

**United States Department of Labor
Employees Compensation Appeals Board**

KENNETH K. CHRISTENSEN, Appellant)
)
and)
)
U.S. FOREST SERVICE, BITTERROOT)
NATIONAL FOREST, Hamilton, MT, Employer)

Docket No. 04-2085
Issued: February 7, 2005

Appearances:
Kenneth K. Christensen, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On August 23, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated May 6, 2004, which denied merit review. Because more than one year has elapsed between the last merit decision of the Office dated July 3, 2003 and the filing of this appeal on August 23, 2004 pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for merit review.

FACTUAL HISTORY

This case has been before the Board previously. In a December 31, 2002 decision, the Board found the case not in posture for decision on the grounds that the Office failed to consider whether appellant's private industry pay rate at the time of his recurrence of disability should be

used to compute his benefits.¹ The law and the facts as set forth in the previous Board decision is incorporated herein by reference.

Subsequent to the Board's December 31, 2002 decision, in letters dated April 30, May 15 and June 24, 2003 the Office requested that appellant submit information regarding his nonfederal pay rate from Tharaldson Property Management Inc., where he was working at the time of his December 1998 recurrence of disability. In a letter dated May 27, 2003, received by the Office on July 1, 2003, appellant advised that, as he had moved from Fargo, North Dakota to Rapid City, South Dakota and then to Billings, Montana, his papers were in storage and he could not access the requested information. By decision dated July 3, 2003, the Office determined that he was not entitled to a greater pay rate for compensation purposes than that previously used. The Office noted that the only evidence of record concerning the period 1998 was his income tax return for that year which showed total wages of \$25,981.00 and noted that, if this figure were to be used, it would provide a weekly pay rate of \$374.72, which was less than the \$409.00 rate on which appellant's compensation was based.

In a letter dated November 20, 2003, appellant advised that he could not retrieve the 1998 pay rate information and included pay rate information for the years 2000 and 2001. He stated that he was not specifically requesting reconsideration at that time. On April 24, 2004 appellant submitted a form reconsideration request and attached a copy of his November 20, 2003 letter. By decision dated May 6, 2004, the Office denied his reconsideration request, finding the evidence submitted was irrelevant to the issue in this case.

LEGAL PRECEDENT

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).² This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.³ 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 on the merits.⁴

¹ Docket No. 02-1872 (issued December 31, 2002).

² 20 C.F.R. § 10.608(a).

³ 20 C.F.R. § 10.608(b)(1) and (2).

⁴ 20 C.F.R. § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the decision of the Office dated May 6, 2004, denying appellant's application for review. Because more than one year had elapsed between the date of the Office's most recent merit decision dated July 3, 2003 and the filing of his appeal with the Board on August 23, 2004, the Board lacks jurisdiction to review the merits of appellant's claim.⁵

With his November 20, 2003 letter and his April 24, 2004 request for reconsideration, appellant submitted no additional evidence. Rather, he advised that he could not access the pay rate information from Tharaldson Property Management because it was in storage at his former place of residence and requested that pay rate information from 2000 and 2001, which he generally provided be used instead.

Under section 8101(4) of the Federal Employees Compensation Act⁶ monthly pay for compensation purposes is the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability, if more than six months after returning to work.⁷ As appellant's date of recurrence is December 16, 1998, his rate of pay in 2000 and 2001 is not relevant to this claim. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁸ As noted above, in this case, appellant is merely contending that the Office should use his 2000 and/or 2001 pay rate.⁹ He, therefore, did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office and did not submit new and relevant evidence with his reconsideration request.¹⁰ The Board, therefore, finds that the Office properly determined that appellant's request did not constitute a basis for reopening the case for further merit review.¹¹

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review on August 23, 2004.

⁵ 20 C.F.R. § 501.3(d)(2).

⁶ 5 U.S.C. § 8101(4).

⁷ See *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

⁸ *Robert P. Mitchell*, 52 ECAB 116 (2000).

⁹ The Board notes that there is no evidence of record to indicate that appellant contacted Tharaldson Property Management to obtain his 1998 rate of pay information.

¹⁰ *Supra* note 3.

¹¹ *Supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2004 be affirmed.

Issued: February 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member