

that the Office used the proper rate of pay for appellant's compensation beginning March 18, 1977.¹

By letter to the Office dated September 12, 2000, appellant requested reconsideration, contending that he was entitled to night differential in his pay rate. He submitted a copy of a June 18, 1999 employing establishment response in a proceeding before the Merit Systems Protection Board (MSPB), wherein the employing establishment stated that, at the time of his 1975 injury, most of appellant's duties were performed between 11:00 p.m. and 7:00 a.m.² By decision dated May 31, 2002, the Office found that the pay rates on November 21, 1975 and March 18, 1977, the dates of his recurrences of disability, were greater without shift pay than his pay rate on his date of injury with shift pay included and that he was paid at the greater, and correct, rate of pay.

By letter received June 21, 2002, appellant requested reconsideration, contending that he was entitled to a 10 percent differential because he worked between 11:00 p.m. and 7:00 a.m. and that application of this differential made his pay rate in November 1975 greater than that used by the Office since March 18, 1977. By decision dated September 17, 2002, the Office found that appellant was not entitled to additional compensation.

By letter dated September 27, 2002, appellant requested reconsideration, contending that he was on permanent night duty and, therefore, was entitled to shift differential for all compensation paid by the Office. By decision dated October 30, 2002, the Office found appellant's request insufficient to warrant review of its prior decisions.

By letter dated July 26, 2003, appellant requested reconsideration, contending that he was advancing a new argument that his pay rate should have been increased by 10 percent because he worked the graveyard shift rather than by 7.5 percent for working the swing shift. Appellant referred to the employing establishment's June 18 and September 10, 1999 statements about his duty hours. By decision dated October 16, 2003,³ the Office found that because appellant's request for reconsideration did not raise substantive legal questions or include new and relevant evidence, it was insufficient to warrant a review of its prior decisions.

¹ 51 ECAB 564 (2000).

² Appellant previously submitted a September 10, 1999 employing establishment response in another MSPB proceeding, containing the same statement regarding his duty hours.

³ By letter dated August 5, 2003, the Office solicited comments from the employing establishment on appellant's request for reconsideration but received no response.

LEGAL PRECEDENT

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.”

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) provide 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.

ANALYSIS

Appellant did not submit any new evidence with his July 26, 2003 request for reconsideration. The legal argument he advanced -- that he was entitled to a 10 percent shift differential -- was previously advanced in his requests for reconsideration received June 21, 2002 and dated September 27, 2002. Appellant also did not show that the Office erroneously applied or interpreted a specific point of law. The Board's June 27, 2000 decision found that the evidence established that appellant was reassigned, as opposed to temporarily assigned, to the day shift on April 6, 1975 and that he was, therefore, not entitled to shift differential after that date. Appellant's July 26, 2003 request for reconsideration does not show this was an improper application of the law.

CONCLUSION

As appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2), the Office properly refused to reopen his case for further review of the merits of his claim for an increased rate of pay.

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member