United States Department of Labor
Employees' Compensation Appeals Board

DAVID CHAMPION, Appellant	)	
and	)	**Docket No. 05-1373**
	)	**Issued: December 15, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer	)	

Appearances:
David Champion, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 13, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated May 19, 2005 which denied appellant's request for reconsideration. Because more than one year has elapsed between the most recent merit decision of April 12, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim but has jurisdiction over the nonmerit issue pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

This is the second time that this case has been before this Board. In a decision dated December 31, 2003, the Board reversed the Office's finding with regard to appellant's wage-

earning capacity. The facts and the history contained in the prior decision are hereby incorporated by reference.[1]

On May 9, 1991 appellant, then a 37-year-old full-time toggle operator, filed a claim for traumatic injury alleging that he injured his back on April 21, 1991 while pulling a mail cart for dispatch. On September 6, 1991 the Office accepted appellant's claim for a lumbar strain and paid appropriate compensation. Appellant returned to work on July 21, 1997 but sustained a recurrence of disability in August 1997.

On February 9, 1999 the employing establishment offered appellant a modified part-time flexible (PTF) mail handler position that complied with the restrictions set forth by the impartial medical specialist. The position was to be for four hours per day for two weeks and then increase to six hours per day. On March 8, 1999 appellant accepted the job offer and began work on March 13, 1999. The record reflects that from March 13 to 26, 1999 appellant worked four hours per day and on March 27, 1999 began to work six hours per day.

In a letter dated April 30, 1999, the Office notified appellant that it was reducing appellant's compensation effective March 13, 1999 and again effective March 27, 1999 to reflect that he returned to work effective March 13, 1999 for 20 hours with an increase to 30 hours effective March 27, 1999 based on actual earnings. A formal wage-earning capacity was set in a decision dated June 14, 1999 for a modified PTF mail handler for six hours per day with wages of $581.61 per week effective March 27, 1999. Appellant's requests for modification were denied by decisions dated March 22 and July 25, 2001. On appeal, the Board found that the Office improperly denied modification of appellant's wage-earning capacity determination.

By decision dated April 12, 2004, the Office determined that appellant's actual earnings as a modified PTF mail handler fairly and reasonably represented his wage-earning capacity. The Office computed appellant's new compensation rate every four weeks at $230.00. The Office noted that appellant's weekly pay rate when injured was $541.01.[2]

By letter dated March 18, 2005, appellant requested reconsideration. Appellant claimed that his wage-earning capacity should be based on the recurrent weekly compensation pay rate of 1998. He submitted pay stubs with regard to his salary in 1997.

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[1] *David Champion*, Docket No. 01-1976 (issued December 31, 2003).

[2] The Office found that the current pay rate for that job for March 27, 1999 was $669.24 (effective March 27, 1999) and that appellant's currently earned $587.61, or 88 percent of the $669.24 paid by his previous job. The Office determined that appellant's wage-earning-capacity in the new position was $476.08 (88 percent times the weekly pay rate when injured). The Office noted that this amounted to a loss of wage-earning capacity of $64.913 per week, and as appellant was compensated at a rate of 2/3, his compensation rate would be $48.70 a week. This figure was increased by cost-of-living adjustments to $57.50 per week, which amounted to a new compensation rate every four weeks of $230.00. The Office noted that the compensation rate would be increased to $257.00 effective March 1, 2004 to represent an increase in cost-of-living adjustments. This formula for determining loss of wage-earning capacity based on actual earning was developed in *Albert C. Shadrick*, 5 ECAB 378 (1953) and has been codified at 20 C.F.R. § 10.403. Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of the injury.

In a decision dated May 19, 2005, the Office denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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) constitute relevant an pertinent new evidence not previously considered by the Office.[4] 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.[5] 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 on the merits.[6]

ANALYSIS

On April 12, 2004 the Office computed appellant's wage-earning capacity as $230.00 per week. On reconsideration, appellant submitted evidence with regard to his pay rate in 1997. However, appellant had previously argued that his pay rate as of the recurrence should be utilized in determining his wage-earning capacity, and this argument had been rejected. The Board has held that evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review.[7] Appellant has not submitted any relevant and pertinent new factual evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously interpreted a specific point of law. Therefore, appellant has not met the criteria to have the Office reopen his case for review on the merits.

CONCLUSION

The Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[3] 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).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.608(b).

[7] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2005 is hereby affirmed.

Issued: December 15, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board