

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WAYNE D. LAWLEY and SMALL BUSINESS ADMINISTRATION,  
REGIONAL OFFICE, Philadelphia, Pa.

*Docket No. 95-2490; Submitted on the Record;  
Issued June 10, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for further consideration of the merits under 5 U.S.C. § 8128 constituted an abuse of discretion.

On February 24, 1988 appellant, then a 36-year-old industrial specialist, filed a claim alleging that he injured his right arm and leg on February 23, 1988 when he attempted to subdue an intruder in the workplace while in the performance of duty.

The Office accepted that appellant sustained a contusion and sprain of the right finger, a laceration of the right thigh, a post-traumatic stress disorder and major depression with psychosis. Appellant returned to full duty on April 13, 1992. The Office accepted that appellant had sustained a recurrence of disability on October 23, 1992.

On November 13, 1992 the employing establishment notified the Office that appellant had returned to full-time work in April 1992, but that he had used 155 hours of leave which averaged approximately one day of leave a week from April to November 1992 which he used "when he felt unable to perform his job."

In a report of telephone call or Office call, CA-110, dated December 7, 1992 the Office noted that appellant "has now brought doctor into picture to verify that he should not be working full time."

On December 8, 1992 the employing establishment, based on appellant's decline in productivity after a few work days each week, changed his work schedule to a four day work week "to allow every Wednesday to be a day covered by workers' compensation," noting that the first day of compensation coverage would be Wednesday, December 16, 1992.

On that same day appellant filed a CA-8, Claim for continuing disability for wage loss, for lost wages one day a week noting that his pay rate was \$24.44 per hour. The employing establishment noted that appellant was working 32 hours a week.

In a medical report dated January 13, 1993, Dr. Benjamin Wood, Board-certified in psychiatry and neurology, stated that he had proposed to the Office in a letter dated April 8, 1992 that appellant be allowed to return to full-time work on a trial basis, but that, in the subsequent six months, appellant, unknown to the doctor, averaged an absence from work of one day a week, which was all that appellant could tolerate. On October 23, 1992 Dr. Wood recommended that appellant's work week be reduced to four days a week which he noted reflected the risk "originally inherent in his returning to full-time work on a trial basis." He concluded that appellant "never really returned to work on a five day a week basis because he was simply unable to do that," and thus recommended that appellant be granted a "permanent, partial disability of 20 percent so he can get proper (*i.e.* 75 percent) compensation for the one day per week that he is not going to be able to work."

On February 17, 1993 the Office, in a letter decision, notified appellant that the position of industrial specialist to which he had been assigned on October 23, 1992 fairly and reasonably represented his wage earning capacity, and that, as a result of computations to determine his subsequent loss of wage-earning capacity, he would receive a compensation check every four weeks in the amount of \$146.60.<sup>1</sup>

In response to appellant's inquiry dated February 23, 1993, the Office advised him in a letter dated that date that his compensation for lost wages was based on "comparing [appellant's] current wage-earning capacity with the current rate of pay for the job, grade and step held at the time of the injury."

On that same date appellant requested an oral hearing which was held on October 28, 1993 in Denver, Colorado. Appellant testified that Dr. Benjamin Wood, his treating physician and Board-certified in psychiatry and neurology, approved his return to full-time work in April 1992 on a trial basis but that the doctor was not aware that appellant had reduced his work week to 32 hours a week due to his inability to perform. In a decision issued on May 11 and finalized on May 18, 1994, the hearing representative found that appellant had returned to full-time work in April 1992 but that, based on a recurrence of disability on October 23, 1992, he was formally assigned to a 32 hour part-time assignment on December 23, 1992. As a result of his returning to part-time work, the Office determined appellant had a loss of wage-earning capacity in the amount of \$148.00 every four weeks. Although the hearing representative noted that this was a reduction from the prior award of \$600.00 every four weeks, he stated that the Federal

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<sup>1</sup> Appellant's weekly income at the time of his initially injury in February 1988 as a GS-12, step 4 was \$822.04. At the time of his recurrence of disability on October 23, 1992 his weekly income as a GS-13, step 4 was \$977.50 a week. Appellant's actual earned income after the recurrence of disability based on a four day work week was \$782.08, which was 95 percent of the current pay rate for the position he held at the time of the initial injury, GS-12, step 4, at \$822.04 a week. Ninety five percent of the weekly rate of pay for a GS-13, step 4 was \$928.63 which was a \$48.87 reduction from appellant's earned income at the time of the recurrence of disability. Based on appellant's dependents, the Office properly calculated his compensation rate based on 75 percent of the loss of wage-earning capacity which resulted in an award of compensation of \$36.65 each week or \$146.60 every 28 days.

Employees' Compensation Act Manual (FECA Manual) specifically prohibited calculations by any other manner.<sup>2</sup>

On June 7, 1994 appellant filed a petition for reconsideration of the hearing representative's decision. In his letter, appellant requested that specific transcript references be reviewed, and noted that he intended to submit explanatory documentation. Appellant also stated that "partial disability was never established."

On June 15, 1994 the Office, in a letter decision, notified appellant that it had received his petition for reconsideration but that he was required to identify clearly the grounds upon which his petition for reconsideration was based and to submit either relevant evidence not previously considered or present legal contentions not previously considered to warrant reconsideration of the hearing representative's decision. The Office stated that because appellant raised neither substantive legal issues or included new and relevant evidence, it declined to review the prior decision.

In a letter received by the Office on October 18, 1994, appellant requested either reconsideration or appeal of the Office's May 18, 1994 decision. Appellant again requested the Office to review portions of the transcript where appellant alleged that the hearing representative found that the Office's decision was incorrect and argued that the formula used to determine his loss of wage-earning capacity was incorrectly based on a determination that he was partially disabled.

In a letter dated October 19, 1994, the Office notified appellant that it was taking no action as a result of his October 18, 1994 letter and advised him to follow the appeal rights which were included in his May 18, 1994 decision.

On January 5, 1995 the Office notified appellant that, based on his February 1988 employment-related injury, he was placed on the periodic rolls and would receive a compensation check for \$150.00 every 28 days pursuant to the Office's May 18, 1994 decision.

In a daily roll payment form dated January 20, 1995, the Office stated that appellant was totally disabled as of December 29, 1994.

In a report dated January 28, 1995, Dr. Nancy Arko, appellant's attending psychiatrist, stated that appellant was totally disabled from December 19, 1994 through June 1, 1995.

On March 23, 1995 appellant filed a petition for reconsideration with the Office regarding its May 18, 1994 decision. Appellant argued that during the course of the hearing, the hearing representative stated off the record that the Office was wrong in its determination, that he was in a unique position not covered by regulations, that the Office should have awarded compensation based on "75 percent and not the 16 percent I was paid," and that the hearing representative seriously doubted if this situation would arise again. He also alleged that his witnesses were not present because the hearing representative determined that they were not

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<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (December 1993).

needed. Appellant requested that the transcript be reviewed to determine if “the language used would not lead a sensible person to believe there are grounds the official knew of to uphold approval.” He also requested that if the Office declined to reconsider his claim that his letter be treated as an appeal.

On April 13, 1995 the Office, in a non-merit decision letter, notified appellant that because he raised neither substantive legal issues nor included new and relevant evidence in his petition for reconsideration, it declined to review its May 18, 1994 decision. It further notified appellant that his request to use the petition for reconsideration “as a request for appeal upon this denial cannot be met.”

The only decision before the Board on this appeal is the Office’s nonmerit decision dated April 13, 1995. As more than one year has elapsed from the date of the Office’s most recent merit decision to the date this appeal was filed, the Board lacks jurisdiction to consider the merits of this claim, and lacks jurisdiction over the May 18, 1994 merit decision of the Office.<sup>3</sup>

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.<sup>4</sup> Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),<sup>5</sup> the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant’s request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant’s case and review the case on its merits whenever the claimant’s application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

- “(i) Showing that the Office erroneously applied or interpreted a point of law; or
- “(ii) Advancing a point of law or fact not previously considered by the Office; or
- “(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>6</sup>

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<sup>3</sup> 20 C.F.R. § 501.3(d)(2).

<sup>4</sup> See *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied* 41 ECAB 458 (1990).

<sup>5</sup> See *Charles E. White*, 24 ECAB 85 (1972).

<sup>6</sup> 20 C.F.R. § 10.138 (b)(1).

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>7</sup>

In this case, appellant alleged that the hearing representative wanted to rule in his favor, stating that he had gone off the record on several instances stating that the Office was incorrect in its decision. However, these allegations are insufficient to warrant reconsideration inasmuch as appellant failed to establish that the hearing representative's decision, based on his findings of fact, was erroneous.<sup>8</sup> Appellant also alleged that the Office improperly used the Shadrick formula in determining his loss of wage-earning capacity because that formula applied to "physical injuries," not the kind of injury that he had sustained which he categorized as "shell shock." However appellant presented no evidence that supported his allegation and thus is insufficient to warrant a further review of his claim. He also alleged that the Office improperly calculated his loss of wage-earning capacity but failed to submit evidence to support that allegation. Appellant also alleged that the hearing representative disallowed appellant's witnesses on the grounds that the case was "cut and dried" and thus witnesses were not necessary. A careful review of the record failed to disclose that appellant requested to have witnesses present nor did it include any discussion from the hearing representative with respect to the relevance of any of appellant's witnesses and thus this allegation is insufficient to warrant further review of appellant's claim.

Appellant presented no new and relevant evidence demonstrating that the Office erred in determining his loss of wage-earning capacity and therefore the Office did not abuse its discretion in refusing to reopen appellant's case for further merit review.<sup>9</sup>

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<sup>7</sup> 20 C.F.R. § 10.138 (b)(2).

<sup>8</sup> See *Beverly Dukes*, 46 ECAB 1014 (1995).

<sup>9</sup> See *Norman W. Hanson*, 45 ECAB 430, 435 (1994). (The Office properly declined to reopen claim because appellant presented no new and relevant evidence).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 13, 1995 is hereby affirmed.

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

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member