



On appeal counsel asserts that appellant's pay rate for compensation purposes was incorrect and that a September 23, 2010 wage-earning capacity determination was in error because it was based on a position that was not a good faith job offer.

### **FACTUAL HISTORY**

On May 20, 2000 appellant, then a 47-year-old temporary census enumerator, filed a traumatic injury claim alleging that on May 19, 2000 he fractured his left shoulder when he slipped and fell in heavy rain. OWCP initially denied the claim in a July 9, 2001 decision. On November 18, 2001 it accepted that appellant sustained a left shoulder fracture that resolved on August 19, 2000. In a July 25, 2002 decision, OWCP extended the date of entitlement to benefits to September 18, 2000. On October 28, 2002 appellant was granted a schedule award for a five percent left upper extremity impairment, and received an additional one percent impairment of the left arm on February 4, 2003.<sup>3</sup> Upon expiration of the schedule awards, he filed a recurrence claim and began receiving disability compensation. Appellant was placed on the periodic compensation rolls in June 2003.

In March 2009 OWCP referred appellant to Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine his current work capacity. On April 15, 2009 Dr. Hutter advised that appellant could return to work with the only restriction of no lifting or reaching. In a work capacity evaluation dated February 19, 2010, appellant's attending orthopedic surgeon, Dr. Leonard Jaffe, provided essentially the same restriction and advised that appellant could perform light work. Another report, also dated February 19, 2010 from him, found that appellant could not work.

In April 2010 appellant accepted a 90-day temporary clerk position on April 24, 2010. The position was identified as sedentary and included clerical functions. The offer stated that it was in accordance with OWCP physical restrictions.<sup>4</sup>

By decision dated September 23, 2010, OWCP found that appellant's earnings in the clerk position represented his wage-earning capacity with zero loss.

On July 4, 2011 appellant filed a recurrence claim, beginning August 30, 2010. The employing establishment stated that his temporary 90-day clerk position was extended because he was doing well, but that all temporary clerk positions ended on August 30, 2010. In a July 14, 2011 report, Dr. Jaffe noted that appellant's sedentary position was ending and that he could perform sedentary duties. Another report by Dr. Jaffe also dated July 14, 2011 found appellant unable to work.

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<sup>3</sup> The October 28, 2002 schedule award decision noted that it was for the right upper extremity. Appellant, however, does not have a right upper extremity claim and it was no doubt a typographical error.

<sup>4</sup> By letter dated September 2, 2009, the employing establishment indicated that it was referring appellant's case to its field division to search for an appropriate position. Attached to the letter was a resume completed by appellant in which he indicated that he had been working in the private sector during periods beginning in September 2001 through January 2006. On EN1032 forms completed by appellant on November 7, 2003, May 5, and November 28, 2006 and November 29, 2007 he indicated that he had not worked during the past 15 months.

In a merit decision dated September 21, 2011, OWCP denied modification of the September 23, 2010 decision. It noted that, although appellant had filed a recurrence claim, the issue was whether the September 23, 2010 wage-earning capacity determination should be modified and found that he had not met the criteria. OWCP found Dr. Jaffe's opinion that appellant could not work insufficient to establish that his employment-related condition had changed.

On September 26, 2011 appellant, through counsel, requested reconsideration. He asserted that the job appellant had been performing was odd-lot or sheltered and not an established position. OWCP requested information regarding the position from the employing establishment and on December 15, 2011 the employing establishment informed it that appellant's date-of-injury position was a temporary enumerator and in April 2010 he was offered a temporary clerk position that was within his restrictions. The employing establishment also noted that the position had been extended because he performed well. The employing establishment maintained that the position was not odd-lot or sheltered, and that the clerk position appellant performed was one of many dozens of identical temporary intermittent clerk positions in existence across the country for the 2010 census and was a standard, regular position in every regard.

By decision dated January 5, 2012, OWCP denied modification of the September 23, 2010 wage-earning capacity determination. It stated:

"On the date you were injured you were employed by the Department of Commerce as a temporary enumerator for the 2000 Census that lasted for 90 days. Subsequently, you were offered a temporary clerical position in 2010 with the Department of Commerce, which you accepted and performed from April 24 through August 28, 2010. You worked in the position more than 60 days, and the temporary position was available for more than 90 days. The evidence of record shows that you performed all of the duties of the position of temporary clerk.

"The temporary clerk position was not an odd-lot or sheltered position designed for your needs nor was it seasonal in nature. The position that was offered was a 'regular' position that would have been performed by another employee. Therefore, the temporary assignment was established and you did resume 'regular' employment within the meaning of [FECA].

"While the clerk position was temporary, the job that you held on the date of injury was also temporary. Reemployment of a temporary worker in another temporary position is proper as long as it will last at least 90 days. Accordingly, [OWCP] may use actual wages in a temporary position to make a wage-earning capacity determination in your case. As such, the original determination of September 23, 2010 was not erroneous."

On February 13, 2012 appellant's counsel requested reconsideration and again asserted that the wage-earning capacity decision was in error because the position was makeshift. He also asserted that the position was not properly offered and that the pay rate on which the determination was based was incorrect. Following OWCP's request for additional information,

in correspondence dated February 29, 2012 the employing establishment reiterated that appellant's temporary position, on which the September 23, 2010 wage-earning capacity decision was based, was not odd-lot. Counsel also discussed appellant's initial pay rate as a census enumerator, noting that the pay rate determination applicable to temporary census enumerators, regardless of their actual earnings, had been affirmed by the Board. It referenced applicable OWCP procedures and attached appellant's notifications of personnel action from 2000 and 2010.

In a merit decision dated May 10, 2012, OWCP denied modification of the September 23, 2010 wage-earning capacity determination. It noted appellant's arguments on reconsideration. With regard to his allegation that the clerk position was makeshift, OWCP again noted that the employing establishment confirmed that the position was a regular 2010 census clerk position and that appellant had worked in that position in excess of 90 days. It found that "the offered position was suitable as a temporary position may be offered to a temporary employee and may serve as the basis for [a wage-earning capacity determination] provided the offered position was for a minimum of 90 days." OWCP further found that the pay rate was accurate. The pay rate for all census enumerators was based on a six and a half hour day for six days a week. It concluded that, as the wage-earning capacity decision was issued after appellant had worked in an appropriate position for 90 days and was based on the correct pay rate, modification of the decision was not warranted. The decision was reissued on June 6, 2012 because of a change in appellant's address of record.

On May 2, 2013 appellant, through counsel, again requested reconsideration. He maintained that Dr. Jaffe's report should have been sufficient to demonstrate that appellant was unable to work and that the clerical job offered to appellant was provided solely to take him off the workers' compensation rolls and to create a loss of wage-earning capacity, again asserting that it was not a legitimate offer and that the position was odd-lot and not available in the open labor market. Counsel again asserted that the compensation rate was improper.

By decision dated May 13, 2014, OWCP denied appellant's request for reconsideration. It noted that the arguments raised on reconsideration were cumulative and repetitive and insufficient to warrant merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>5</sup> Section 10.608(a) of Title 20 of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>6</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; or (2) advances a relevant

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.608(a).

legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### ANALYSIS

The only decision before the Board in this appeal is the decision of OWCP dated May 13, 2014 denying appellant's application for review. Because more than one year elapsed between the date of OWCP's most recent merit decision, dated May 10, 2012, and reissued on June 6, 2012, and the filing of this appeal with the Board on September 9, 2014, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>9</sup>

On September 23, 2010 OWCP found that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. In merit decisions dated September 21, 2011, January 5 and May 10, 2012, reissued on June 6, 2012, it denied his requests for modification of the wage-earning capacity decision. Appellant again requested reconsideration on May 2, 2013. As a general rule, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner should evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>10</sup> Nonetheless, in cases where arguments submitted have previously been addressed by OWCP and in which a claimant submits no new or relevant evidence, OWCP may address the request under the provisions found in section 8128 of FECA and deny merit review.<sup>11</sup>

In the case at hand, each argument raised by appellant in his May 2, 2013 reconsideration request had been addressed by OWCP in previous decisions. Appellant submitted no new evidence with the May 2, 2013 request to bolster his contentions; however, he asserts that Dr. Jaffe's opinion was sufficient to demonstrate that he could not perform the duties of the clerical position. The most recent medical reports from Dr. Jaffe were dated July 14, 2011 and were reviewed and found insufficient by OWCP in its September 21, 2011 decision denying modification of the September 23, 2010 wage-earning capacity determination.

The arguments regarding the offered clerical position were discussed in each merit decision denying modification of the September 23, 2010 wage-earning capacity determination, those dated September 21, 2011, January 5 and May 10, 2012, reissued on June 6, 2012. Finally,

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<sup>7</sup> *Id.* at § 10.608(b)(1) and (2).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *Id.* at § 501.3(e).

<sup>10</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>11</sup> *A.P.*, Docket No. 14-851 (issued September 2, 2014). *See also G.A.*, Docket No. 14-1505 (issued November 5, 2014).

in the May 10, 2012 decision, reissued on June 6, 2012, OWCP also discussed appellant's pay rate as a census enumerator on which the September 23, 2010 wage-earning capacity determination was based. Appellant submitted no new relevant or pertinent evidence to bolster his assertions.

Thus, appellant's arguments in his May 2, 2013 reconsideration request did not constitute arguments which have not been considered and did not show error by OWCP in applying or interpreting a specific point of law. Consequently, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>12</sup> Moreover, appellant did not submit any evidence with his May 2, 2013 reconsideration request.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied his reconsideration request.<sup>13</sup>

### **CONCLUSION**

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

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

<sup>13</sup> *A.P.*, *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 13, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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