United States Department of Labor
Employees' Compensation Appeals Board

ALAN L. BRADY, Appellant	)	
and	)	**Docket No. 03-145**
	)	**Issued: July 8, 2004**
DEPARTMENT OF THE ARMY, WATERVLIET ARSENAL, Watervliet, NY, Employer	)	

Appearances:
Alan L. Brady, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 15, 2002 appellant filed a timely appeal from the December 18, 2001 and January 25, 2002 merit decisions and June 28, 2002 nonmerit decision of the Office of Workers' Compensation Programs. In the December 18, 2001 decision, the Office denied appellant's claim of a recurrence of disability on December 2, 2000 causally related to his April 28, 1986 employment injury. The January 25, 2002 decision modified a February 14, 2001 decision to reflect appellant's pay rate for his date-of-injury job in determining that his actual earnings as a financial aide clerk fairly and reasonably represented his wage-earning capacity. In the June 28, 2002 decision, the Office denied appellant's request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on December 2, 2000 causally related to his April 28, 1986 employment injury; (2) whether the Office properly determined appellant's actual wages as a financial aide clerk

fairly and reasonably represented his wage-earning capacity; and (3) whether the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 28, 1986 appellant, then a 29-year-old machine tool operator, filed a traumatic injury claim alleging that on that date he experienced pain in his lower back while unloading a broading machine. Appellant stopped work on the date of injury. He returned to light-duty work on May 5, 1986 and returned to his regular duties on May 12, 1986. The Office accepted appellant's claim for lumbosacral strain.

By letter dated October 22, 1992, the employing establishment proposed to reassign appellant from his machine tool operator position, W6-3431-8, to the lower grade position of financial aide clerk, GS-503-04, at a retained pay rate based on the results of a December 3, 1991 fitness-for-duty examination which revealed that he was unable to perform the physical requirements of the machine tool operator position. The employing establishment noted that appellant was unable to lift over 15 pounds and could not engage in prolonged repetitive lifting, bending or twisting. On November 27, 1992 appellant was reassigned to the position of financial aide clerk.

On December 4, 2000 appellant was released from the employing establishment due to a reduction-in-force (RIF). The employing establishment stated that appellant's position of financial aide clerk was being abolished and that his position was identified in an across-the-board RIF along with 100 other full-time positions.

By decision dated February 14, 2001, the Office issued a retroactive determination that appellant had no loss of wage-earning capacity. The Office found that, effective January 11, 1991, appellant had been reemployed as a financial aide clerk with the employing establishment with wages of $520.40 per week. The Office found that appellant had satisfactorily performed the duties of the financial aide clerk position and determined that this position fairly and reasonably represented his wage-earning capacity. The Office stated that, after his injury, appellant returned to work at a retained pay rate and, therefore, he incurred no wage loss. In so doing, the Office applied the principles of the *Alfred C. Shadrick*[1] formula.

On August 13, 2001 appellant filed a claim alleging that he sustained a recurrence of disability on December 2, 2000 causally related to his April 28, 1986 employment injury. He stopped work on December 2, 2000. Appellant submitted a claim for compensation (Form CA-7), and an undated attending physician's report from Dr. Gary A. Williams, a Board-certified orthopedic surgeon, indicating that he sustained an injury in 1986, that his chronic back strain was caused by an employment activity with an affirmative mark and that he was partially disabled for work until July 25, 2001. He also submitted the Office's February 14, 2001 decision and May 27, 1993 decision regarding a previous recurrence claim he filed, and a medical bill and referral slip. In addition, appellant submitted the employing establishment's October 22, 1992 letter, an undated disability certificate from a physician whose signature is illegible providing a diagnosis of chronic thoracic lumbar sprain, his physical restrictions and a finding that he was

[1] 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

permanently disabled starting October 29, 1991 and correspondence from the employing establishment.

By letter dated August 27, 2001, the Office advised appellant about the type of factual and medical evidence he needed to submit to establish his recurrence claim. In a September 1, 2001 letter, appellant stated that he was separated from the employing establishment due to a RIF. He noted that there was no specific activity that caused the recurrence on this date other than having a light-duty position taken away. Appellant stated that his condition remained the same as when he was put on permanent light duty. He also submitted a February 12, 1992 form report from Dr. Yong C. Bradley, an employing establishment physician, noting his physical restrictions.

The Office received the July 25, 2001 treatment notes of Dr. Williams who reviewed a history of the April 28, 1986 employment injury and appellant's complaint of chronic back pain. Dr. Williams conducted a review of appellant's systems and medical, social and family histories. He provided his findings on physical and objective examination and diagnosed chronic back strain.

On December 7, 2001 the Office asked the employing establishment whether the RIF was across the board, involved only a few select individuals in addition to appellant and whether it involved full-time workers or those on light duty. The employing establishment replied that appellant's position was identified in an across-the-board RIF and that 100 positions were affected by the action. The employing establishment noted that all the positions affected were full-time positions.

By decision dated December 18, 2001, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on December 2, 2000 causally related to his April 28, 1986 employment injury.

The Office received medical treatment notes from employing establishment physicians covering the period April 16, 1985 through March 26, 1992 concerning appellant's various conditions including, his back condition.

Appellant requested reconsideration of the Office's February 14, 2001 decision. In December 3 and 26, 2001 letters, appellant contended that he was not retrained or otherwise vocationally rehabilitated for the financial aide clerk position. He stated that, when his job duties fell outside his permanent limitations, the employing establishment told him to obtain assistance from his coworkers to complete the task. Appellant contended that the financial aide clerk position was a makeshift position designed for his particular needs that he had not been retrained and there was no opportunity for advancement. He argued the financial aide position did not fairly and reasonably represent his wage-earning capacity. Appellant submitted claims for compensation, correspondence from the employing establishment concerning his reassignment to the lower grade position, and documents regarding his change in position. In an August 2, 2001 report, Dr. Williams provided a history of appellant's April 28, 1986 employment injury, a diagnosis of chronic back strain and his physical limitations.

In a January 25, 2002 decision, the Office modified the Office's February 14, 2001 decision to reflect appellant's correct current pay rate for his date-of-injury job as a machine tool operator. The Office found that the evidence of record did not establish that the financial aide clerk position was not suitable or that it did not fairly and reasonably represent appellant's wage-earning capacity. Regarding the December 18, 2001 decision, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability due to the RIF.

In a letter dated February 10, 2002, appellant requested reconsideration, contending that the financial aide clerk position had been modified and he had been retrained in such a way that his actual wages did not adequately represent his wage-earning capacity. He argued that the position was a makeshift position and it was not available on the open labor market. Appellant submitted performance appraisals that rated him successful in the position of financial aide clerk and a personnel form dated June 30, 1992.

On June 28, 2002 the Office issued a decision denying appellant's request for reconsideration on the grounds that the evidence submitted was of a repetitious and irrelevant nature.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[2]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[3]

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[4]

[2] 20 C.F.R. § 10.5(x) (1999).

[3] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *James H. Botts*, 50 ECAB 265 (1999).

ANALYSIS -- ISSUE 1

Appellant did not stop work on December 2, 2000 because of a change in the nature and extent of his injury-related condition. He stopped work because of a RIF. Appellant has submitted no medical opinion evidence establishing that the injury he sustained on April 28, 1986 worsened to the point that he could no longer perform the limited-duty work that he had successfully performed prior to December 2, 2000. Dr. Williams' attending physician's report which indicated with an affirmative mark that appellant's chronic back strain was caused by a 1986 injury and that he was partially disabled for work until July 25, 2001 failed to address the relevant issue of disability as of December 2, 2000 as caused by the accepted injury. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[5]

Dr. Williams' July 25, 2001 treatment notes and August 2, 2001 medical report finding that appellant had chronic back strain failed to address whether appellant's back condition was caused by the April 28, 1986 employment injury.[6]

The undated disability certificate from a physician whose signature is illegible stated a diagnosis of chronic thoracic lumbar sprain, appellant's physical restrictions and finding that appellant was permanently disabled commencing October 29, 1991. This is prior to the December 2, 2002 claim. The treatment notes from employing establishment physicians covering the period April 16, 1985 through March 26, 1992 concerning appellant's various conditions including his back condition are similarly irrelevant to the issue of disability as of December 2, 2002. They predate the alleged recurrence of disability on December 2, 2000 and, thus, fail to address whether or how appellant's disability on that date was caused by his April 28, 1986 employment injury.[7]

Appellant did not stop work on December 2, 2000 because of a change in the nature and extent of his limited-duty job requirements such that he could no longer perform the limited-duty job under his existing medical restrictions. He stopped work because of a RIF that had nothing to do with his April 28, 1986 employment injury or the medical restrictions resulting therefrom. The employing establishment stated that appellant's position of financial aide clerk was being abolished and that appellant's position was identified in an across-the-board RIF along with 100 other full-time positions. The Office's procedure manual provides that a recurrence of disability does not include a work stoppage caused by true RIFs, where employees performing full duty, as well as those performing light duty, are affected.[8]

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[5] *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

[6] *James H. Botts, supra* note 4.

[7] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(2)(c) (May 1997).

The Board finds that the record in this case fails to establish that the residuals of appellant's April 28, 1986 employment injury prevented him from continuing in his employment at the employing establishment beyond December 2, 2000.

LEGAL PRECEDENT -- ISSUE 2

It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation of benefits.[9] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Federal Employees' Compensation Act[10] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earning fairly and reasonably represent his wage-earning capacity.[11] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[12] However, if actual earnings are derived from a make-shift position designed for the employee's particular needs[13] or when the job constitutes part-time, sporadic, seasonal or temporary work,[14] actual earnings may not represent wage-earning capacity.

ANALYSIS -- ISSUE 2

In this case, the Office accepted that, on April 28, 1986, appellant sustained a lumbosacral strain. He was reassigned from the position of machine tool operator to the position of financial aide clerk at retained pay effective January 11, 1991. The Office determined in its February 14, 2001 decision that appellant had no loss of wage-earning capacity as of that date based on his actual earnings as a financial aide clerk at the employing establishment beginning January 11, 1991. As appellant had satisfactorily performed the duties of this position, the Office determined that the position fairly and reasonably represented appellant's wage-earning capacity. At the time the Office issued its loss of wage-earning capacity determination on February 14, 2001, appellant was in a retained pay position and therefore had no loss of wage-earning capacity.[15] This determination is consistent with section 8115(a) of the Act as cited above.

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[9] *See Lawrence D. Price,* 47 ECAB 120 (1995); *Charles E. Minniss,* 40 ECAB 708 (1989); *Vivien L. Minor,* 37 ECAB 541 (1986).

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8115(a); *Loni J. Cleveland,* 52 ECAB 171 (2000).

[12] *Stanley B. Plotkin,* 51 ECAB 700 (2000).

[13] *William D. Emory,* 47 ECAB 365 (1996).

[14] *See Monique L. Love,* 48 ECAB 378 (1997).

[15] *Domenick Pezzetti,* 45 ECAB 787 (1994).

The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a make-shift position designed for claimant's particular needs.[16] The record indicates that appellant was performing all of the duties described for the position of financial aide clerk. Appellant stated that, when certain requirements of this position exceeded his permanent limitations, the employing establishment told him to get help from his coworkers to complete the task. The employing establishment offered appellant the position of financial aide clerk as he satisfied regulatory and medical requirements. Appellant has not submitted the necessary evidence to establish that the position he filled would not exist except for the need to accommodate his work restrictions.

As of January 11, 1991, appellant was assigned as a financial aide clerk, GS-0503-04, which required the development and maintenance of financial records, attendance at meeting, inventory control, creation of marketing strategies, administrative duties and other duties as assigned. This assignment was given to appellant not only because of his physical disabilities, but also because of his experience and expertise.[17] The Board finds that this is a further indication, irrespective of pay rate, that appellant's duties were appropriate, and fairly and reasonably represented his wage-earning capacity.

The Board notes that the Office retroactively reduced appellant's compensation on the grounds that his employment as a financial aide clerk became effective on January 11, 1991. The Office's procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in a position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and "the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work."[18]

As a financial aide clerk, appellant had actual earnings for the period January 11, 1991 through December 2, 2000 at the rate of $520.40 per week for working a 40-hour week. While the Act contemplates that actual earnings will not be used to determine wage-earning capacity if they do not fairly and reasonably represent wage-earning capacity, in the present case, appellant had actual earnings for a period of over four months and as found above he did not submit any evidence to establish that his earnings as a financial aide clerk did not fairly and reasonably represent his wage-earning capacity. As appellant's position as a financial aide clerk was not makeshift,[19] part time, seasonal, sporadic or temporary[20] and as he worked at the position

[16] *William D. Emory*, 47 ECAB 365 (1996).

[17] The record reveals that appellant was appointed to the position of funds control assistant on October 6, 1992 which required him to be in charge of the daily activity report, inventory controls and petty cash vouchers.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (May 1997); *Ronald Litzler*, 51 ECAB 588 (2000).

[19] *See William D. Emory,* 47 ECAB 365 (1996) (grandfather's babysitting position was designed for his particular needs).

[20] *See Monique L. Love*, 48 ECAB 378 (1997) (appellant's position was "sheltered" designed only for her particular needs).

successfully for more than 60 days,[21] the Office properly determined his wage-earning capacity based upon his actual earnings rather than on a constructed position.

The Office applied the *Shadrick* formula for determining loss of wage-earning capacity based on appellant's actual earnings. The Office first calculated appellant's wage-earning capacity in terms of percentage by dividing his earnings by the "current" pay rate.[22] Appellant's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes (defined at section 10.5(s) as the pay rate at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater) by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.[23] Compensation payable is then adjusted by the applicable cost-of-living adjustments.

The Board finds that appellant had worked in the position of financial aide clerk steadily for a period in excess of 60 days, the Office had made a determination that the employment position of financial aide clerk fairly and reasonably represented appellant's wage-earning capacity and appellant's work stoppage did not occur because of any change in his injury-related condition affecting his ability to work, but rather occurred due to a RIF. The Board finds that such a retroactive determination of loss of wage-earning capacity is appropriate under the facts of this case.

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[24] Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[25]

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).[26] 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

[21] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (November 2000); *see contra Beverly Dukes*, 46 ECAB 1014 (1995); *Corlisia L. Sims (Smith)*, 46 ECAB 172 (1995) (both finding that appellant had not worked the "minimum" 60-day period).

[22] "The Office may use any convenient date for making the comparison as long as both rates are in effect on the date used for comparison." 20 C.F.R. § 10.403(d).

[23] 20 C.F.R. § 10.403(e).

[24] 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[25] *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

[26] 20 C.F.R. § 10.608(a).

interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[27]

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.[28]

ANALYSIS -- ISSUE 3

On reconsideration, appellant has argued that the position of financial aide clerk was a makeshift position created to fit his physical limitations and it was not available on the open labor market. He submitted duplicate documents that were previously of record. Appellant's argument and the duplicate documents he submitted were previously considered by the Office in its January 25, 2002 decision. The Board has found that evidence which repeats or duplicates evidence already in the record has no evidentiary value and does not constitute a basis for reopening a case.[29]

Appellant also submitted performance appraisals that rated him successful in the position of financial aide clerk and a personnel form dated June 30, 1992. This evidence is irrelevant to the issues of whether appellant sustained a recurrence of disability on December 2, 2000 causally related to his April 26, 1986 employment injury and whether his actual wages as a financial aide clerk fairly and reasonably represented his wage-earning capacity and are therefore insufficient to warrant a merit review.

Appellant argued that the financial aide clerk position had been modified and he had not been retrained, thus, the position did not adequately represent his wage-earning capacity and he submitted a description of this position. Appellant has raised these arguments before the Office in his previous December 3, 2001 letter requesting reconsideration of the Office's February 10, 2001 decision. The Board has held that the submission of arguments which repeat or duplicate arguments already in the case record do not constitute a basis for reopening a case.[30] Thus, the duplicate arguments raised by appellant on reconsideration are insufficient to require the Office to reopen his claim for a merit review.[31]

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[27] 20 C.F.R. § 10.606(b)(1)-(2).

[28] 20 C.F.R. § 10.608(b).

[29] *Paul Kovash*, 49 ECAB 350 (1998).

[30] *Linda I. Sprague*, 48 ECAB 386 (1997).

[31] The Board notes that, on appeal, appellant has submitted additional evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c). Appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2) (1999).

As appellant has failed to show that the Office erroneously applied or interpreted a specific point of law, to advance a relevant legal argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review of the merits pursuant to section 8128(a).

CONCLUSIONS

The Board finds that appellant has failed to establish that he sustained a recurrence of disability on December 2, 2000 causally related to his April 28, 1986 employment injury. The Board further finds that the Office properly determined appellant's actual wages as a financial aide clerk fairly and reasonably represented his wage-earning capacity. The Board also finds that the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 28 and January 25, 2002 and December 18, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 8, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member