

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS D. JOY and DEPARTMENT OF THE INTERIOR,
LOWELL NATIONAL HISTORICAL PARK, Lowell, MA

*Docket No. 98-1086; Submitted on the Record;
Issued March 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's September 11, 1997 request for reconsideration.

In a decision dated September 10, 1996, finalized on September 13, 1996, an Office hearing representative found that the Office properly reduced appellant's compensation for total disability based on his capacity to perform the duties of a paralegal. The hearing representative noted that in some circumstances extensive rehabilitation efforts would not succeed. In such circumstances the Office's procedures instruct the rehabilitation counselor to submit a final report summarizing that placement efforts were not successful and to submit relevant information to the Office. The hearing representative found that the Office properly determined that appellant was no longer totally disabled for work due to the effects of his May 17, 1989 work-related injury; that the Office properly determined that the position of paralegal was well within the restrictions provided by appellant's physician; and the Office properly followed established procedures for determining appellant's loss of wage-earning capacity.

In a letter dated September 11, 1997, appellant requested reconsideration. He stated that he was basing his request on a legal argument not previously raised and on alleged procedural flaws at the hearing. He argued that the termination of his vocational rehabilitation was not in his best interest; that the decision of the Office was contrary to known facts; and that the Office had information that would lead a reasonable person to the probable deduction that he would not achieve a position in the paralegal field with his limited experience and education. Appellant argued that he had sent out over 60 resumes and that, despite his efforts and the efforts of the rehabilitation counselor, they were not able to arrange for an interview or to identify a position that was actually open. He stated that he was informed that the Office had never placed a paralegal prior to his case. Appellant added that a bachelor's degree was required to obtain consideration for employment by the federal government in the paralegal field.

Concerning the procedure of the hearing before an Office hearing representative, appellant argued that the issue to be determined was whether the decision by the Office to refuse adequate training was reasonable in light of all the known facts. He stated that the hearing representative misunderstood the issue to be whether the position of paralegal fairly represented his wage-earning capacity. Appellant took exception to the hearing representative's reliance on a statement by the rehabilitation counselor that appellant was ambivalent toward working as opposed to continuing his rehabilitation. He further argued that typing was not a requirement of a paralegal position and that appellant's lack of typing skills and failure to take a suggested typing course did not prove ambivalence. Appellant indicated that the hearing representative misidentified the selected position as a clerical secretary position. He alleged the hearing representative of being biased, of spending a great deal of time in defense of Office actions and in cross-examination of appellant, and of cutting the hearing short without providing him an opportunity to present additional material or to respond to her statements in defense of the Office actions.

In a decision dated December 12, 1997, the Office denied appellant's September 11, 1997 request for reconsideration without reviewing the merits of his claim. The Office found that appellant had previously raised his arguments concerning procedural flaws, inaccurate information, lack of reasonableness in failing to extend vocational rehabilitation services, questionable data, and purported ambivalence at the time of his oral hearing. These arguments were repetitious, the Office found, and of no new evidentiary value. The Office further found that there was no evidence that the hearing representative misinterpreted the issue at hand. The Office noted that prior decisions had encompassed the issue of whether appellant had sufficient training in order to secure employment as a paralegal. The Office found that the hearing representative's reference to a clerical secretary position was an obvious typographical mistake that was not fatal to the outcome of the claim and constituted harmless error, as the hearing representative had made it abundantly clear throughout her decision that the issue was whether the position of paralegal fairly and reasonably represented appellant's wage-earning capacity. As for appellant's accusation of bias, the Office found that he presented no evidence to support his allegation. The Office concluded that none of appellant's arguments met the requirements of 20 C.F.R. § 10.138(b)(1) and that his request was insufficient to warrant review of the prior decision.

The Board finds that the Office properly denied appellant's September 11, 1997 request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹

In his September 11, 1997 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he submit relevant and pertinent

¹ 20 C.F.R. § 10.138(b)(1).

evidence not previously considered by the Office. Accordingly, he may not obtain a merit review of his claim under the first or third requirement set forth above. Appellant, instead, advanced a legal argument that he stated was not previously raised.

The Board has reviewed the record on appeal, included the transcript of the oral hearing held on June 27, 1996, and notes that appellant has previously raised most of the issues presented in his September 11, 1997 request for reconsideration. At the hearing, he addressed at length the insufficiency of the two-year vocational training program and how it left him unemployable or at a significant disadvantage in gaining an entry-level position as a paralegal. Appellant questioned the reasonableness of the labor market survey and of the prevailing wage rate used for his rating. He argued that, when one looks at all the firms contacted, the results did not clearly show that there were ample jobs in the market place for someone with his background. Appellant also addressed questions of whether he was ambivalent about working and whether he should take a typing course. To the extent that appellant previously raised such issues before the Office hearing representative, he is not entitled to a merit review of his claim under the third criterion above. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.²

Appellant's September 11, 1997 request for reconsideration also raised issues concerning the hearing itself. He alleged that the hearing representative misunderstood the issue, misidentified the selected position as a clerical secretary position, showed bias and cut the hearing short without providing him an opportunity to present additional material or to respond to her statements in defense of the Office actions. The Board has carefully reviewed the transcript of the oral hearing held on June 27, 1996 and finds no merit in appellant's arguments. The hearing representative correctly understood the issue to be decided and the position selected to determine appellant's wage-earning capacity. The Office correctly found that any reference to a clerical secretary position was harmless error. The transcript fails to establish bias. While the hearing representative at one point told appellant that "we [wi]ll need to continue, because we need to conclude," there is no evidence that appellant was prevented from presenting additional material or responding to any of the hearing representative's statements.

Although the reopening of a case for merit review may be predicated solely on a legal premise, such reopening is not required where the contention does not have a reasonable color of

² *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

validity.³ The Board finds that appellant's arguments concerning procedural flaws in the hearing lack sufficient color of validity and do not warrant a reopening of his case for a review of the merits of his claim.

As appellant's September 11, 1997 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review of his claim, the Board will affirm the Office's December 12, 1997 decision denying his request.⁴

The December 12, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 16, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

³ See *Constance G. Mills*, 40 ECAB 317 (1988) (legal premise not previously considered must have reasonable color of validity); see generally *Daniel O'Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application; if the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient).

⁴ 20 C.F.R. § 10.138(b)(2).