

FACTUAL HISTORY

The Office accepted that on November 7, 2006 appellant, then a 48-year-old housekeeping aid, sustained a left wrist sprain at work.¹ He submitted a claim for compensation (Form CA-7), signed October 30, 2007, for wages lost from private employment from November 7, 2006 to March 6, 2007.

In a November 16, 2007 decision, the Office denied appellant's claim for wages lost from private employment between November 7, 2006 and March 6, 2007. It stated:

“Please be advised that under the Federal Employees’ Compensation Act, wages in concurrent employment outside your [f]ederal employment are not included in compensation pay rate determinations when the [f]ederal employee works full time and has worked in his [f]ederal position for 11 months or more. Concurrent employment would only be considered for employees working less than 11 months in [f]ederal employment, or working part time. And then concurrent wages would only be included if the concurrent employment duties were similar to the [f]ederal job duties.

“Under the [Act] a pay rate based on full[-]time [f]ederal employment for at least 11 months prior to the injury may not be expanded to include the pay earned in concurrent employment, even if that employment is similar to the [f]ederal duties. Therefore, your claim for compensation for the above period is denied.”

Appellant requested reconsideration of the Office's November 16, 2007 decision on February 7, 2008. He did not submit any evidence or argument in support of his reconsideration request. In a May 9, 2008 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he was injured substantially for the entire year

¹ Appellant worked on a full-time basis and worked for the employing establishment for more than 11 months prior to his injury. He initially received continuation of pay for missed days from work. In a November 16, 2007 letter, the Office advised appellant that he would be receiving a check for disability compensation covering the period January 14 to 19, 2007. It informed him that he would not receive compensation for January 11 to 13, 2007 because under 5 U.S.C. § 8117 compensation is not payable for the first three days of temporary disability after the expiration of continuation of pay unless the total period of disability is followed by permanent disability or exceeds 14 days. This matter is not the subject of the current appeal.

immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.² Section 8114(d)(1) of the Act provides:

“Average annual earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if 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

According to Office procedure, a pay rate based on full-time federal employment for at least 11 months prior to the injury may not be expanded to include the pay earned on concurrent employment, even if that employment is similar to the federal duties.⁴

ANALYSIS -- ISSUE 1

The Office accepted that on November 7, 2006 appellant sustained a left wrist sprain at work. He worked on a full-time basis and worked for the employing establishment for more than 11 months prior to his injury. Appellant submitted a Form CA-7, signed October 30, 2007, in which he claimed compensation from November 7, 2006 to March 6, 2007 for wages lost from private employment. Because he worked on a full-time basis and worked for the employing establishment for more than 11 months prior to his injury, the Office properly determined that his wages lost from private employment could not be included in his pay rate. Appellant did not advance any credible argument justifying payment for wages lost from concurrent private employment.

² 5 U.S.C. §§ 8114(d)(1), (2).

³ 5 U.S.C. §§ 8114(d)(1). The phrase “substantially the whole year” has been interpreted to mean at least 11 months. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4a (December 1995).

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4a(3)(a) (April 2002); *Ricardo Hall*, 49 ECAB 390 (1998).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.⁵ 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.⁶ 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.⁷

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's November 16, 2007 decision in a form dated February 7, 2008 and received by the Office on February 15, 2008. He did not submit any evidence or argument in support of his reconsideration request. Therefore, appellant did not provide any evidence or argument which would have served as a basis to reopen his claim for further review of the merits.

Appellant has not established that the Office improperly denied his request for further review of the merits of its November 16, 2007 decision under section 8128(a) of the Act, because he did not submit evidence or argument showing 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 relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant was not entitled to be compensated for wages lost from private employment. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 9, 2008 and November 16, 2007 decisions are affirmed.

Issued: April 10, 2009
Washington, DC

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

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

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