

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

S.B., Appellant

and

**DEPARTMENT OF THE NAVY, MARE
ISLAND NAVAL SHIPYARD, Vallejo, CA,
Employer**

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**Docket No. 07-505
Issued: August 20, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2006 appellant filed a timely appeal of an August 15, 2006 decision of the Office of Workers' Compensation Programs denying merit review of his claim. Since more than one year has elapsed between the last merit decision on September 16, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUE

The issue is whether the Office properly refused to reopen the claim for merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 11, 1986 appellant, then a 48-year-old plastics molder, filed a traumatic injury claim (Form CA-1) alleging that he twisted his left knee on that date while in the performance of

duty. The Office accepted a left knee strain and torn left medial meniscus. On December 10, 1987 the Office issued a schedule award for a 33 percent permanent impairment to his left leg.

Appellant filed a CA-1 on March 20, 1989 for a left knee injury on March 10, 1989 during a slip and fall. On January 22, 1991 he accepted a position as a communications clerk.

By decision dated July 5, 1994, the Office determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. Pursuant to 5 U.S.C. § 8115, the Office reduced appellant's compensation based on his wage-earning capacity.

On May 12, 1995 appellant received a schedule award for an additional 17 percent permanent impairment to the left leg. The Office referred appellant for a second opinion examination by Dr. Richard Preininger, an orthopedic surgeon. In a report dated November 12, 1996, Dr. Preininger diagnosed bilateral traumatic osteoarthritis of the knees and opined that the condition was causally related to the employment injuries. The Office accepted bilateral knee traumatic arthritis and on March 14, 1997 appellant received a schedule award for a 53 percent right leg permanent impairment. Appellant also received a schedule award for an additional 15 percent left leg impairment by decision dated August 11, 1999.

Appellant continued to submit reports from Dr. James Gemmer, an attending orthopedic surgeon. In a report dated October 30, 2000, Dr. Gemmer reported that x-rays showed a loss of articular cartilage in appellant's knees.

By letter dated December 16, 2003, appellant requested reconsideration of the July 5, 1994 wage-earning capacity determination. He argued that in July 1994 he was not working as a communications clerk, but as a civilian pay technician. Appellant also argued that his condition had materially changed since 1994 based on the medical evidence.

In a decision dated March 3, 2004, the Office determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error. Following an appeal to the Board, the case was remanded to the Office. The Board found that the Office had improperly characterized appellant's letter as an untimely application for reconsideration, as he was requesting modification of the wage-earning capacity determination.¹

By decision dated September 16, 2005, the Office denied modification of the July 5, 1994 decision. The Office found there was no error in the wage-earning capacity determination, and that the medical evidence of record did not establish that appellant's condition had changed such that he was no longer capable of performing the rated position.

Appellant again requested reconsideration by letter dated May 8, 2006. He argued that the wage-earning capacity determination was in error as it was not based on a current medical evaluation, the communications clerk position was a makeshift position and the Office did not consider his right knee condition, which was ultimately accepted as a consequential injury. Appellant also argued that his condition had gotten worse, noting the increased schedule awards and the medical evidence of record stating that he was totally disabled.

¹ Docket No. 05-866 (issued July 26, 2005).

By decision dated August 15, 2006, the Office determined that the application for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office]."³ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁴

ANALYSIS

Appellant submitted a May 8, 2006 application for reconsideration with respect to the 1994 wage-earning capacity determination. He argued that the original determination was in error, without meeting any of the requirements of section 10.606(b)(2). The application for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument. Moreover, appellant did not submit any new and relevant evidence. For example, the argument that the record did not include a current medical evaluation has no reasonable color of validity, as the wage-earning capacity was based on actual earnings, not a selected position in the labor market.⁵ With respect to a makeshift position, appellant had raised this allegation before the September 16, 2005 merit decision and he provided no new and relevant evidence to support his allegation. Appellant alleged that the Office failed to consider his right knee condition, without explaining what specific evidence was before the Office as of July 5, 1994, showing that he was unable to perform the communications clerk position due to his right knee condition.

In his May 8, 2006 application for reconsideration, appellant also reiterated his prior argument that his employment-related condition had changed. He did not submit any new and relevant medical evidence on this issue. The Board finds that the application for reconsideration did not meet any of the requirements of section 10.606(b)(2) as it failed to show that the Office

² 5 U.S.C. § 8128(a) (providing that "[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.")

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ A current medical report with a detailed description of a claimant's condition is required when the Office selects a position from the Department of Labor, *Dictionary of Occupational Titles* for a wage-earning capacity determination. *See John D. Jackson*, 55 ECAB 465 (2004). When appellant raises a legal argument on reconsideration that has no reasonable color of validity, the Office is not required to reopen the case for merit review; *see Norman W. Hanson*, *supra* note 4.

erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or provide relevant and pertinent evidence not previously considered. Accordingly, the Office properly refused to reopen the claim for merit review.

CONCLUSION

The Office properly refused to reopen the claim for merit review pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 15, 2006 is affirmed.

Issued: August 20, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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