U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of HARRY G. SCHORTMANN, JR. and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Nashua, NH

*Docket No. 99-2218; Submitted on the Record;*
*Issued June 14, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs used the proper rate of pay in computing appellant's compensation for the period beginning January 1, 1979 through December 31, 1996; and (2) whether the Office erred in denying appellant's request for merit review pursuant to section 8128.

On May 19, 1978 appellant, then a 46-year-old air traffic control specialist, filed an occupational disease claim alleging that he developed a dermatological condition due to factors of his employment on or prior to February 27, 1975.[1] The Office accepted the claim for temporary aggravation of neurodermatitis. The employing establishment noted that appellant's pay rate at the time he stopped work was $17,956.52 excluding extra pay for night differential, holiday and Sunday pay.

The record contains a copy of appellant's SF-50 form approving his disability retirement effective September 19, 1978 and that he was a GS-11, Step 5.

In letters dated August 11, 1997 and May 28, 1998, the employing establishment noted the qualification criteria for an employee to reach a GS-12 and GS-13 was as follows:

"GS-9 to GS-11 -- 1 year

[1] On the back of the CA-2 form, the employing establishment noted that appellant had been approved for disability retirement effective August 23, 1978 and his length of federal service was seven years and seven months. Prior to his disability retirement, appellant had been transferred to the ATC second career training pool on May 23, 1976 where he received training to qualify him as a minister-administrator/counselor. At the time of his injury appellant's salary was based upon his GS-11, Step 3 wages plus night differential, holiday and Sunday pay. He retired on September 20, 1978 and received disability benefits from the Office of Personnel Management from September 20, 1978 through September 30, 1997.

"GS-11 to GS-12 -- 1 year, 3 months

"GS-12 to GS-13 -- 1 year"

By decision dated December 7, 1992, the Office terminated appellant's compensation on the basis that his temporary aggravation of neurodermatitis had ceased. On May 30, 1997 the Office vacated the prior decision and reinstated compensation.

On October 9, 1997 the Office placed appellant on the rolls for temporary total disability and made a loss of wage-earning capacity determination.

In response to various inquiries by appellant, the Office, in a December 12, 1997 decision, found that appellant was not entitled to the five percent Operational Responsibility Differential (ORD), that the number of years used to compute his earnings was correct and that whole years were used because his earning determination was based upon his income tax returns for the period January 1, 1979 through December 31, 1996. Appellant later requested a hearing by letter dated January 11, 1998.

Regarding promotions, an employing establishment handbook stated:

> "[A]ir traffic controllers are in a recognized career progression field. As such, they may be promoted as exceptions to competitive procedures, as they become eligible, until they reach the full performance level in the facility to which assigned. These promotions are not automatic. Each controller must demonstrate his ability to perform at the next higher level. He must merit the promotion."

By decision dated August 3, 1998, the hearing representative affirmed in part and reversed in part the Office's December 12, 1997 decision. In the decision, the hearing representative affirmed the Office's finding that appellant failed to qualify as a "learner" under section 8113, found that the Office incorrectly found that appellant was not entitled to the ORD premium awarded all air traffic controllers in 1983 and that the Office used the wrong number of years to calculate appellant's actual earnings.

On September 14, 1998 appellant requested reconsideration of the hearing representative's decision, stating that it was incorrect and that he intended to submit both written and oral evidence.

In a letter dated September 29, 1998, the Office denied appellant's request for a merit review on the basis that no evidence had been submitted nor had he raised any substantive legal questions.[2]

The Board finds that the hearing representative properly computed appellant's compensation for the period January 1, 1979 through December 31, 1996.

[2] The Board notes that the Office received additional medical evidence subsequent to the issuance of its September 29, 1998 nonmerit decision. The Board has no jurisdiction to consider this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

Under the Federal Employees' Compensation Act, compensation is based on an employee's monthly pay, which is defined under section 8101(4) of the Act as the greatest of the rate of pay at the time of injury, the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time employment with the United States.[3] However, section 8113(a) of the Act provides:

> "If an individual --
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> (1) was a minor or employed in a learner's capacity at the time of injury; and
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> (2) was not physically or mentally handicapped before the injury;
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> "[T]he Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity."[4]

In interpreting this section of the Act, the Board has held that "the Act contemplates but one increase in wage-earning capacity upon the learner's completion of training or the minor's reaching the age of majority; but it does not contemplate such factors as future promotions, increases in salary or advancements, as these rest upon a number of indefinite and uncertain contingencies which place the happening of an event in the realm of possibility, not probability."[5] In later cases, the Board continued to interpret section 8113 of the Act as providing that an employee is only entitled to compensation at the pay rate he would have received when he would have completed training.[6] To reflect this interpretation of the Act, the Office issued FECA Program Memorandum No. 122 (issued May 19, 1970) which stated:

> "In effect, the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his learner's status which would have brought him either: (1) to a new level within; or (2) to completion of his learner's program."

In the instant case, appellant was employed as an air traffic control specialist, GS-11, Step 3, on February 27, 1975, the date of his injury. At the time of his disability retirement on September 20, 1978, appellant was in the ATC second career training pool as a GS-11, Step 5; a position he had held since May 23, 1976. As in the *Parkes*[7] case appellant was not a participant

[3] 5 U.S.C. § 8101(4).

[4] 5 U.S.C. § 8113(a).

[5] *Robert H. Merritt*, 11 ECAB 64, 66-67 (1959).

[6] *See Bruce E. Hickey*, 19 ECAB 98, 99-100 (1967).

[7] *James L. Parkes*, 13 ECAB 515 (1962)

in a formal training program with a specified period for completion, at which time he would have automatically been promoted to a higher grade. Moreover, the employing establishment's procedures clearly state that an air traffic controller must merit the promotion. Therefore, appellant's status was not any different from any regular employee in that the opportunity for advancement to a higher grade was dependent on his demonstrated ability, merit and the availability of a position.[8] The fact that the effects of an employment injury preclude the employee from obtaining a higher-paying job does not establish a loss of wage-earning capacity, nor does it establish that the employee was employed in a learner's capacity at the time of the injury.[9] Therefore, the Board finds that the circumstances here do not warrant a finding that appellant was a "learner" so as to entitle him to an increase in his "monthly pay" upon which to compute compensation for loss of wage-earning capacity due to any work-related disability.[10]

The Board also finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[11] the Office's 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 fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[12] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[13]

In this case, appellant did not submit any additional evidence with his request for reconsideration. The September 14, 1998 reconsideration request alleges that the hearing representative's decision was incorrect and that he intended to submit both written and oral evidence. Appellant did not advance a relevant point of law or fact not previously considered, nor submitted new and relevant medical evidence. Accordingly, the Board finds that the Office properly denied merit review in this case.

[8] *Id.; see also Robert Allan*, 30 ECAB 1154 (1979).

[9] *See John Olejarski*, 39 ECAB 1138 (1988).

[10] *Robert Allan*, *supra* note 8.

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.138(b)(1).

[13] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

The decisions of the Office of Workers' Compensation Programs dated September 29, and August 3, 1998 are hereby affirmed.

Dated, Washington, DC
June 14, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member