United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant	)	
and	)	**Docket No. 08-1486**
	)	**Issued: March 16, 2009**
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Bakersfield, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 28, 2008 appellant filed a timely appeal from a November 19, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim for an increased pay rate and an April 11, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined appellant's pay rate for compensation purposes; and (2) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128.

FACTUAL HISTORY

This case is before the Board for the second time. By decision dated July 13, 2006, the Board set aside a March 31, 2005 decision determining appellant's pay rate for compensation

purposes.[1] The Board found that the Office correctly applied the provisions of 5 U.S.C. § 8114(d)(3) in determining his pay rate as he did not work in the position in which he was employed at the time of injury for a whole year immediately preceding the injury and the position would not have afforded employment for substantially the whole year. The Board noted that appellant was a career seasonal employee as his company and the employing establishment had a July 1990 contract that established an expectation of recurring seasonal employment. The Board concluded that the Office properly calculated appellant's pay rate as $436.00 per week by using the pay rate of a full-time administratively determined (AD) employee at the rate provided for appellant in the contract between the company and the employing establishment of $10.90 per hour. The Board determined, however, that the Office did not consider whether his average daily wage during the year preceding his injury multiplied by 150 yielded a greater pay rate pursuant to section 8114(d)(3). The Board remanded the case for the Office to contact appellant's federal employers for the year immediately preceding his work injury to determine his daily wages for that period. The Board noted that his employers appeared to be the Department of Interior's Bureau of Land Management (BLM) and the Department of Agriculture's U.S. Forest Service (Forest Service). The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

In a letter dated July 28, 2006, appellant noted that he worked as an AD employee and received pay at either a daily or hourly rate. AD personnel were not covered by overtime rules, laws passed after 1992 or rules applicable to federal employees. Appellant maintained that his payroll records were not kept for more than seven years and thus had been destroyed. He contended that the Office erred in failing to consider his similar employment in determining his pay rate. Appellant asserted that he earned $38.00 per hour working for Petersen Equipment as a medical supervisor, the same position that he held for the Forest Service.

By letters dated July 31, 2006, the Office requested that the Forest Service and the BLM provide appellant's daily wages from August 29, 1991 to August 29, 1992. The BLM resubmitted a contract showing that he would receive a flat rate of pay of $174.40 per day for work performed. The Forest Service indicated that he worked from August 21 through 31, 1992 as a fire emergency hire and that it had no records of income prior to August 21, 1992. Appellant earned $1,716.75 from August 21 to 31, 1992.

On July 20, 2006 the BLM indicated that AD employees worked in emergencies, usually suppressing fires. An AD employee was not a regular government employee and did not sign an Oath of Office or receive government benefits. AD employees were covered under the Federal Employees' Compensation Act (the Act).[2]

In a letter dated October 7, 1998, Audrey Johnston, the chief executive officer of Petersen Equipment, stated:

> "[Appellant] has been an operations officer for Petersen Equipment since 1988. He does not receive pay from Petersen Equipment because our contracts are with

[1] 57 ECAB 680 (2006). On August 30, 1992 appellant, then a 56-year-old subcontractor, sustained chronic chemical pneumonitis and an aggravation of asthma due to fuel splashing onto his face and in his mouth. The Office paid him compensation beginning October 16, 1993 at a pay rate of $436.00 per week.

[2] 5 U.S.C. §§ 8101-8193.

> the Federal Government and under our contracts he is a [f]ederal employee. [Appellant's] pay with the Federal Government was around $25.00 per hour. I no longer have those records."

In a letter dated November 9, 1998, Petersen Equipment clarified that appellant did not receive pay from the company while working under a contract with the Federal Government. Appellant received $40.00 per hour from the company when he was not employed with the government.

In a September 27, 2006 telephone call, the employing establishment indicated that appellant possibly worked for both the BLM and the Forest Service on the Rainbow fire and noted that an employee could work for several agencies under one contract.

By letter dated October 23, 2006, Arlene D. Brown, a budget analyst with the BLM, asserted that the AD plan under which appellant worked provided for an hourly rather than a daily wage. She noted that the July 1990 contract referred to by the Board in its July 13, 2006 decision was an emergency equipment rental agreement (EERA). Ms. Brown stated that, while she signed the original EERA, as the Forest Service broke the fire it was responsible for processing claims and payment. She stated:

> "In your letter dated July 31, 2006, you requested that we provide you with the wages earned each day from August 29, 1991 through August 29, 1992. In order to do this, we would have to know which agencies hired him and ask them to query their records (if they have them that far back) and get the information. This was an EERA that could have been used by any [f]ederal [a]gency across the United States during the period in question.
>
> "I would assume that [appellant] would have received 1099s from the agencies that hired him during the period of time in question. If he can provide that to us, we might be able to provide the information that is being asked for."

By decision dated October 24, 2006, the Office denied appellant's claim for an increased pay rate. It found that he earned $1,716.75 in the year preceding his injury from the Forest Service. The Office noted that the BLM asserted that the Forest Service paid appellant even though it signed the contract. It calculated appellant's earnings using the 150 formula and found that it yielded a pay rate of $33.00 per week. The Office consequently determined that it properly paid him at the higher rate of $436.00 per week pursuant to section 8114(d)(3).

On August 17, 2007 appellant requested reconsideration. He contended that AD personnel were not subject to rules governing federal employees. Appellant related that all his employment and payroll records had been destroyed. He asserted that the Office must contact every the BLM, Forest Service, National Park Service and Bureau of Indian Affairs office in the country to check for his payroll records. Appellant also challenged the Board's prior finding that he was a career seasonal employee. He argued that his compensation should be based on a daily pay rate of $174.40 per day or $38.00 per hour. Appellant also contended that the Office failed to consider his similar employment in calculating his pay rate. He maintained that he earned $40.00 per hour at Peterson Equipment performing the same job as held with the BLM at the

time of injury. Appellant submitted a letter dated July 26, 2006 from James C. Knox, the BLM, who indicated that AD personnel were not career seasonal employees.[3]

In a decision dated November 19, 2007, the Office denied modification of its October 24, 2006 decision. It found that appellant had not submitted any evidence that he earned wages in concurrent similar employment at the time of his injury. The Office further noted that it did not have the obligation to contact every agency in the country to obtain possible payroll records.

On December 14, 2007 appellant questioned whether the Office had considered all of the submitted information in reaching its November 19, 2007 decision. He contended that the Office should have notified Petersen Equipment of the need to maintain his records. Appellant again noted that the Office must contact all offices to obtain his pay rate information as there is no national data base. He argued that 5 U.S.C. § 8114(d)(3) did not apply to AD employees. Appellant also contended that he should have received pay at a higher AD rate based on the actual work performed. He noted that pay for an AD was based on an 8- to 16-hour workday and that overtime rules did not apply. Appellant resubmitted evidence previously of record relevant to the pay rate determination, including the October 7 and November 9, 1998 letters from Ms. Johnston and the July 20 and 26, 2006 letters from the BLM. He further submitted a form from the Internal Revenue Service advising a taxpayer to keep records for four years and a form showing that overtime was not paid to AD personnel.

In a letter dated January 11, 2008, the Office noted that it had received all the evidence submitted by appellant when reaching its November 19, 2007 decision. On January 15, 2008 appellant requested reconsideration. In an accompanying letter dated January 14, 2008, he requested the number of cases accepted or rejected by the Office since 1992.

By decision dated April 11, 2008, the Office denied appellant's request for reconsideration on the grounds that he failed to submit evidence and argument sufficient to warrant reopening his case for further merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[4] Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents.[5] Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, which ever is greater.[6]

[3] Appellant further resubmitted pay rate information previously of record.

[4] 5 U.S.C. § 8105(a).

[5] *Id*. at § 8110(b).

[6] *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

Section 8114(d)(1) and (2) of the Act,[7] provide methodology for computation of pay rate for compensation purposes by determining average annual earnings at the time of injury. Section 8114(d)(1) and (2) of the Act specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would have afforded employment of substantially the whole year if the employee had not been injured.

Section 8114(d)(3) provides:

> "If either of the forgoing methods of the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he 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.[8]

ANALYSIS -- ISSUE 1

The Board previously affirmed the Office's use of section 8114(d)(3) of the Act in determining appellant's pay rate for compensation purposes. Section 8114(d)(3) provides for the calculation of average annual earnings in situations where the employee did not work substantially the whole year prior to the injury and was not employed in a position that would have afforded employment for substantially a whole year. The employee's average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he 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.[9] The Board found that the Office properly determined that his average annual earnings were $10.90 per hour or $436.00 per week. The Board determined, however, that the Office had not considered whether appellant's average annual earnings were less than 150 times the average daily wage he earned in his employment for the year immediately preceding the injury.

On remand the Office requested that the Forest Service and the BLM provide appellant's daily wages for the year preceding his work injury. The BLM submitted a contract showing that

[7] 5 U.S.C. § 8114(d)(1) and (2).

[8] *Id*. at § 8114(d)(3).

[9] *Monte Fuller*, 51 ECAB 571 (2000).

he would receive a flat rate of $174.40 per day. The Forest Service indicated that appellant worked from August 21 through 31, 1992 as an emergency fire hire. Appellant earned $1,716.75 during that period. On October 23, 2006 Ms. Brown explained that the Forest Service paid appellant compensation as it "broke the fire." She indicated that she would have to query every agency across the country to get information about his earnings in the year prior to his injury. Ms. Brown noted that appellant would have received 1099 tax forms from any agency that hired him during that period.

Based on this evidence, the Office determined that appellant earned $1,716.75 in the year prior to his August 30, 1992 work injury, or earnings of $6.60 per day. It multiplied $6.60 per day by 5 to find a pay rate of $33.00 per week. Under the 150 formula, however, appellant's average annual daily earnings of $6.60 are multiplied by 150, which yields $990.00 per year, or $19.04 per week. As this amount is less than the pay rate of $436.00 found by the Office and previously affirmed by the Board, the Office properly denied appellant's claim for an increased pay rate.

Appellant contended that the Office erred in failing to contact every federal office in the BLM, Forest Service, National Park Service and Bureau of Indian Affairs to determine whether he earned wages in the year preceding his injury. He has not, however, specifically listed any employer or provided any employment information, such as tax forms, in support of his contention that he performed additional federal employment. This is appellant's responsibility.

Appellant additionally maintained that the Office erred in failing to include his concurrent, similar earnings in calculating his pay rate. Earnings from concurrent nonfederal employment may be combined with the federal salary in determining pay rate if derived from similar employment.[10] By letter dated October 7, 1998, Ms. Johnston related that appellant did not receive pay from Peterson Equipment but was instead paid as a federal employee under contracts between the Federal Government and the company. She no longer had records of his employment. On November 9, 1998 Ms. Johnson maintained that when appellant was not working under contract with the Federal Government he earned $40.00 per hour from Peterson Equipment. She did not submit any evidence documenting her assertion or the hours worked by appellant and paid by Peterson Equipment in the year prior to August 30, 1992. Appellant, consequently, has not established that he had earnings for concurrent, similar employment.

Appellant argued that he was not a career seasonal employee and that his compensation should be based on a pay rate of $174.40 per day or $38.00 per hour. As discussed, however, the provisions of section 8114(d)(3) apply to determining his compensation and establish his pay rate as $436.00 per week.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[11] the Office 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

[10] *See L.C.*, 60 ECAB ___ (Docket No. 08-224, issued December 23, 2008).

[11] 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."

previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[12] 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.[13] 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.[14]

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.[15] 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.[16] 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.[17]

ANALYSIS -- ISSUE 2

In its November 19, 2007 decision, the Office denied appellant's request for an increased pay rate. On January 14, 2008 appellant requested that the Office provide the number of cases that it had accepted or rejected since 1992. He submitted a form from the Internal Revenue Service indicating that tax records should be maintained four years and a form showing that overtime rates did not apply to AD personnel. Appellant's request for information about the Office's processing of cases, however, does not constitute a relevant legal argument sufficient to warrant reopening his case for further review of the merits. Further, the evidence about tax records and overtime rates is not relevant to the Office's determination of his pay rate. Evidence or argument that does not address the particular issue involved does not warrant reopening a case for merit review.[18]

Appellant resubmitted pay rate information, including letters from Ms. Johnston dated October 7 and November 9, 1998 and from the BLM dated July 20 and 26, 2006. He again argued that the Office should have contacted all government agencies to determine his pay rate and that the provisions of the Act did not apply as he was an AD employee. Evidence or argument, however, which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[19]

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[12] 20 C.F.R. § 10.606(b)(2).

[13] *Id*. at § 10.607(a).

[14] *Id*. at § 10.608(b).

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

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

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

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

[19] *Richard Yadron*, 57 ECAB 207 (2005).

Appellant further contended that the Office should have notified Petersen Equipment of the need to maintain his records and that he should have been paid at a higher rate then specified because of the work that he performed. The Office, however, is not responsible for the work records of a private company or determining the rate that a claimant is paid for his federal employment. Thus, appellant's argument does not have a reasonable color of validity such that it would warrant reopening his case for merit review.[20]

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 constitute new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly determined appellant's pay rate for compensation purposes. The Board further finds that the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 11, 2008 and November 19, 2007 are affirmed.

Issued: March 16, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[20] *Elaine M. Borghini*, 57 ECAB 549 (2006).