

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CLIFTON C. REID and U.S. POSTAL SERVICE,  
PROCESSING & DELIVERY CENTER, Hicking, NC

*Docket No. 02-763; Submitted on the Record;  
Issued November 22, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for reconsideration of the merits on November 8, 2001.

Appellant, a 37-year-old distribution clerk, filed a claim on July 30, 1974 alleging that he injured his left arm in the performance of duty. The Office accepted appellant's claim for olecranon bursitis on the left and left triceps insertion tendinitis. Appellant returned to light-duty work as a modified distribution clerk at the employing establishment on October 14, 1997. By decision dated January 9, 1998, the Office reduced appellant's compensation benefits based on his earnings in the modified position.

Appellant filed a notice of recurrence of disability on March 19, 1998 alleging additional symptoms due to his employment injury. In a letter dated April 20, 1998, the Office stated that as appellant did not lose time from work it would not address this claim and informed appellant that if he disagreed with the January 9, 1998 decision, he should exercise his appeal rights.<sup>1</sup> By decision dated September 21, 1998, the Office granted appellant a schedule award for an additional 10 percent permanent impairment of his left upper extremity. Appellant requested reconsideration of this decision on November 2, 1998. By decision dated January 27, 1999, the Office declined to reopen appellant's claim for schedule award for consideration of the merits and again informed him that if he disagreed with the January 9, 1998 wage-earning capacity determination he should exercise his appeal rights in regard to that decision.

Appellant stopped performing his limited-duty position on April 29, 1998. Appellant filed a series of claims for compensation requesting wage-loss compensation from May 18, 1998 to March 26, 1999. By decision dated May 14, 1999, the Office denied appellant's claim for

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<sup>1</sup> In a letter dated July 3, 1998, appellant stated that he thought that his return to work in October 1997 was on a trial basis and describing his actual employment duties.

recurrence of disability beginning April 9, 1998. Appellant requested an oral hearing on May 26, 1999. By decision dated September 6, 2000, the hearing representative affirmed the May 14, 1999 decision of the Office and noted that appellant had not exercised his appeal rights in regard to the January 9, 1998 wage-earning capacity determination.

Following the September 6, 2000 decision of the hearing representative, appellant, through his attorney, requested reconsideration. Appellant submitted arguments regarding the suitability of his limited-duty position and an affidavit. Appellant also resubmitted evidence already included in the record. By decision dated November 8, 2001, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that the evidence and argument submitted was repetitious.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for recurrence of disability for consideration of the merits.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>2</sup>

Appellant requested reconsideration of the September 6, 2000 decision of the hearing representative, contending that he had attempted to appeal the January 9, 1998 decision, by informing the Office of his inability to perform the specific duties of the modified position<sup>3</sup> and asserted that the Office had the burden of proof to modify compensation benefits. Appellant contended that the employing establishment had altered his modified position by March 1998 reducing his duties to answering a telephone equipped with a speaker, therefore, establishing that the modified position was not a suitable basis for his wage-earning capacity. He also alleged that the Office had never determined whether appellant could perform the duties of answering the telephone as provided by the employing establishment.

The record does not contain a letter from appellant requesting reconsideration of the January 9, 1998 decision, reducing his compensation based on his wages earned in the modified distribution clerk position. The Office has not issued a decision addressing appellant's loss of wage-earning capacity following the determination on January 8, 1998. In the May 14, 1999 Office decision and the September 6, 2000 hearing representative's decision, the Office clearly limited the issue to whether appellant had met his burden of proof in establishing a recurrence of disability on or after April 9, 1998. As there is no final decision on the issue of wage-earning capacity issued within one year of appellant's appeal to the Board on February 1, 2002 the Board does not have jurisdiction to address the issue of wage-earning capacity on appeal.<sup>4</sup>

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<sup>2</sup> 5 U.S.C. §§ 10.609(a) and 10.606(b).

<sup>3</sup> The Office's regulations provide that reconsideration must be requested from the district office, must be made in writing and should include supporting documents or arguments. 20 C.F.R. §§ 10.605, 10.606.

<sup>4</sup> 20 C.F.R. § 501.3(d)(2).

As noted above, the Office's May 14, 1999 decision, only addressed the issue of recurrence of disability on or after April 9, 1998. Appellant requested an oral hearing and in the September 6, 2000 decision, the hearing representative specifically stated that she was not considering appellant's January 9, 1998 loss of wage-earning capacity determination as he had not exercised his appeal rights regarding this decision. The arguments from appellant's attorney addressed the alleged errors in the January 9, 1998 decision, determining appellant's wage-earning capacity based on his actual earnings and not the issue of appellant's recurrence of disability on or after April 9, 1998. Therefore, these arguments are not relevant to the issue before the Board, whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits of his claim for recurrence of disability. Based on the lack of relevance of these arguments to the merit issue, the Office properly declined to reopen the September 6, 2000 decision of the hearing representative.

Appellant also submitted an affidavit in support of his request for reconsideration. Appellant set forth the facts regarding his return to work in the modified position and the changes in his duties made by his supervisor at his request. Appellant further alleged that he had requested reconsideration of the January 8, 2000 wage-earning capacity decision. This affidavit does not constitute new evidence as appellant had testified regarding his work duties at his oral hearing and as the record already contains his descriptions of his need to alter job duties. As appellant's affidavit is repetitive of evidence already contained in the record it is not sufficient to require the Office to reopen appellant's claim for consideration of the merits of the decision denying his alleged recurrence of disability. Appellant's attorney specifically noted that the remainder of the evidence submitted with the request for reconsideration had previously been submitted to the Office. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.<sup>5</sup>

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<sup>5</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

The November 8, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
November 22, 2002

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member