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

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| **D.J., Appellant** | ) | |
| | ) | **Docket No. 07-1007** |
| **and** | ) | **Issued: August 10, 2007** |
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| **DEPARTMENT OF THE ARMY, KELLY AIR FORCE BASE, Santa Fe, NM, 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 March 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 28 and May 31, 2006 decisions, which denied merit review. Because more than one year has elapsed between the most recent merit decision of the Office dated November 22, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

### ***ISSUE***

The issue is whether the Office properly denied appellant's requests for reconsideration dated February 7 and May 11, 2006.

### ***FACTUAL HISTORY***

On February 1, 1995 appellant, then a 27-year-old aircraft pneudraulic systems mechanic, sustained a ruptured left eye when performing maintenance on an aircraft. The Office accepted his claim for ruptured left eye, left eye glaucoma and left eye chronic angle glaucoma. Appellant stopped work on February 1, 1995 and returned to a limited-duty position on August 20, 2005.

Appellant was treated in the emergency room on February 1, 1995 and underwent surgery the same day. In an operative report dated February 1, 1995, Dr. Keith Rothberg, a Board-certified ophthalmologist, noted a history of injury and performed a repair of ruptured sclera and corneal laceration of the left eye with reposition of expulsed choroidal tissue. He diagnosed ruptured globe left eye and status post radial keratotomy surgery, both eyes. Appellant came under the treatment of Dr. John E. Graham, a Board-certified ophthalmologist, who, in a report dated February 13, 1995, performed a lensectomy, vitrectomy, scleral buckle and gas injection of the left eye and diagnosed penetrating trauma to the left eye, vitreceous hemorrhage left eye and retinal detachment left eye. In a report dated August 26, 1995, Dr. Graham noted a history of the February 1, 1995 injury and advised that the structural integrity of the eye was weakened. The long-term prognosis for retention of the globe of the eye was questionable with an effective loss of virtually all useful vision of the left eye.

In a decision dated April 23, 1996, the Office granted appellant a schedule award for 100 percent impairment of the left eye. The period of the award was from September 25, 1995 to October 18, 1998.

By decision dated August 19, 1996, the Office found that appellant had been employed as a modified-duty aircraft mechanic effective August 20, 1995, which was over 60 days and that his actual earnings in that position was equivalent to the pay rate for the position he held at the time of his injury; thus, no loss of wages occurred. The Office concluded that his actual earnings as a full-time modified-duty aircraft mechanic fairly and reasonably represented his wage-earning capacity.

In a letter dated March 18, 1999, the employing establishment noted that the medical documentation revealed that appellant was unable to perform the duties as an aircraft pneudraulic systems mechanic. The employing establishment offered appellant a position as a computer assistant with a salary of $17.98 per hour effective March 29, 1999. Appellant accepted the position on March 20, 1999. By decision dated March 9, 2001, the Office modified the prior wage-earning capacity determination, finding that his actual earnings in the position of full-time computer assistant fairly and reasonably represented appellant's wage-earning capacity.[1]

Appellant requested reconsideration. In a decision dated March 24, 2003, the Office affirmed the March 9, 2001 decision, as modified, noting that his actual earnings as an information specialist fairly and reasonably represent his wage-earning capacity.

Appellant was treated by Dr. Robert W. Reidy, a Board-certified ophthalmologist, on March 7, 2005. Dr. Reidy noted a history of injury and diagnosed severe and uncontrolled pain, a phthisical left eye and recommended enucleation. In an operative report dated April 12, 2005, he performed an enucleation of the left eye with insertion of an 18 millimeter silicone sphere and revision of tarsorrhaphy of the left eye. Dr. Reidy diagnosed blind painful left eye, status post-traumatic left eye and status post tarsorrhaphy left eye.

[1] On September 4, 2001 appellant was promoted to a computer specialist with a pay retention allowance of 25 percent.

On August 16, 2005 the employing establishment offered appellant a position as a human resources assistant with a salary of $44,395.00 effective August 21, 2005. On August 18, 2005 appellant accepted the position.

Appellant submitted CA-7 forms, claims for compensation, for the period May 1 to August 2 and September 4 to 17, 2005. He noted that due to his work injury he had missed National Guard annual military training from May 2 to 13, 2005 which paid compensation of $1,002.56 and National Guard military drills from May 14 to August 7, 2005 which paid compensation of $1,307.04.

On October 14, 2005 the Office indicated that appellant had been employed as a human resources assistant effective August 21, 2005, which was over 60 days and that the pay in that position of $853.75 was equivalent to the pay rate for the position he held at the time of his injury; thus, no loss of wages occurred. The Office concluded that his actual earnings in position of full-time computer assistant fairly and reasonably represented his wage-earning capacity.

In an undated note, appellant indicated that due to his work-related injury he was absent from the National Guard military drills from February 5 to August 8, 1995 and was not paid military drill compensation of $2,159.92 for this period.

In a decision dated November 22, 2005, the Office denied appellant's claim for compensation for the period February 25 to August 8, 1995, May 1 to August 2 and September 4 to 17, 2005.

On December 8, 2005 appellant submitted a CA-7 form, claim for compensation, for the period February to August 1995.

On February 7, 2006 appellant requested reconsideration. He submitted documentation from the Air Force Accounting and Finance Center and excerpts from the United States Code addressing military technicians, dual status, employment, use and status.

In a memorandum dated February 8, 2006, the New Mexico National Guard noted that, in accordance with the Unites States Code, a military technician was a federal civilian employee required to maintain membership in the National Guard. Once the individual lost their military membership, they would be separated from the military dual status technician employment.

In a decision dated April 28, 2006, the Office denied appellant's claim for reconsideration on the grounds that he failed to identify which Office decision he was appealing. The Office noted that a formal loss of wage-earning determination was issued on October 14, 2005 and a denial of compensation was issued on November 22, 2005; however, appellant failed to specify which decision he sought to appeal.

On May 11, 2006 appellant requested reconsideration, identifying that he sought review of the November 22, 2005 decision.

By decision dated May 31, 2006, the Office denied appellant's reconsideration request on the grounds that he neither raised substantive legal questions nor included new and relevant evidence.

## ***LEGAL PRECEDENT***

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[3] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(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]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[4]

## ***ANALYSIS***

Appellant's February 7, 2006 request for reconsideration[5] 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. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted documentation from the Air Force Accounting and Finance Center and excerpts from the U.S. Code addressing military technicians, dual status, employment, use and status. However, these documents are not relevant because they do not specifically address the issue of whether appellant was entitled to military drill pay for the specific periods claimed. Appellant did not otherwise provide any new and relevant evidence pertaining to the issue of whether he was entitled to military drill pay for the specific

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b).

[4] 20 C.F.R. § 10.608(b).

[5] The Board notes that appellant did not specify a particular decision from which he was requesting reconsideration but the accompanying documents he submitted in support of his reconsideration request address entitlement to military pay drill compensation. The record reveals that the Office decision dated November 22, 2005 denied appellant's request for compensation for several dates in which appellant allegedly missed military drills due to his work-related injury.

periods claimed. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his February 7, 2006 request for reconsideration.

With respect to the May 11, 2006 request for reconsideration, appellant 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. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, consitituting relevant and pertinent new evidence not previously considered by the Office, appellant failed to submit any additional evidence with his reconsideration request. The Board, therefore, finds that the Office properly determined that appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his May 11, 2006 request for reconsideration.

## ***CONCLUSION***

The Board finds that the Office properly denied appellant's requests for reconsideration dated February 7 and May 11, 2006.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** May 31 and April 28, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 10, 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