



Appellant submitted no evidence in support of his claim and in a letter dated February 21, 2007, the Office notified him that the evidence of record was insufficient to support his claim. The Office advised appellant that he needed to submit further factual and medical evidence in support of his claim. It also notified appellant that the employing establishment was controverting his claim because it was filed more than 30 days after the alleged accident and because he had not submitted medical evidence in support of his claim.

Appellant submitted no evidence and by decision dated March 26, 2007, the Office denied his claim because the evidence of record was insufficient to establish he sustained an injury as defined by the Federal Employees' Compensation Act.

Appellant disagreed and, on April 3, 2007, requested reconsideration. The Office received appellant's request for reconsideration on April 11, 2007. In support of his request, appellant submitted an undated letter signed by coworkers and a March 30, 2007 medical note signed by Dr. Daniel Guerrero Miseses, an orthopedic surgeon, who after evaluation and x-rays of his phalange I, diagnosed him with fracture of the phalange distal of the right hand.

By decision dated July 24, 2008, the Office denied merit review.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>1</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>2</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>3</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>4</sup>

The Board also has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>5</sup> 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.<sup>6</sup>

---

<sup>1</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>2</sup> 20 C.F.R. § 10.606(b)(2).

<sup>3</sup> *Id.* at § 10.607(a).

<sup>4</sup> *Id.* at § 10.608(b).

<sup>5</sup> *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>6</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

### ANALYSIS

The Board finds that this case is not in posture for decision. The Office abused its discretion by denying merit review in this case. The Board initially notes that appellant requested reconsideration of the March 26, 2007 denial of the claim on April 3, 2007. Appellant included new evidence with his request for reconsideration. The record supports a finding that the Office received appellant's request for reconsideration on April 11, 2007. It however did not issue a decision regarding the request for reconsideration until July 24, 2008. In similar cases, the Board has previously found that the Office's delay in acting on appellant's request for reconsideration had "prevented [him] from gaining review by the Board of the merits of his claim" and that this delay constituted an abuse of discretion.<sup>7</sup> The Board will therefore set aside the Office's July 24, 2008 decision and remand the case to the Office to review the case record and issue a *de novo* decision on the merits of the claim.

The Board also notes that in this case appellant's April 3, 2007 request for reconsideration satisfied the third requirement under section 10.606(b)(2). Appellant submitted relevant and pertinent new factual and medical evidence with his April 3, 2007 request for reconsideration.

Therefore, the Office improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case will be remanded to the Office for a merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

### CONCLUSION

The Board finds that the Office, in its decision dated June 24, 2008, improperly denied appellant's request for reconsideration of his case on its merits.

---

<sup>7</sup> *Tony J. Fosko*, 35 ECAB 644 (1984).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 24, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further development in accordance with this decision.

Issued: June 12, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board