

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNON L. LEE and DEPARTMENT OF AGRICULTURE,
DEADWOOD RESERVOIR, Lowman, ID

*Docket No. 01-1685; Submitted on the Record;
Issued June 11, 2002*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the selected position of lot attendant represented appellant's wage-earning capacity; and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

The Board finds that the Office properly reduced appellant's compensation based on its determination that the selected position of lot attendant represented appellant's wage-earning capacity.

The Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the December 21, 2000 decision of the Office hearing representative is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.

In a January 25, 2001 letter, appellant requested reconsideration of the hearing representative's decision.

By decision dated May 3, 2001, the Office denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was repetitious, irrelevant and cumulative, and thus, insufficient to warrant a review of its prior decision.

The Board finds that the Office abused its discretion in refusing to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.³ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.⁴

In support of his request for reconsideration, appellant submitted the following evidence: (1) page 3 of a December 15, 1998 note of Dr. R. Richard Maxwell, a Board-certified orthopedic surgeon and his treating physician, regarding appellant's physical limitations; (2) pages 9-10 of the hearing transcript wherein he testified that the requirements of the lot attendant position exceeded his physical limitations and vocational skills and the rehabilitation counselor encouraged him not to divulge any information regarding his back injury during job interviews and on applications; (3) page 1 of the Office's February 28, 2000 memorandum regarding its proposed reduction of his compensation; (4) earnings and leave statements covering the period August 1 through September 29, 1999; (5) page 1 of the Office's May 10, 2000 decision finalizing its proposed reduction of his compensation; (6) the rehabilitation plan and award he signed on April 7, 1999; (7) the individual rehabilitation placement plan and job search plan and agreement he signed on April 7, 1999; and (8) the Office's November 19, 1999 response to a letter from Senator John McCain's office. The evidence submitted by appellant was previously of record and considered by the Office. As the Office previously considered this evidence, it is duplicative and repetitive in nature and, therefore, insufficient to warrant a merit review of the case.⁵

Appellant also submitted job descriptions for the position of lot attendant from several employers. Prescott Auto Sales required a lot attendant to wash cars, put gas in the cars, clean dealership, move parts and other articles in excess of 50 pounds and deal with hazardous chemicals. Lamb Chevrolet required a lot attendant to stand six to eight hours per shift, lift parts weighing up to 70 pounds several times during each shift.

Further, appellant submitted a March 12, 2001 note entitled "Job Description" from Dr. Maxwell indicating that he was unable to fulfill the lifting requirement of 70 pounds.

¹ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(1)-(2).

³ *Id.* at § 10.607(a).

⁴ *Id.* at § 10.608(b).

⁵ *James A. England*, 47 ECAB 115 (1995).

The Office found that the physical requirements of the selected position of lot attendant, as set forth in the Department of Labor, *Dictionary of Occupational Titles*, were within the restrictions given by Dr. Maxwell. Dr. Maxwell restricted appellant to no lifting more than 35 pounds, and he placed restrictions on bending, stooping or climbing stairs and ladders.

Appellant has submitted relevant and pertinent new evidence with his request for reconsideration not previously considered by the Office indicating that actual lot attendant positions in his area exceeded his physical requirements and that Dr. Maxwell opined that he could not perform the lifting requirement of these positions.⁶ The Board, therefore, finds that the Office abused its discretion in denying appellant's request for a merit review of his claim.

The May 3, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed and the case is remanded for further consideration on its merits. The Office's December 21 and May 10, 2000 decisions are hereby affirmed.

Dated, Washington, DC
June 11, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Barbara J. Hines*, 37 ECAB 445 (1986).