United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 08-1795**
	)	**Issued: December 23, 2008**
DEPARTMENT OF THE NAVY, HAMPTON NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 16, 2008 appellant filed a timely appeal from a March 26, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. There is no merit decision within one year of the filing of this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.2, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

The Office accepted that on or before October 26, 1987 appellant, then a 39-year-old shipfitter, sustained bilateral carpal tunnel syndrome due to repetitive hammering. Following the injury, he worked light duty and then returned to full duty. The Office accepted a recurrence of disability commencing March 14, 1990. Appellant underwent a left median nerve release on December 17, 1990, followed by light duty beginning in January 1991. He underwent a right

median nerve release on December 18, 1991.[1] Appellant returned to light duty in a clerical position in February 1992.

In January 1993, appellant was placed on permanent light duty. From August 17, 1993 to August 20, 1999, he was assigned to the carpentry shop doing special projects. Appellant's light-duty position was withdrawn in July 1999. The employing establishment separated him effective August 20, 1999 due to disability.

The Office accepted that appellant sustained a recurrence of total disability beginning August 20, 1999 following his separation from the employing establishment. Appellant underwent a repeat left median nerve release on December 17, 1999. He received compensation on the periodic rolls, using a March 14, 1990 effective pay rate.

Appellant remained off work from 2000 to 2003.[2] He participated in vocational rehabilitation in 2004 and 2005. Dr. Thomas E. Fithian, an attending Board-certified orthopedic surgeon, opined on February 13, 2005 that appellant could drive 4 hours a day with 10-minute breaks between each hour.

On March 1, 2005 appellant began work as a private-sector truck driver for 20 hours a week. He earned $7.50 an hour or $150.00 a week. Appellant continued in this job through February 2006.

In a March 24, 2006 memorandum, the Office noted that the hourly pay rate for appellant's date-of-injury job was $20.58 as of March 1, 2005. Appellant's actual private-sector earnings as of March 1, 2005 were $7.50 an hour. He was compensated at a recurrent pay rate, using the March 14, 1990 recurrence of disability as the effective date.

By decision dated September 19, 2006, the Office reduced appellant's monetary compensation effective March 1, 2005 based on his actual earnings as a truck driver. It found that his earnings as a truck driver represented his wage-earning capacity. The Office determined that appellant's disability began on March 14, 1990, the date of recurrence of disability following the accepted injury. The pay rate as of March 14, 1990 was $479.20 a week. The current weekly pay rate for the job and step when injured was $823.20. Appellant's actual weekly earning capacity was $150.00. The Office calculated that appellant was entitled to $1,492.42 every 28 days due to an 82 percent loss of wage-earning capacity.

In an October 15, 2006 letter, appellant requested a telephonic hearing, held on February 8, 2007. During the hearing, he asserted that the Office should have used his pay rate as of August 1999 in adjusting his compensation as he had returned to full duty. Appellant submitted additional evidence.

[1] By decision dated April 7, 1994, the Office granted appellant a schedule award for a 20 percent permanent impairment of the left upper extremity and a 25 percent permanent impairment of the right upper extremity.

[2] Appellant underwent a total right knee replacement in May 2001 pursuant to Claim No. xxxxxx834. This claim is not before the Board on the present appeal.

In a February 19, 2004 note, Dr. Fithian limited appellant to operating a vehicle no more than 60 minutes a day. He submitted February 7, 2007 and February 4, 2008 progress notes.

In a February 3, 2007 affidavit of earnings and employment (Form EN1032), appellant noted earning $7.50 an hour from November 1, 2005 to February 1, 2007 as a truck driver in the private sector. He earned a total of $7,800.00.

By decision dated and finalized April 16, 2007, an Office hearing representative affirmed the September 19, 2006 wage-earning capacity determination. The hearing representative found that appellant had returned to work in the private sector on March 1, 2005, earning $7.50 an hour driving a truck. Appellant performed those duties for more than 60 days prior to the September 19, 2006 decision. The hearing representative further found that the Office properly calculated the new compensation rate using appellant's pay rate in effect on the date disability began.

In a March 11, 2008 letter, appellant requested reconsideration. He asserted that the Office erred by failing to use a recurrent pay rate in determining his wage-earning capacity. Appellant asserted that it should have based his compensation on a recurrent pay rate as of August 1999, when his light-duty position was withdrawn. He submitted an excerpt from the Office's procedure manual, providing that pay rate for disability should be based on the date-of-injury pay rate, the date of recurrence or the date disability began, whichever was higher. Appellant noted that he would enclose an August 1999 pay stub showing his pay rate. This pay stub is not of record.

Appellant also submitted a February 13, 2005 letter from Dr. Fithian finding him able to drive 4 hours a day with 10-minute breaks between each hour. A February 2, 2008 affidavit of earnings and leave (Form EN1032) showed that appellant worked from October 1, 2006 to December 31, 2007 as a truck driver earning $7.50 an hour with a total $8,200.00 in earnings.

By decision dated March 26, 2008, the Office denied reconsideration on the grounds that appellant did not submit new, relevant evidence or substantive legal questions. It found that appellant's March 11, 2008 letter and procedure manual excerpt were duplicative of his arguments at the February 8, 2007 hearing.

LEGAL PRECEDENT

To require the office to reopen a case for merit review under section 8128(a) of the Act,[3] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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) constitue relevant and pertinent new evidence not previously considered by the Office.[4] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

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.[5]

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.[6]

ANALYSIS

The Office reduced appellant's wage-earning capacity in a September 19, 2006 decision, affirmed by an Office hearing representative on April 16, 2006. Appellant requested reconsideration by March 11, 2008 letter. He asserted that the Office should have used a recurrent pay rate in calculating his wage-earning capacity.

Appellant's March 11, 2008 letter is repetitive of the arguments which were raised before the Office hearing representative. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.[7] This evidence does not require reopening the record for further merit review. Dr. Fithian's letter and the Form EN1032 do not address the pay rate issue. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.[8]

Appellant has not established that the Office improperly refused to reopen his claim for a review of the merits under section 8128(a) of the Act. He 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 constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review.

[5] 20 C.F.R. § 10.608(b). *See also T.E.*., 59 ECAB ___ (Docket No. 07-2227, issued March 19, 2008).

[6] *Annette Louise*, 54 ECAB 783 (2003).

[7] *Denis M. Dupor*, 51 ECAB 482 (2000). *See also David Champion*, (Docket No. 05-1373, issued December 15, 2005) (where the Board held that the claimant's arguments on reconsideration regarding a recurrent pay rate were repetitive of his prior arguments and were therefore insufficient to reopen the case for a merit review).

[8] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 26, 2008 is affirmed.

Issued: December 23, 2008
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