

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal, the Board issued a decision on May 15, 2003, in which it affirmed the Office decisions dated October 29, 2001 and January 28, 2002.¹ The Board found that the Office properly reduced appellant's compensation benefits effective August 15, 1999² based on its determination that the selected position of Cashier 2³ represented his wage-earning capacity and that the position duties were not of a repetitive nature. The Board also found that appellant failed to meet his burden of proof in establishing a recurrence of disability on or after August 28, 2000 causally related to his accepted March 15, 1982 employment injury.⁴ In the second appeal, the Board affirmed an April 12, 2004 decision, with respect to the Office's determination that modification of the wage-earning capacity was not warranted.⁵ However, the Board found that further clarification was required by the Office on its calculation of appellant's wage rate by using a mean rate. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.⁶

In a decision dated March 31, 2005, the Office found the rate of pay for cashiers in the Philadelphia region was \$327.52 per week. The Office explained that this information was contained in the vocational rehabilitation counselor's June 1, 1999 job classification report upon which the Office based its wage-earning capacity decision.

On April 5, 2005 the Office issued an amended decision vacating the March 31, 2005 decision. The Office noted that the figure of \$327.52 was determined based upon the mean or "median weekly earnings" for both men and women in the Philadelphia region for the position of Cashier 2 located in the "total" column of the "LifeStep Growth Projections Report" designed

¹ Docket No. 02-2265 (issued May 15, 2003).

² The Office issued its initial decision reducing the rate of appellant's compensation benefits based on his wage-earning capacity as a Cashier 2, effective August 15, 1999 on July 16, 1999.

³ The Department of Labor, *Dictionary of Occupational Titles* (DOT) describes the position of Cashier 2, (code 211.462-010) as follows:

"Receives cash from customer or employees in payment for goods or services and records amounts received. Makes change, cashes checks and issues receipts or tickets to customers."

The DOT describes the job requirements as follows: "Sedentary position (lifting up to 10 pounds); requires the ability to reach, handle and finger; must be able to see, talk and hear; requires 30 days of short demonstration."

⁴ On March 15, 1982 appellant, who was then a 32-year-old molder, caught his right hand between the chain and gate he was attempting to hook. The Office accepted the claim for fracture of the fifth right metacarpal and authorized nerve entrapment surgery.

⁵ Docket No. 04-1438 (issued December 14, 2004).

⁶ The Board notes that appellant filed an appeal of a May 15, 2003 decision on July 29, 2003 and the Board docketed the appeal as Nos. 03-1923 and 03-2022. On October 6, 2003 the Board granted appellant's request to dismiss his appeal in Docket No. 03-1923. Also on October 6, 2003 the Board issued an order dismissing Docket No. 03-2022 as a duplicate appeal of Docket No. 03-1923.

for appellant. The Office attached a copy of the report. The Office also noted the “[June] 1, [19]99 report also identifies the Cashier [2] position as ‘light,’ which is defined in that document as requiring occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds.”

On April 21 and May 12, 2005 appellant requested reconsideration of the April 5, 2005 decision. In support of his request he resubmitted a February 2, 1988 report by Dr. Frank A. Mattei, a treating Board-certified orthopedic surgeon and February 8, 1999 questions to the second opinion physician.

On June 2, 2005 the Office denied appellant’s request for further merit review of the April 5, 2005 decision.

In a letter dated June 9, 2005, appellant requested reconsideration. He contended that the April 5, 2005 decision amended the position of Cashier 2 to light duty from sedentary.

On September 6, 2005 the Office received a July 27, 2005 clinic note by Dr. Joseph J. Thoder, an attending Board-certified orthopedic surgeon, who documented that appellant experienced a flare-up of hand and wrist pain.

By decision dated September 15, 2005, the Office denied appellant’s request for further merit review on the grounds that he neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee’s case to an Office wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open market, that fits the employee’s capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.⁷ Finally, application of the principles set forth in *Albert C. Shadrick*⁸ will result in the percentage of the employee’s loss of wage-earning capacity.⁹

⁷ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁸ 5 ECAB 376 (1953).

⁹ See 20 C.F.R. § 10.403.

Section 8114(d)(3) provides:¹⁰

“(d) Average annual earnings are determined as follows --

(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, [5 U.S.C. §§ 8114 (d)(1) or (2)] the average annual earnings are a sum that reasonably represents the employment in which he was working at the time of the injury have regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding the injury.”

ANALYSIS -- ISSUE 1

The issue before the Board is whether the Office properly determined the rate of pay for the selected position of Cashier 2. In a prior appeal, the Board affirmed the Office’s determination that the position of Cashier 2 was within appellant’s physical restrictions and the position was available in sufficient numbers. On remand, the Office was instructed to clarify its determination on the rate of pay.

The Office issued an amended decision on April 5, 2005, noting that it utilized information provided by the vocational rehabilitation counselor in a June 1, 1999 job classification report in the portion entitled “LifeStep Growth Projections Report” and the State of Pennsylvania for determining the mean or “median weekly earnings” for all workers, male and female, in the Philadelphia region for this position was \$327.52. The Office used section 8114(d)(3) as a guide when it averaged the earnings for all workers, both female and male, in the Philadelphia area from the information provided by the vocational rehabilitation counselor.¹¹ Section 8114(d)(3) provides for a determination of earnings for compensation purposes by averaging the annual earnings of employees working the same of the same class. Because appellant’s “average annual earnings” for the selected position of Cashier 2 could not be determined reasonably and fairly under sections 8114(d)(1) or (2) of the Federal Employees’ Compensation Act, the Office properly applied section 8114(d)(3) to find a sum that reasonably represented the average annual earnings in the selected position of Cashier 2. In the instant case, neither sections 8114(d)(1) or (2) are applicable as the pay rate at issue involves the determination of a pay rate for a selected position rather than a determination of a pay rate for a date-of-injury position. The Office correctly used section 8114(d)(3) as a guide to find that appellant had a weekly pay rate of \$327.52, a figure which was derived by averaging the weekly

¹⁰ 5 U.S.C. § 8114(d)(3).

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(4) (March 1996).

pay rate for females and the weekly pay rate for males in the position of Cashier 2. The Board finds that the Office properly determined appellant's pay rate based upon the information supplied by the State of Pennsylvania, as interpreted by the vocational rehabilitation counselor, with regards to the median wage rate for individuals in the Philadelphia area for the position of Cashier 2.¹² The Office has sufficiently explained its application of the established procedures for determining appellant's employment-related loss of wage-earning capacity, using the principles set forth in the *Shadrick* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.¹⁴

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁵ Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁷

¹² On appeal, appellant contends his civil rights were violated due to his compensation being reduced based upon an incorrect job description and his ability to perform the position, which raises a constitutional question. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures. *See Johnson V. Robinson*, 415 U.S. 361 (1974) and cases cited therein; *see also Robert F. Stone*, 57 ECAB ____ (Docket No. 04-1451, issued December 22, 2005). As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant. *See Dianna L. Smith*, 56 ECAB ____ (Docket No. 04-2256); *Vittorio Pittelli*, 49 ECAB 181 (1997). The federal courts retain jurisdiction over decisions under the Act where there is a constitutional claim. The Board, therefore, lacks jurisdiction to review the merits of appellant's argument."

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

¹⁴ *Jeffrey M. Sagrecy*, 55 ECAB ____ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ 20 C.F.R. § 10.608(b).

¹⁷ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS -- ISSUE 2

In its April 5, 2005 decision, the Office determined the median rate of pay for the position of Cashier 2 for the Philadelphia area was \$327.52. Appellant requested reconsideration by letters dated April 21 and May 12, 2005. In support of his request appellant submitted a February 2, 1988 report by Dr. Mattei, a treating Board-certified orthopedic surgeon, and February 8, 1999 questions to the second opinion physician. The Office denied appellant's claim by decisions dated June 2, 2005, finding that he failed to submit any evidence showing the pay rate was incorrectly determined. On June 9, 2005 appellant requested reconsideration by a June 9, 2005 and on September 6, 2005 the Office received a clinic note by Dr. Thoder. The Board finds that appellant's April 21, May 12 and June 9, 2005 requests for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Appellant contended that the Office used different job descriptions for the position of Cashier 2 when its definition of the position changed from sedentary duty to light duty and that the Office used an incorrect statement of facts. The Board finds appellant's legal arguments without merit. The Office based appellant's ability to perform the position of Cashier 2 as it required lifting up to 10 pounds, the ability to reach, handle and finger as well as the ability to see, talk and hear, which complied with his physical restrictions based upon the medical evidence of record. Thus, the determination of whether the position was light duty or sedentary is irrelevant as appellant was found to be physically capable, by both the Office and this Board, of performing the lifting restrictions required of the position. Appellant also contends that the statement of accepted facts is incorrect as if fails to identify each surgery performed. The Board finds this argument irrelevant as it does not address whether appellant is capable of performing the selected position of Cashier 2. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(2).¹⁸

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, a July 27, 2005 clinic note by Dr. Thoder, a February 2, 1988 report by Dr. Mattei, a treating Board-certified orthopedic surgeon, and February 8, 1999 questions to the second opinion physician. The clinic note by Dr. Thoder, although new evidence, is not relevant to the underlying issue of the pay rate for Cashier 2. The report by Dr. Mattei and the questions for the second opinion physician were previously of record and reviewed by the Office and this Board and thus do not constitute a basis for reopening the case.¹⁹ Moreover, they are not relevant to the issue of the correct pay rate for the selected position of Cashier 2. As appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).²⁰

¹⁸ 20 C.F.R. § 10.608(b)(2)(i) and (ii).

¹⁹ The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *See Daniel O. Vasquez*, 57 ECAB ____ (Docket No. 06-568, issued May 5, 2006); *Eugene F. Butler*, 36 ECAB 393 (1984).

²⁰ 20 C.F.R. § 10.608(b)(2)(iii).

CONCLUSION

The Board finds that the Office properly determined the rate of pay for the selected position of Cashier 2. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15, June 2 and April 5, 2005 are affirmed.

Issued: October 24, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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