

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KYU J. KELLY and U.S. POSTAL SERVICE,  
POST OFFICE, Las Cruces, NM

*Docket No. 02-1851; Submitted on the Record;  
Issued December 9, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

This case has previously been on appeal before the Board. By decision dated October 4, 2000, the Board found that the Office improperly determined appellant's loss of wage-earning capacity for the period beginning February 18, 1997. The Office found that appellant's position as a self-employed accounting service business owner fairly and reasonably represented her wage-earning capacity. However, the Office did not use appellant's earnings in this position as the basis for her wage-earning capacity, instead using the amount appellant estimated it would have cost her to hire someone to perform her position.<sup>1</sup>

On return of the case record, the Office obtained from appellant a copy of her income tax return for 1994.

By decision dated June 18, 2001, the Office found that appellant had been self-employed as an accounting service business owner/operator, effective February 18, 1997, and that this position fairly and reasonably represented her wage-earning capacity. The Office's decision stated:

"The original decision was in error because it rated you as though you had actually earned \$400.00 per week. This was the salary reported for this position had the company actually hired for the amount \$10.00 per hour. The Office was

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<sup>1</sup> Docket No. 99-1636.

in error by stating that you actually earned this amount. Instead, it should be noted that this is the amount that you were capable of earning in this capacity. However, you did not provide any earnings for the 1994 tax year.”

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“The Board has held that the test of what constitutes a reportable earnings is not whether a claimant has received a salary, but what it would have cost to have someone else do the work. Based on the foregoing it is found that your current position as a self-employment accounting service business owner being performed fairly and reasonably represents your wage-earning capacity.”

By letter dated February 11, 2002, appellant requested reconsideration, stating that it was improper to use appellant’s earnings from 1994 as the basis of her wage-earning capacity, as the Board indicated that appellant began her business in December 1994. Appellant contended that one month of earnings in a self-employed business could not fairly and reasonably represent her wage-earning capacity, and submitted her income tax returns from 1995 and 1996, which she indicated should be used in determining her wage-earning capacity. Appellant also contended that she had no actual earnings from her self-employment and that the Office had not submitted sufficient information to determine how it arrived at its June 18, 2001 decision.

By decision dated April 22, 2002, the Office found that appellant had not submitted any evidence that was not repetitious in nature, that she did not advance any new legal contentions, and that her request for reconsideration was insufficient to warrant a merit review of the file.

The only Office decision before the Board on this appeal is the Office’s April 22, 2002 decision finding that appellant’s application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office’s most recent merit decision on June 18, 2001 and the filing of appellant’s appeal on July 2, 2002, the Board lacks jurisdiction to review the merits of appellant’s claim.<sup>2</sup>

The Board finds that the Office improperly refused to reopen appellant’s case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

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<sup>2</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>3</sup> Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>4</sup>

The 1995 and 1996 tax returns that appellant submitted with her February 22, 2002 request for reconsideration constituted relevant new evidence, since the Office must determine whether the employee's actual earnings fairly and reasonably represent his or her wage-earning capacity.<sup>5</sup> Appellant's 1995 and 1996 tax returns are relevant to this determination.<sup>6</sup>

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<sup>3</sup> *Eugene F. Butler*, 36 ECAB 393 (1984).

<sup>4</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>5</sup> *Radames Delgado-Serrano*, 47 ECAB 650 (1996).

<sup>6</sup> Appellant's representative notes in his appeal that the Office decision, issued April 22, 2002, bears the date of December 4, 2001. Although the date appears as December 4, 2001, it is obviously an error as appellant's request for reconsideration was not filed until February 11, 2002. Thus, the Board finds that the date on the claims examiner's decision is a typographical error and that it was actually issued on April 22, 2002. In addition, appellant's representative notes that the Office mailed its April 22, 2002 decision to the representative's incorrect address. In view of the decision of the Board to reverse the Office's April 22, 2002 decision and remand the matter to the Office for a merit review, the argument is moot.

The April 22, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for a merit decision addressing appellant's loss of wage-earning capacity beginning February 18, 1997.

Dated, Washington, DC  
December 9, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member