

FACTUAL HISTORY

On February 5, 2009 appellant, then a 55-year-old purchasing agent, filed a traumatic injury claim (Form CA-1) alleging that on February 2, 2009 he developed a splitting headache caused by fumes in the workplace. The employing establishment controverted the claim because he never reported to the work site the date he claimed exposure and the employer received a call stating that he was in the hospital.

In a February 2, 2009 report, James Hammon, EMS crew chief, stated that he arrived at the scene (a clinic/doctor's office) in response to a medical emergency. He noted that appellant's condition on the scene appeared minor. Appellant complained of a two-hour headache. Mr. Hammon stated that the clinic staff advised him that appellant was there complaining of a headache and that the cleaning crew's cleaning product was making it worse.

In a February 2, 2009 report, Dr. Brenda Oatman, Board-certified in emergency medicine, diagnosed appellant with acute cephalalgia triggered by environmental conditions and stated it was unclear if the condition was work related.

By letter dated February 9, 2009, the employing establishment controverted appellant's claim stating that fact of injury had not been proven, the record contained no evidence to support causal relationship, and that there were no known "fumes" in the health clinic.

By letter dated February 20, 2009, the Office informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidenced needed and directed to submit it within 30 days.

By letter dated February 2, 2009, appellant stated that he reported to the Letterkenny Army Depot medical clinic that day at approximately 6:30 a.m. to be released back to work after being off duty for work-related asthma and headaches caused by smells and fumes. Upon entry into the clinic, he could smell cleaning products which caused an intense headache. Appellant stated that the doctor at the clinic refused to see him and he requested an ambulance.

Appellant submitted records dated January 9, 2009 to February 13, 2010, including physician's reports, prescription slips, consultation and emergency room reports, diagnostic tests and physician progress notes.

By decision dated March 23, 2009, the Office denied appellant's claim finding that his medical complaint on February 2, 2009 was not sustained while in the performance of duty as the injury did not arise out of the course of his employment and occurred at a location off-premises. It noted that the employing establishment stated that he never reported to the work site and was thus not in the performance of duty. Appellant failed to establish the occurrence of the claimed February 2, 2009 incident, specifically, that he had a splitting headache which was caused by fumes.

On February 15, 2010 appellant, through counsel, requested reconsideration of the Office's March 23, 2009 decision, contending that the decision should be vacated due to a statement from Karen Amerson, appellant's supervisor. No such statement appears in the record

as received by the Office. Appellant submitted newspaper articles discussing the opening of his new winery.

By decision dated March 5, 2010, the Office denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.²

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), 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.³ Section 10.608(b) of Office regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁴

ANALYSIS

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim did not constitute an abuse of discretion pursuant to 5 U.S.C. § 8128(a).

The only Office decision before the Board on appeal is the March 5, 2010 decision, denying appellant's application for review. Since more than 180 days elapsed between the date of the Office's most recent merit decision on March 23, 2009 to the filing of appellant's appeal on March 26, 2010, the Board lacks jurisdiction to review the merits of appellant's claim.⁵

In his February 15, 2010 reconsideration request, counsel for appellant referred to a statement from Ms. Amerson; however, no such statement was received in the record. His statement in support of the reconsideration request did not show that the Office erroneously applied or misinterpreted a specific point of law or that appellant advanced a relevant legal argument not previously considered by the Office.

Appellant submitted a number of newspaper articles discussing his commercial wine making venture; however, this evidence is immaterial and irrelevant to the denial of his claim for failing to establish that his injury occurred in the performance of duty. These materials have no

² Following the Office's March 5, 2010 decision, appellant submitted additional evidence to the Office. As this evidence was not before the Office at the time of its final decision, the Board may not review this evidence for the first time on appeal. 20 C.F.R. § 510.2(c)(1).

³ *D.K.*, 59 ECAB 141 (2007).

⁴ *K.H.*, 59 ECAB 495 (2008).

⁵ 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of the Office's final decision being appealed.

connection to the claimed employment incident. To require the Office to reopen a case for reconsideration, appellant must submit relevant evidence not previously of record or advance legal contentions not previously considered.⁶ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁷

In its February 20, 2009 letter, the Office had informed appellant of the type of evidence needed to support his claim; however, the record before the Board contains no such evidence. Evidence submitted by appellant after the final decision cannot be considered by the Board, although he may submit new evidence, along with a request for reconsideration to the Office.

Appellant failed to 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 submit relevant and pertinent new evidence not previously considered by the Office. The Office properly refused to reopen his claim for further reconsideration of the merits in the March 5, 2010 decision.⁸

CONCLUSION

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

⁶ *E.g.*, *Eladio Joel Abrera*, 28 ECAB 401 (1977); *Edward Matthew Diekemper*, 31 ECAB 224 (1979); *Ethel D. Curry*, 35 ECAB 737 (1984); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁸ *Sherry A. Hunt*, 49 ECAB 467 (1998).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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