

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

D.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Employer)

**Docket No. 12-202
Issued: June 21, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2011 appellant filed a timely appeal of a May 9, 2011 decision of the Office of Workers' Compensation Programs (OWCP), denying his application for reconsideration without merit review of the claim. Since more than 180 days has elapsed between the last merit decision on March 23, 2010 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim under section 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case was before the Board on a prior appeal with respect to a schedule award.² As the Board noted, OWCP had accepted a torn medial meniscus of the left knee and left leg osteoarthritis resulting from a February 3, 2007 employment incident. The Board found that appellant was not entitled to an additional schedule award.

With respect to compensation for wage loss, in a decision dated January 12, 2010, OWCP found that appellant had no loss of wage-earning capacity based on actual earnings as a modified city carrier. It determined that appellant's current earnings were \$1,050.37, and this was greater than the current date-of-injury pay rate of \$1,032.38 per week.

On March 17, 2010 appellant requested reconsideration. He stated that his base pay for his date-of-injury position had increased to \$53,684.00 annually when he returned to work in May 2009, yet his compensation from October 2007 to May 2009 had not reflected his wage increases. Appellant submitted a copy of a city carrier wage schedule effective November 1, 2009.

By decision dated March 23, 2010, OWCP reviewed the case on its merits and denied modification. It stated that the evidence did not show error as there was no evidence appellant was entitled to general wage increases.

On March 18, 2011 appellant again requested reconsideration. He submitted copies of employing establishment notification of personnel action forms from November 24, 2007 to November 21, 2009.

By decision dated May 9, 2011, OWCP denied the application for reconsideration without merit review of the claim. It found that the reconsideration request and evidence submitted were insufficient to warrant a review of the merits of the underlying claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP'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 OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."⁴ Section 10.608(b) states that any application for review that does not meet at least one of the

² Docket No. 11-1913 (issued April 6, 2012).

³ 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").

⁴ 20 C.F.R. § 10.606(b)(2).

requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁵

ANALYSIS

In the present case, OWCP issued a decision dated January 12, 2010 finding that appellant had no loss of wage-earning capacity based on actual earnings. It is well established that when a claimant attempts to show error in the wage-earning capacity determination, he must meet one of the requirements of 20 C.F.R. § 10.606(b)(2) to be entitled to a merit review of the claim.⁶

The January 12, 2010 wage-earning capacity determination was based on appellant's current actual earnings of \$1,050.37 per week (\$54,619.24 annually) and the current date-of-injury pay rate of \$1,032.38 per week (\$53,684.00 annually).⁷ In his initial application for reconsideration, appellant did not argue that these figures were wrong, as he noted that his pay was \$53,684.00 annually when he returned to work. His argument was that he felt he was underpaid compensation for wage loss while he was off work from October 2007 to May 2009, because his pay rate had increased during that time.

The issue of a possible underpayment of compensation for wage loss from October 2007 to May 2009, prior to the wage-earning capacity, is a separate issue from the wage-earning capacity determination. The January 12, 2010 wage-earning capacity determination is based on application of the formula set forth at 20 C.F.R. § 10.403, which requires the comparison of current earnings and current pay rate for the date-of-injury position.

The submission on March 18, 2011 of employing establishment forms with pay rate information from 2007 to 2009, therefore, does not constitute new and relevant evidence with respect to the wage-earning capacity determination. This evidence reiterates the pay rate information used in the wage-earning capacity determination. The forms submitted do not provide any new and relevant information on the issue.

In addition, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP.

The Board accordingly finds that appellant was not entitled to a merit review in this case. Appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). The Board notes that he may at any time seek modification of the wage-earning capacity determination by submitting new and relevant evidence on the issue.

On appeal, appellant noted that the March 23, 2010 OWCP decision stated that the initial article he had submitted was not sufficient documentation of wage increases. The Board

⁵ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁶ *See W.F.*, Docket No. 11-877 (issued March 9, 2012).

⁷ *See* 20 C.F.R. § 10.403(d), which provides that an employee's wage-earning capacity is computed by dividing the employee's earnings by the current pay rate for the date-of-injury job.

acknowledges that OWCP did not address the actual argument made by appellant and explain the issues. Appellant may pursue the issue of compensation for wage loss from October 2007 to May 2009 in an appropriate manner with OWCP.

CONCLUSION

The Board finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 9, 2011 is affirmed.

Issued: June 21, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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