he was making regular contributions to her support pursuant to a court order. Appellant asserted that he was entitled to a compensation rate of 75 percent, noting that 20 C.F.R. § 10.404(b) provides compensation for schedule awards at 75 percent of pay when the employee has a dependent. He resubmitted the marriage dissolution judgment.

By decision dated January 26, 2007, the Office denied the reconsideration request without merit review of the claim. The Office stated that appellant's former spouse did not meet the criteria for a dependent and appellant's letter did not raise substantial legal questions or include new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

The basic rate of compensation under the Federal Employees' Compensation Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, he is entitled to have his basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.[1] Under the Act a dependent means "a wife, if (a) she is a member of the same household as the employee; (b) she is receiving

[1] 5 U.S.C. § 8110(b); *see also William G. Dimick*, 38 ECAB 751 (1987). The compensation rate for schedule awards is the same as compensation for wage loss. *See* 5 U.S.C. § 8107; 20 C.F.R. § 10.404(b) (1999).

regular contributions from the employee for her support; or (c) the employee has been ordered by a court to contribute to her support."[2]

A dependent also includes an unmarried child less than 18 years of age, while living with the employee or receiving regular contributions for support.[3] The term "child" includes stepchildren, adopted children and posthumous children.[4]

ANALYSIS -- ISSUE 1

Appellant received a schedule award for a 100 percent permanent impairment to the left eye pursuant to 5 U.S.C. § 8107(c)(5). He does not contest the percentage awarded or the period of the award. It is appellant's contention on appeal that the basic compensation rate of 66 2/3 percent of his monthly pay should be augmented under 5 U.S.C. § 8110(a) because his former wife is a "dependent" under this section. He asserts that he made regular contributions for her support pursuant to a court order. The contributions were made pursuant to a judgment of dissolution terminating appellant's marriage effective June 8, 2003.

A similar argument was raised in *William S. Cappeller, M.D.*[5] In that case, the employee made regular contributions to the support of his former spouse pursuant to a final divorce judgment. The Board found that "an ex-wife does not come within the meaning of the term "wife." Therefore, even though appellant contributes to the support of his former wife, the Board finds she does not qualify as a "dependent."[6] In the present case, the court judgment dissolved the marriage as of June 8, 2003. As of that date appellant did not have a "wife" under 5 U.S.C. § 8110(a)(1) and therefore did not have a dependent under this section.[7] The schedule award began on November 18, 2005 and appellant's former spouse was not a dependent under the Act at that time.

Appellant also reported on the October 4, 2006 Form CA-7 as dependents in his household a fiancée and her son. There is no provision under 5 U.S.C. § 8110 for augmented compensation under these circumstances. The fiancée is not a wife and therefore 5 U.S.C. § 8110(a)(1) is not applicable. The son of the fiancée is not a "child" under the Act and therefore not a dependent. While the term "child" under the Act includes stepchildren, since appellant was not yet married the son is not a stepchild. With respect to adoption, appellant did not argue or present evidence that the son of his fiancée had been adopted.

Based on the evidence of record before the Office at the time of the November 8, 2006 schedule award decision, there was no probative evidence that appellant had a dependent under 5

[2] 5 U.S.C. § 8110(a).

[3] 5 U.S.C. § 8110(a)(3).

[4] 5 U.S.C. § 8101(9).

[5] 28 ECAB 262 (1977).

[6] *Id.* at 264.

[7] *See also Linda F. Green,* 39 ECAB 636 (1988).

U.S.C. § 8110. The Office accordingly found the schedule award was payable at the basic compensation rate of 66 2/3 percent of monthly pay.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office]."[9] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[10]

ANALYSIS -- ISSUE 2

In his November 19, 2006 application for reconsideration, appellant argued that he should be entitled to augmented compensation because his former wife was a dependant, since he made contributions to her support through a court order. Appellant resubmitted the judgment terminating his marriage on June 8, 2003 and the agreement requiring him to contribute the support of his former wife.

As noted above, appellant must meet one of the standards of 20 C.F.R. § 10.606(b)(2) to require the Office to reopen the case for review of the merits. He did not show that the Office erroneously applied or interpreted a specific point of law. As the above discussion illustrates, the Office had properly paid appellant at the basic compensation rate of 66 2/3 percent of monthly pay. Appellant did not advance a new and relevant legal argument. He had previously asserted that his former wife was a dependent and submitted evidence indicating he was required to make regular contributions to her support. The application for reconsideration noted that an employee with a dependent is entitled to a 75 percent compensation rate, without providing a new and relevant legal argument. Furthermore, appellant did not submit new and relevant evidence. The marriage dissolution judgment and the stipulation agreement were previously submitted and considered by the Office.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). The November 19, 2006 application for reconsideration was properly denied without merit review of the claim.

[8] 5 U.S.C. § 8128(a) (providing that "[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").

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

CONCLUSION

The evidence of record did not establish that appellant was entitled to augmented compensation pursuant to the November 8, 2006 schedule award. Appellant's November 19, 2006 application for reconsideration was not sufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 26, 2007 and November 8, 2006 are affirmed.

Issued: April 28, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board