United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 06-1913**
	)	**Issued: August 21, 2007**
U.S. POSTAL SERVICE, CASA VIEW STATION, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2006 appellant filed a timely appeal from a June 12, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. As the most recent merit decision was issued January 20, 1991, more than one year from the date of the filing of this appeal, the Board lacks jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On September 21, 1989 appellant, then a 27-year-old part-time flexible letter carrier, filed a claim for injuries resulting from a September 19, 1989 motor vehicle accident. The Office

[1] 20 C.F.R. §§ 501.2(c) and 501.3.

accepted the claim for a concussion, lumbosacral strain, cervical strain and depressive disorder. The Office noted that appellant had worked less than seven months for the employing establishment at the time of her injury. The Office calculated her pay rate as $263.31 per week.

In a letter dated November 3, 1989, appellant's union representative noted that a comparable part-time flexible letter carrier worked 41.4 hours per week but appellant received compensation for only 30 hours per week. On February 2, 1990 the Office requested that the employing establishment provide the average annual earnings of an employee similar to appellant who worked substantially the whole year prior to September 19, 1989, the date of injury. On February 7, 1990 the employing establishment responded that a casual part-time flexible employee who worked for one year prior to September 19, 1989 earned $21,981.32.

By letter dated February 8, 1990, the Office notified appellant that her compensation would be adjusted to $422.72 per week under section 8114(d)(2) based on information from the employing establishment that an employee "working in the same class and working in the same employment earned $21,981.32." The Office additionally paid her $1,691.52 in retroactive compensation for the period in which she was paid at an inaccurate rate, November 4, 1989 to February 10, 1990.

On December 18, 1990 appellant alleged that she did not receive retroactive compensation from November 4, 1989 to February 19, 1990. She further contended that the Office continued to pay her at an inaccurate pay rate. On December 26, 1990 the Office verified from the employing establishment that appellant was a part-time flexible city carrier whose position would have afforded employment for 11 or more months.

In a decision dated January 28, 1991, the Office determined that it had properly calculated appellant's pay rate for compensation purposes as $422.72 per week. The Office noted that it calculated her compensation under section 8114(d)(1)(B).[2] The Office found, however, that as appellant did not work substantially the whole year prior to her injury in the date-of-injury position,[3] it properly calculated her earnings under section 8114(d)(3) based on the "actual earnings of a similarly employed individual working the greatest number of hours during the year immediately preceding the date of injury."[4] The Office noted that appellant had

[2] Section 8114(d)(1)(B) provides that if the employee worked in for substantially the whole year precedent the injury in the job held at the time of injury and the annual rate of pay was not fixed, then the annual earnings are calculated by multiplying the daily wage by "300 if [s]he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week."

[3] Appellant worked as a part-time flexible employee rather than a casual employee for only 24 days prior to her injury.

[4] Section 8114(d)(3) provides for the calculation of average annual earnings in situations not covered by sections 8114(d)(1) or 8114(d)(2). Section 8114(d)(3) indicates that the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which she was working at the time of the injury having regard to the previous earnings of the employee in federal 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 one year immediately preceding the injury.

received retroactive compensation for the difference between the new rate and what she was paid prior to the adjustment in her pay rate. The Office verified that the information provided by the employing establishment regarding the wages for a casual part-time flexible carrier was comparable to appellant's earnings as a career part-time flexible carrier.

By letter dated September 10, 2002, appellant requested compensation for "back pay from 1989 to [the] present." She noted that she earned $1,430.00 a month in 1989 with the employing establishment but only received $1,200.00 in compensation. In a response dated October 8, 2002, the Office informed her that she received compensation for total disability at a rate of 66 and 2/3 percent of her salary with no dependents or 75 percent of her salary with dependents. The Office notified her that it also deducted for health benefits and optional life insurance. The Office concluded that her pay rate since 1989 appeared accurate and enclosed a copy of computer records showing her compensation payments from the date disability began to the present. The computer records establish that on March 16, 1990 the Office paid appellant retroactive compensation for the period November 4, 1989 to February 10, 1990.

Appellant continued to challenge her pay rate and the Office instructed her to follow the appeal rights accompanying the January 20, 1991 decision. On March 25, 2003 she alleged that she had not received appeal rights.[5] By letter dated June 16, 2003, appellant requested reconsideration of the Office's calculation of her pay rate. She argued that until March 1990 her compensation checks did not show the correct pay rate of $422.72 per week. Appellant submitted letters dated July l, 2003, June 21 and October 21, 2004. Challenging the amount of compensation received.

In a decision dated April 22, 2005, the Office denied appellant's request for reconsideration as it was untimely and insufficient to establish clear evidence of error. She appealed to the Board. In an order dated December 7, 2005, the Board dismissed the appeal at her request so that she could request reconsideration before the Office.[6]

On March 17, 2006 appellant requested reconsideration. She contended that she did not receive retroactive pay for the initial four compensation checks issued at an inaccurate pay rate. Appellant also alleged that section 8114(d)(2) rather than section 8114(d)(3) applied because she would have been employed in her date-of-injury position for substantially the whole year. She argued that the Office erred in basing her pay rate on the earnings of a casual part-time flexible carrier rather than a career part-time flexible carrier. Appellant contended that she only received pay for 30 hours per week but the average pay for a comparable employee was 41.4 per week. She submitted the Office's February 2, 1990 letter requesting pay rate information, a December 1, 1989 internal Office memorandum, section 8114 of the Federal Employees' Compensation Act, a letter dated August 15, 1989 from the employing establishment, a November 3, 1989 letter from her union and pay records from another part-time flexible carrier.

By letter dated April 28, 2006, the employing establishment noted that in November 1989 the union provided the Office with the annual earnings of a part-time flexible city carrier. The

[5] The Board notes that appeal rights accompanied the January 28, 1991 decision.

[6] Order Dismissing Appeal, Docket No. 05-1748 (issued December 7, 2005).

employing establishment asserted that the union's November 3, 1989 letter was erroneous as it included overtime in its calculation of the pay rate of the part-time flexible carrier who worked the whole year prior to appellant's injury and "did not calculate the average earned in the year prior to September 19, 1989."

In a decision dated June 12, 2006, the Office denied appellant's request for reconsideration under section 8128 on the grounds that the evidence submitted was insufficient to warrant merit review of the prior decision. The Office noted that she had not submitted any new evidence supporting that she received compensation at an inaccurate rate.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] 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) submit relevant and pertinent new evidence not previously considered by the Office.[8] 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.[9] 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.[10]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[12] 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.[13]

ANALYSIS

In the last merit decision dated January 20, 1991, the Office denied appellant's request for back pay and additional compensation after finding that it had properly calculated her pay rate for compensation purposes as $422.72 per week. The Office noted that it had initially paid

[7] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

[8] 20 C.F.R. § 10.606(b)(2).

[9] *Id*. at § 10.607(a).

[10] *Id*. at § 10.608(b).

[11] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[12] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[13] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

her at a rate of $263.61 per week. Appellant did not work substantially the whole year in her date-of-injury position prior to her September 19, 1989 motor vehicle accident. The Office recalculated her earnings based on information provided by the employing establishment that an employee working in a similar position at the same location earned $21,981.32 in the year preceding September 19, 1989. The Office noted that she received retroactive compensation to cover the difference between what she should have been paid initially and what she actually received. The Office further ascertained that the information from the employing establishment accurately portrayed the salary of a career part-time flexible carrier.

Appellant requested reconsideration on June 21, 2004. By decision dated April 22, 2005, the Office denied her request for reconsideration as untimely and insufficient to show clear evidence of error. She again requested reconsideration on March 17, 2006. In a decision dated June 12, 2006, the Office denied merit review of the claim under section 8128.[14]

In support of appellant's request for reconsideration, she submitted a February 2, 1990 letter from the Office, a December 1, 1989 internal Office memorandum, a copy of portions of the Act, a letter dated August 15, 1989 from the employing establishment, a letter from her union dated November 3, 1989 and pay records from another part-time flexible carrier. All of the evidence submitted by appellant was already contained in the case record before the Office at the time of its last merit decision. The Board has held that evidence which duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[15]

Appellant alleged that the Office owed her back pay because her four initial compensation payments did not show the correct pay rate.[16] She further contended that the Office erroneously calculated her pay rate under section 8114. Appellant maintained that the Office based its pay rate determination on information from the employing establishment relevant to a casual rather than career part-time flexible carrier. The Office, however, previously considered these arguments in its January 28, 1991 decision. As discussed above, the submission of evidence or argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[17]

Appellant argued that the Office should have applied the provisions of section 8114(d)(2) rather than section 8114(3) in computing her pay rate.[18] She has not, however, raised

[14] As the record contained no merit decision issued within one year of March 17, 2006, the Office should have evaluated appellant's request for reconsideration under the clear evidence of error standard. Any error, however, is harmless as the Office considered her request for reconsideration under a standard more favorable to appellant.

[15] *Freddie Mosley*, 54 ECAB 255 (2002).

[16] The Board notes that the evidence of record supports that appellant received retroactive compensation from the Office for the period in question.

[17] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[18] Section 8114(d)(2) provides that if an employee did not work in his or her date-of-injury position for the whole year preceding the injury but the position would have afforded employment for substantially a whole year, the average annual earnings "are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment…."

any argument showing why this would affect the calculation of her average annual earnings or submitted any evidence to show that the Office inaccurately applied the provisions of section 8114 in determining her average annual earnings.[19]

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit pertinent new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 12, 2006 is affirmed.

Issued: August 21, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[19] The Board notes that it appears the Office applied section 8114(d)(2) in determining appellant's average annual earnings even though it referenced section 8114(d)(3) in its January 28, 1991 decision.