

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

R.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Huntsville, TX, Employer**

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**Docket No. 10-2299
Issued: June 20, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 13, 2010 appellant filed a timely appeal of a July 21, 2010 decision of the Office of Workers' Compensation Programs (OWCP), denying his application for reconsideration without merit review of the claim. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the July 21, 2010 nonmerit decision. Since more than 180 days elapsed between the most recent merit decision of September 18, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 14, 2008 appellant, then a 59-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right shoulder injury in the performance of duty on September 27, 2006. OWCP accepted the claim for right shoulder contusion, right shoulder and upper arm sprain, rotator cuff tear and sprain of shoulder and upper arm acromioclavicular. Appellant received compensation for wage loss commencing March 14, 2009, and underwent right shoulder arthroscopic surgery on March 31, 2009.

On May 11, 2009 the employing establishment offered appellant a full-time modified rural carrier position effective May 14, 2009. Appellant returned to work in the modified position on May 14, 2009.

In a decision dated September 18, 2009, OWCP determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. It found he had no loss of wage-earning capacity.

The record indicates that OWCP developed the medical evidence with respect to a schedule award for a right arm permanent impairment, and he received compensation for a schedule award from December 13, 2009 to May 14, 2010. There is no formal schedule award decision in the case record on appeal.

By letter dated June 25, 2010, appellant requested reconsideration of his claim.² He indicated that his last day at work in federal employment was May 20, 2010, and stated that he "had been removed from my position as a mail carrier, and was assigned a temporary light-duty clerical position, and was being kept on the payroll at my former salary." Appellant submitted medical evidence regarding his permanent impairment.

By decision dated July 21, 2010, OWCP declined to review the merits of the claim. It stated, "Because your letter neither raised substantive legal questions nor included new and relevant evidence, it is insufficient to warrant a review of our prior decision at this time." No further discussion of appellant's June 25, 2010 application for reconsideration was provided.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a),³ the Office's regulations provide 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

² On the appeal request form appellant indicated that the date of the Office decision was September 18, 2009. In the June 25, 2010 letter, appellant also referred to a reconsideration of "the schedule award previously applied for."

³ This section states, "The Secretary of Labor may review and 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).

10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁵

ANALYSIS

In this case, OWCP issued a September 18, 2009 decision finding that appellant's actual earnings in a modified rural carrier position since May 14, 2009 represented his wage-earning capacity. In his application for reconsideration, appellant asserted that the position was a temporary clerical position. OWCP did not discuss appellant's specific contentions in its July 21, 2010 decision. It is well established that a wage-earning capacity determination using actual earnings cannot be based on a job that is part time, seasonal or temporary.⁶ Appellant has advanced a relevant legal argument with respect to the wage-earning capacity determination. He had not raised the issue before and it is a relevant legal argument not previously considered. Pursuant to 20 C.F.R. § 10.606(b)(2)(ii), OWCP should have reviewed the merits of the claim and addressed appellant's argument. Accordingly, the case will be remanded for a merit decision with respect to the loss of wage-earning capacity determination.

With respect to a schedule award, OWCP apparently paid compensation pursuant to a schedule award issued in 2009. The record does not contain a final decision with appeal rights. If OWCP has not issued a final decision regarding a schedule award, it should do so on return of the case record.

CONCLUSION

The Board finds that appellant met the requirements of 20 C.F.R. § 10.606(b)(2) in his application for reconsideration. The case is remanded for a merit decision.

⁵ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁶ *See D.T.*, Docket No. 10-1012 (issued January 6, 2011); *A.J.*, Docket No. 10-619 (issued June 29, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 21, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 20, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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