

**United States Department of Labor
Employees' Compensation Appeals Board**

T.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Knoxville, TN, Employer**

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**Docket No. 11-1662
Issued: March 5, 2012**

Appearances:
Nolan Dennis, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 5, 2011 appellant filed a timely appeal of an April 4, 2011 decision of the Office of Workers' Compensation Programs (OWCP), denying his application for reconsideration without merit review of the claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the April 4, 2011 nonmerit decision. Since more than 180 days has elapsed between the last merit decision on November 12, 2010 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly determined that appellant's January 5, 2011 application for reconsideration was insufficient to warrant a merit review of the claim.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 1, 2001 appellant, then a 53-year-old letter carrier, filed an occupational claim, Form CA-2, alleging that he sustained shoulder injuries as a result of his federal employment. OWCP accepted the claim for bilateral impingement syndrome and left shoulder glenoid labrum tear. Appellant underwent left shoulder surgery on March 14, 2002 and returned to work in a light-duty position.

On February 22, 2007 appellant filed a claim for a recurrence of disability. The record indicates that he underwent additional left shoulder surgery on May 15, 2007. Attending Physician Dr. William Hovis indicated that appellant could return to modified duties on August 30, 2007.

By decision dated December 11, 2008, OWCP determined that appellant was not entitled to a schedule award. In a report dated July 7, 2009, Attending Physician Dr. Susan Pick opined that he had a 10 percent left arm permanent impairment and an 8 percent right arm impairment. She indicated that appellant reached maximum medical improvement on December 20, 2007.² In a report dated October 23, 2009, OWCP's medical adviser found that appellant had a 10 percent left arm impairment and a 9 percent right arm permanent impairment. He stated that the date of maximum medical improvement was July 7, 2009, the date of Dr. Pick's report.

In a decision dated December 1, 2009, OWCP vacated the December 11, 2008 decision. A pay rate memorandum dated December 1, 2009 indicated that appellant's pay rate on May 15, 2007 was \$959.77 a week. On December 4, 2009 OWCP issued a schedule award for a permanent impairment of 10 percent for the left arm and 9 percent to the right arm. The period of the award was 59.28 weeks from July 7, 2009. The weekly pay rate for compensation purposes was \$959.77.

By letter dated January 2, 2010, appellant, through his representative, requested reconsideration. He argued that the pay rate should be determined at the date of maximum medical improvement.

In a decision dated January 14, 2010, OWCP denied the reconsideration request without merit review of the claim. Appellant again requested reconsideration by letter dated February 28, 2010. He again argued that the pay rate should be based on pay rate as of July 7, 2009.

By decision dated May 4, 2010, OWCP reviewed the case on its merits. It found that the December 4, 2009 decision should be modified as to the date of maximum medical improvement, as Dr. Pick had established a date of December 20, 2007.³ As to the pay rate, OWCP affirmed that the correct date as May 15, 2007, the date of a recurrence of disability.

² In a report dated December 20, 2007, Dr. Hovis indicated that appellant had reached maximum medical improvement.

³ OWCP incorrectly stated in its cover letter that the date was December 20, 2009, but the accompanying memorandum used the date, December 20, 2007.

In a decision dated May 11, 2010, OWCP issued a schedule award for a 10 percent left arm and 9 percent right arm permanent impairment. The period of the award was 59.28 weeks commencing December 20, 2007.

In a letter dated June 3, 2010, appellant again requested reconsideration. He argued that OWCP had ignored medical evidence and based its pay rate decision on the vacated December 11, 2008 decision. Appellant again stated that the pay rate date should be July 7, 2009.

By decision dated July 23, 2010, OWCP reviewed the case on its merits and denied modification. In a letter dated September 10, 2010, appellant requested reconsideration. He stated that May 15, 2007 was the date of surgery, not a recurrence of disability. Appellant referred to OWCP regulations at 20 C.F.R. § 10.403(d) and stated that it was reasonable to apply a pay rate on July 7, 2009.

In a decision dated November 12, 2010, OWCP reviewed the case on its merits and denied modification. It noted that the pay rate for a schedule award is determined under 5 U.S.C. § 8101(4).

On November 23, 2010 OWCP received a November 18, 2010 request for an oral hearing. By decision dated December 16, 2010, it found that, since appellant had already requested reconsideration, he was not entitled to a hearing as a matter of right. OWCP stated that the issue in the case could equally well be addressed through the reconsideration process.

By letter dated January 5, 2011, appellant requested reconsideration. He again stated that the December 11, 2008 decision had been vacated, noted the findings of OWCP in the November 11, 2010 decision and referred to OWCP regulations. Appellant concluded that OWCP had discretion to choose between “the various pay rates of the period being considered” and to select the highest.

In a decision dated April 4, 2011, OWCP determined that the application for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP’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: “(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP.”⁵ Section 10.608(b) states that any application for review that does not meet at least one of the

⁴ 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.”)

⁵ 20 C.F.R. § 10.606(b)(2).

requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

In the present case, appellant submitted an application for reconsideration dated January 5, 2011. He believes that OWCP erred in determining the pay rate for his schedule award. To be entitled to a review of the merits of the compensation issue presented, appellant must meet one of the standards under 20 C.F.R. § 10.606(b)(2) noted above. With respect to a showing that OWCP erroneously applied or interpreted a specific point of law, he did not meet this standard. Appellant referred to OWCP regulations at 20 C.F.R. § 10.403(d), but this is a regulation regarding how to calculate wage-earning capacity under 5 U.S.C. § 8115.⁷ OWCP has not made a determination of wage-earning capacity under 5 U.S.C. § 8115 and this regulation is not relevant to the issue presented. The applicable statute regarding pay rate for a schedule award, as OWCP as explained to appellant, is 5 U.S.C. § 8101(4).⁸ Appellant did not show that OWCP erroneously applied or interpreted a specific point of law.

With respect to a relevant legal argument not previously considered by OWCP, the Board notes that appellant has filed numerous applications for reconsideration on the pay rate issue. Appellant has argued that the applicable pay rate should be July 7, 2009, the date of examination by Dr. Pick. The arguments presented in the January 5, 2011 letter do not constitute new and relevant legal arguments. Appellant continues to assert that OWCP is relying on a December 11, 2008 decision that was vacated. The December 11, 2008 decision made no findings on the pay rate issue, as it held appellant was not entitled to a schedule award. There is no evidence that OWCP was relying on that decision in any subsequent decision. Appellant states that OWCP has discretionary authority to determine between various pay rates, but the relevant statute is 5 U.S.C. § 8101(4), which provides that monthly pay is the pay at the time of injury, the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after return to regular full-time employment, whichever is greater. It is not an issue of exercising a discretionary authority, it is an issue of proper application of the statute. OWCP has explained that it used the pay rate on May 15, 2007, the date of recurrent disability due to surgery. The reopening of a case is not required where the legal contention has no reasonable color of validity.⁹ Appellant has not provided a new and relevant legal argument with his application for reconsideration.

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁷ 20 C.F.R. § 403(d) states that wage-earning capacity in terms of percentage is computed by dividing earnings by the current pay rate for the date of injury job. OWCP may use any convenient date for making the comparison as long as both wage rates are in effect on the date used for comparison. 5 U.S.C. § 8115 provides that wage-earning capacity is determined based on actual earnings, if actual earnings fairly and reasonably represent wage-earning capacity, or if they do not, with due regards to enumerated factors.

⁸ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ *Elaine M. Borghini*, 57 ECAB 549 (2006); *Annette Louise*, 54 ECAB 783 (2003).

As to the submission of new, relevant and pertinent evidence, appellant did not meet this standard. He did not submit any new evidence with his application for reconsideration. Accordingly, the Board finds appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). OWCP properly denied the application for reconsideration without merit review.

CONCLUSION

The Board finds that OWCP properly denied the application for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 4, 2011 is affirmed.

Issued: March 5, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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