

<sup>2</sup> *Id.* The record also contains a March 11, 2003 decision, in which the Board reviewed the merits of the case and affirmed a September 19, 2001 decision, of the Office concerning appellant's wage-earning capacity. The Office did not consider the merits of appellant's case after the issuance of the Board's March 11, 2003 decision.

## **FACTUAL HISTORY**

On December 14, 1984 appellant, then a 33-year-old letter carrier, sustained a contusion, sprained medial collateral ligament and torn medial meniscus of his left knee due to a fall at work. On April 28, 1987 he sustained a right knee contusion and aggravation of chondromalacia symptoms when his right knee was struck by a mail case. The Office also accepted that appellant sustained an employment-related torn medial cartilage of his right knee, precipitation of osteoarthritis and permanent aggravation of chondromalacia.<sup>3</sup> Appellant stopped worked for various periods and worked in limited-duty positions for the employing establishment and on January 18, 1988 he returned to full-time work for the employing establishment as a modified distribution clerk.<sup>4</sup> On February 12, 1989 appellant sustained a right knee contusion and a left ankle sprain due to a fall at work. He stopped work on that date but later returned to work in his modified distribution clerk position. In May 1989 appellant was terminated from the employing establishment for falsifying documentation pertaining to his medical condition.

By decision dated December 20, 1999, the Office terminated appellant's compensation based on the opinion of Dr. Mahendra R. Patel, a Board-certified orthopedic surgeon, selected as an impartial medical specialist, who determined that appellant no longer had employment-related disability.<sup>5</sup> However, by decision dated and finalized May 3, 2000, an Office hearing representative reversed the Office's December 20, 1999 decision on the grounds that the opinion of Dr. Patel was not sufficiently rationalized to justify termination of appellant's compensation. In July 2000 appellant began to participate in a vocational rehabilitation program. In order to resolve the existing conflict in the medical evidence regarding appellant's ability to work, the Office referred appellant to Dr. Alan H. Wilde, a Board-certified orthopedic surgeon, for an impartial medical examination. Appellant's vocational rehabilitation counselor determined that appellant was vocationally capable of working as a customer service clerk and that such positions were reasonably available in his commuting area.<sup>6</sup>

By decision dated December 15, 2000, the Office adjusted appellant's compensation based on its determination that he was capable of working as a customer service clerk. The

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<sup>3</sup> The Office authorized arthroscopic surgical procedures of both knees, which were performed in July and October 1987. Appellant received schedule awards for a 58 percent permanent impairment of his left leg and a 56 percent permanent impairment of his right leg. He also has preexisting nonwork-related conditions including chronic venous insufficiency of both lower extremities, post-traumatic stress disorder, obesity and a right knee arthrotomy due to a 1977 mine accident.

<sup>4</sup> The position involved sorting mail and required standing, walking and lifting up to 20 pounds on a regular basis.

<sup>5</sup> The Office had determined that there was a conflict in the medical evidence regarding appellant's employment-related disability between Dr. Tim Rice, an attending Board-certified orthopedic surgeon and Dr. Moses Leeb, a Board-certified orthopedic surgeon, who served as an Office referral physician.

<sup>6</sup> The customer service clerk position involved providing for the needs of customers through such actions as exchanging merchandise, approving checks, taking orders for goods and responding to customer inquiries. The position, which was essentially sedentary in nature, fell under the light-work classification and did not require lifting more than 20 pounds or engaging in climbing, stooping or kneeling.

Office found that appellant was physically capable of performing the duties of the position on the opinion of the impartial medical examiner, Dr. Wilde. Appellant requested a hearing before an Office hearing representative, which was held on June 27, 2001. At the hearing, appellant testified that he had post-traumatic stress disorder and a right thigh condition related to his military service in Vietnam.<sup>7</sup> In particular, appellant alleged that his emotional condition caused him to be argumentative and full of rage and, therefore, prevented him from interacting with members of the public in any potential job. Appellant's attorney argued that these preexisting conditions should have been considered in determining appellant's wage-earning capacity. By decision dated and finalized September 19, 2001, an Office hearing representative reversed the Office's December 15, 2000 decision, but adjusted appellant's compensation based on her finding that he was capable of working as a modified distribution clerk. The Office hearing representative found that the opinion of Dr. Wilde established that appellant was physically capable of performing the more demanding position of modified distribution clerk.

By decision dated March 11, 2003,<sup>8</sup> the Board affirmed the Office's September 19, 2001 decision, as modified to reflect that the Office improperly adjusted appellant's wage-earning capacity based on his ability to work as a modified distribution clerk, but met its burden of proof to show that his wage-earning capacity was represented by his ability to work as a customer service clerk effective December 15, 2000. The Board noted that appellant had not worked in the modified distribution clerk position referenced by the Office hearing representative since he was terminated from the employing establishment in May 1989 and indicated that Office procedure provided that a federal or other civil service position, in which the claimant is not actually employed may not be used to make a loss of wage-earning determination based on a constructed position. The Board determined that the weight of the medical evidence regarding appellant's ability to work rested with the well rationalized June 7 and 26, 2000 reports of Dr. Wilde, the impartial medical specialist. It further found that Dr. Wilde provided work limitations in his reports, which were well within those necessitated by the duties of the constructed position of customer service clerk.<sup>9</sup> The Board also noted that Dr. Wilde indicated that he had reviewed the statement of accepted facts and considered the effect of all employment-related and preexisting conditions on appellant's ability to work.<sup>10</sup>

By letter dated September 26, 2003, appellant's attorney requested reconsideration of the Office's decisions on behalf of appellant. Appellant's attorney asserted that appellant had

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<sup>7</sup> The record reveals that appellant had disability ratings from the Veterans Administration for service-related conditions, including post-traumatic stress disorder, right knee arthritis and right thigh muscle damage due to a gunshot wound.

<sup>8</sup> Docket No. 02-365, issued March 11, 2003.

<sup>9</sup> The Board noted that Dr. Wilde explained that appellant had some residuals of his employment-related condition, which prevented him from performing the heavy duties of his original letter carrier position, but that the nature of his condition was not so severe that it prevented him from performing less demanding work.

<sup>10</sup> The Board noted that there was no medical evidence of record, which showed that appellant's preexisting post-traumatic stress disorder and right lower extremity condition prevented him from performing the customer service clerk position. The Board also found that the opinion of appellant's rehabilitation counselor showed that he was vocationally capable of performing the customer service clerk position and that the evidence of record showed the position was reasonably available in his commuting area.

“recently revealed” to him that he had disabling preexisting conditions related to military duty in Vietnam, in the form of post-traumatic stress disorder and a right knee condition. He argued that the Office improperly failed to consider these conditions in evaluating appellant’s wage-earning capacity. By decision dated October 7, 2003, the Office denied appellant’s reconsideration request without reviewing his case on the merits.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,<sup>11</sup> the Office’s regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new 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 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, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>14</sup>

### **ANALYSIS**

In the present case, it was determined that the Office met its burden of proof to show that appellant’s wage-earning capacity was represented by his ability to work as a customer service clerk effective December 15, 2000. On request for reconsideration appellant’s attorney argued, in a letter dated September 26, 2003, that appellant had disabling preexisting conditions related to military service in Vietnam, in the form of post-traumatic stress disorder and a right knee condition, which the Office improperly failed to consider in evaluating his wage-earning capacity.<sup>15</sup> However, appellant and his attorney had previously presented this argument and the Office had previously considered and rejected it. 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>

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<sup>11</sup> 5 U.S.C. § 8101 *et seq.* 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 her own motion or on application.” 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.606(b)(2).

<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> 20 C.F.R. § 10.608(b).

<sup>15</sup> In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his work tolerance. *William Ray Fowler*, 31 ECAB 1817, 1822 (1980).

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

At a June 27, 2001 hearing before an Office hearing representative, appellant testified that he had post-traumatic stress disorder and a right lower extremity condition related to his military service in Vietnam, which affected his ability to work. He alleged that his emotional condition prevented him from interacting with members of the public in any potential job. At the same hearing, appellant's attorney argued that these preexisting conditions should have been considered in determining appellant's wage-earning capacity.<sup>17</sup> The Office hearing representative considered and rejected this argument in her September 19, 2001 decision.<sup>18</sup>

In the present case, appellant has not established that the Office improperly refused to reopen his case for a review of the merits under section 8128(a) of the Act, because the evidence and argument he submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

### **CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>17</sup> Given these facts, it remains unclear how appellant's attorney could have alleged in his September 26, 2003 letter that these condition were "recently revealed" to him by appellant.

<sup>18</sup> Moreover, the Board noted in its March 11, 2003 decision, that there was no evidence that appellant's preexisting conditions prevented him from performing the customer service clerk position.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 7, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member