

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

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**HAROLD E. SCAIFE, JR., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 05-423  
Issued: June 8, 2005**

*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, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On December 7, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 22, 2004 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this decision. The last merit decision of the Office was an October 7, 2003 decision concerning appellant's wage-earning capacity. As this decision was issued more than one year prior to the date appellant filed the present appeal, the Board does not have jurisdiction over this decision.<sup>1</sup>

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains a March 15, 2004 decision of the Board affirming an October 7, 2003 Office decision denying appellant's September 2003 reconsideration request. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

## ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

This is the third appeal in this case. In a March 11, 2003 decision, the Board found that the Office improperly adjusted appellant's wage-earning capacity based on his ability to work as a modified distribution clerk, but met its burden of proof to show that his wage-earning capacity was represented by his ability to work as a customer service clerk effective December 15, 2000.<sup>2</sup> The Board determined that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized June 7 and 26, 2000 reports of Dr. Alan H. Wilde, a Board-certified orthopedic surgeon who served as the impartial medical specialist.<sup>3</sup>

On March 15, 2004 the Board affirmed the denial of appellant's September 2003 request for reconsideration.<sup>4</sup> The Board found that the arguments presented by appellant in connection with his reconsideration request had previously been considered and rejected by the Office. The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

By letter dated November 7, 2004, appellant, through his attorney, requested reconsideration of his claim. Appellant submitted an October 25, 2004 report in which Dr. Tim Nice, an attending Board-certified orthopedic surgeon, indicated that his medical conditions included osteoarthritis of both knees, obesity, diabetes, hypoxemia, and chronic cellulitis lymphodema. Dr. Nice stated that appellant's multiple conditions rendered him unable to perform any work. In a form report dated September 17, 2004, Dr. Michael M. Lew, an attending physician, noted that appellant was unable to perform his usual work due to osteoarthritis of both knees, peripheral edema, cellulitis, vascular insufficiency and obesity.<sup>5</sup>

By decision dated November 22, 2004, the Office denied appellant's request for further merit review of his claim.

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<sup>2</sup> Docket No. 02-365 (issued March 11, 2003).

<sup>3</sup> On December 14, 1984 appellant, then a 33-year-old letter carrier, sustained a contusion, sprained medial collateral ligament and torn medial meniscus of his left knee due to a fall at work. On April 28, 1987 he sustained a right knee contusion and aggravation of chondromalacia symptoms when his right knee was struck by a mail case. The Office also accepted that appellant sustained an employment-related torn medial cartilage of his right knee, precipitation of osteoarthritis and permanent aggravation of chondromalacia. On February 12, 1989 appellant sustained a right knee contusion and a left ankle sprain due to a fall at work. In May 1989 appellant was terminated from the employing establishment for falsifying documentation pertaining to his medical condition.

<sup>4</sup> Docket No. 04-225 (issued March 15, 2004).

<sup>5</sup> Dr. Lew is not listed in the directories of medical specialties. Appellant also submitted letters to congressional representatives in which he argued that, contrary to the Office's determination, he was physically incapable of working as a customer service clerk.

## LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

## ANALYSIS

In support of his November 7, 2004 reconsideration request, appellant submitted an October 25, 2004 report in which Dr. Nice, an attending Board-certified orthopedic surgeon, indicated that his medical conditions, including osteoarthritis of both knees, obesity, diabetes, hypoxemia, and chronic cellulitis lymphodema, rendered him unable to perform any work. He also submitted a September 17, 2004 form report in which Dr. Lew, another attending physician, noted that he was unable to perform his usual work due to osteoarthritis of both knees, peripheral edema, cellulitis, vascular insufficiency and obesity.

The Board notes that these reports are not relevant to the main issue of this case and therefore do not require reopening of appellant's case for merit review.<sup>10</sup> The issue in the present case is whether the Office properly determined that appellant's wage-earning capacity effective December 15, 2000 was represented by his ability to work as a customer service clerk. The reports of Drs. Nice and Lew are not relevant to this issue in that neither physician rendered an opinion on appellant's medical condition around December 2000 or indicated whether he could perform the customer service clerk position during that time period.

Appellant also submitted letters to congressional representatives in which he argued that he was physically incapable of working as a customer service clerk. However, appellant had previously made similar arguments to the Office on numerous occasions. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8101-8193. Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> 20 C.F.R. § 10.608(b).

<sup>10</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>11</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

Appellant has not established that the Office improperly denied his request for further review of its prior merit decisions under section 8128(a) of the Act, because the evidence and argument he submitted 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 relevant and pertinent new evidence not previously considered by the Office.

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' November 22, 2004 decision is affirmed.

Issued: June 8, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member