

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY RAMEY and DEPARTMENT OF LABOR, MINE SAFETY &
HEALTH ADMINISTRATION, Elkhorn City, KY

*Docket No. 00-2801; Submitted on the Record;
Issued April 18, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review.

The Office accepted appellant's claim filed on May 8, 1989 for bilateral carpal tunnel syndrome. Appellant retired in November 1992 and received appropriate compensation.¹ Subsequently, he was reemployed as a mine safety and health specialist, starting in March 1999, earning \$42,936.00 as a GS-9, step 10.

On the date of injury, June 13, 1988, appellant was a GS-12, step 4, earning \$36,539.00 per year. The same position in March 1999 paid \$52,681.00. By the time he left the employing establishment in 1992, he was a GS-12, step 6, earning \$43,509.00. The same position earned \$55,874.00 as of March 1999.

By letter dated April 13, 1999, appellant's representative inquired whether appellant should be receiving the difference between the pay scale of a GS-9, step 10 and a GS-12, step 6, rather than GS-12, step 4.

By decision dated May 4, 1999, the Office adjusted appellant's wage-loss compensation to reflect the difference between his compensation pay rate and his wages in his new position, amounting to \$520.00 every four weeks. Appellant requested reconsideration, arguing that his compensation should be based on the GS-12, step 6 rate. Because carpal tunnel syndrome was a progressive disease, the date of injury should be later than July 1988, which was merely a processing date for the claim. Appellant contended that he was not diagnosed with carpal tunnel

¹ Appellant, a former mine inspector, also filed claims for chronic bronchitis related to coal dust exposure and work-related hearing loss. The Office accepted both claims and paid schedule awards for lung impairment, hearing loss and loss of use of both arms due to carpal tunnel syndrome.

syndrome until 1990 and continued using leave until his employment ended in November 1992 when he had achieved the higher, step 6 pay rate.

On August 17, 1999 the Office denied modification of its prior decision. The Office explained how it had calculated appellant's loss of wages, noting that when appellant first became aware of his symptoms on June 13, 1988 and filed his claim on May 8, 1989, he was employed as a GS-12, step 4. (Disability began on April 17, 1989.) Therefore, the correct current pay rate when injured was that set at GS-12, step 4.

Appellant again requested reconsideration, arguing that the Office paid him wage-loss compensation at the GS-12, step 5 rate while he was disabled, but reverted to the step 4 rate when he was reemployed in March 1999. He also argued that he should have received the step 6 rate in 1991 and should now be paid at the step 7 rate. Appellant submitted copies of December 16, 1991 and April 9, 1999 letters from the Office and a computer printout of the Office's calculation of compensation.

On August 24, 2000 the Office denied appellant's request on the grounds that the evidence submitted was cumulative and, therefore, insufficient to warrant reconsideration of its August 17, 1999 decision. The Office explained that the law "is very clear that the comparison of current earnings is with the current earnings for your date-of-injury job," which in this case was GS-12, step 4.

The Board finds that the Office properly denied appellant's request for reconsideration.

The only Office decision before the Board on appeal is dated August 24, 2000, denying appellant's request for reconsideration. Because more than one year has elapsed between the Office's last merit decision dated August 17, 1999 and the filing of this appeal on September 11, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.²

Section 8128(a) of the Federal Employees' Compensation Act³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office 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).⁵ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously

² 20 C.F.R. §§ 501.2(c); 501.3(d)(2). See *John Reese*, 49 ECAB 397, 399 (1998).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8128(a) ("[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. § 10.608(a) (1999).

considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁶ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.⁷

With his request for reconsideration, appellant submitted no new pertinent evidence. The copies of the Office letters and printout were already in the record and were considered by the Office in its August 17, 1999 decision. Therefore, appellant failed to meet subsection iii of section 10.608(b).

Appellant's argument that he should be compensated at the GS-12, step 6 rate instead of the step 4 rate has no validity, as the Office thoroughly explained in its discussion of wage-earning capacity on August 17, 1999. He has failed to show that the Office erred in interpreting the law and regulations governing wage-earning capacity. Nor has appellant advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.⁸

The August 24, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 18, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ 20 C.F.R. § 10.606(b)(1)-(2) (1999).

⁷ 20 C.F.R. § 10.608(b) (1999).

⁸ See *Cleopatra McDoughal-Saddler*, 50 ECAB 367, 369 (1999) (the Office properly denied merit review on the grounds that appellant's legal contention was previously raised and decided).