

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

G.A., Appellant)

And)

**DEPARTMENT OF HOMELAND SECURITY,
EMERGENCY PREPAREDNESS &
RESPONSE, Biloxi, MS, Employer**)

**Docket No. 14-1505
Issued: November 5, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case submitted on the record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 23, 2014 appellant, through her attorney, filed a timely appeal from the May 20, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying further merit review of her claim. Because more than 180 days elapsed from the last merit decision, which was the Board's decision of January 10, 2014, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied review of the merits of appellant's case under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board.² In a decision dated January 10, 2014, the Board found that OWCP considered the proper factors to determine that the constructed position of personnel clerk represented appellant's wage-earning capacity. The Board found that the weight of the evidence of record established that she had the requisite physical ability, skill and experience to perform the position of personnel clerk. Further, the position was reasonably available within the general labor market of appellant's commuting area. The Board found that OWCP properly reduced her compensation effective July 1, 2012. The facts of the case, as set forth in the prior decision, are incorporated by reference.

In a letter dated March 4, 2014, appellant's attorney requested reconsideration. He argued that the prior decision should be vacated because the selected position was based upon an antiquated and defunct publication and the jobs could not be shown to exist in the present economy. Counsel contended that the Department of Labor, *Dictionary of Occupational Titles* (DOT) used by OWCP was out of date, that the publication was no longer used and that it had not been updated for many years. He argued that the conclusion reached in appellant's case was based on old news and was no better than fiction. Counsel argued that she and other employees "who have LWEC [loss in wage-earning capacity] decisions based on the DOT have been denied their basic rights under the law" and that their compensation payments were reduced based upon a fiction. He further asserted that OWCP's decision should be vacated and appellant's compensation be restored. Counsel argued that it was "well known and well accepted that the Department of Labor has replaced the DOT. It is only through OWCP inaction that such update has not been taken with regard to injured federal employees." Counsel referred to the Department of Labor, Office of Administrative Law Judges official website and noted that the DOT was last updated in 1991 and was replaced by "O*NET." He noted that the DOT was "rendered obsolete and replaced by a database which is largely informed by people who have direct experience working in each occupation, the Occupational Information Network or the O*NET."

By decision dated May 20, 2014, OWCP denied appellant's request for reconsideration. It found that the evidence submitted was insufficient to warrant review of its prior decision. OWCP noted that counsel's contentions were similar to his prior argument which was previously considered.

LEGAL PRECEDENT

Under section 8128(a) of FECA,³ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal

² Docket No. 13-1351 (issued January 10, 2014).

³ 5 U.S.C. § 8128(a).

regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁴

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 OWCP without review of the merits of the claim.⁵

ANALYSIS

On January 10, 2014 the Board affirmed OWCP’s determination that appellant’s wage-earning capacity decision was reflected in the constructed position of a personnel clerk. OWCP thereafter denied appellant’s reconsideration request without a merit review.

In his reconsideration request, counsel reasserted that DOT was outdated and that the selected position had not been shown to exist in the present economy. The Board finds that appellant’s representative arguments to not establish a legal error by OWCP or advance a relevant legal argument not previously considered. The Board notes that his argument that OWCP used an antiquated DOT system was previously raised and considered.⁶ The Board also notes that OWCP procedures clearly provide that the rehabilitation counselor shall use the DOT description, or OWCP-determined equivalent, to establish the duties and physical requirements of each job.⁷ Thus, counsel’s opinion, that the DOT is antiquated is not a relevant legal

⁴ 20 C.F.R. § 10.606(b).

⁵ *Id.* at § 10.608(b).

⁶ Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case. *J.P.*, 58 ECAB 289 (2007).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.5(a) (June 2013); *see id.* at Chapter 2.813.7(a) (February 2011). *See also D.J.*, Docket No. 14-863 (issued August 25, 2014) (where counsel argued that DOT was antiquated and defunct, and there was no evidence that the selected position existed in the current economy, the Board noted that the rehabilitation counselor found that the selected position was available in sufficient numbers and that appellant had submitted no evidence supporting the allegations that the selected position did not exist or was not reasonably available).

argument which has not been considered nor does it show error by OWCP in applying or interpreting a specific point. Appellant also did not submit any new and relevant evidence.⁸

Appellant therefore did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, appellant is not entitled to further merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁸ The Board notes that a claimant may pursue modification of the wage-earning capacity determination at any time, by requesting that OWCP review new evidence or argument in support of a modification request. *See A.P.*, Docket No. 14-851 (issued September 2, 2014). However, appellant's counsel, as noted did not submit any new evidence and he offered an argument that was repetitive of his previous assertions.