

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARISOL DEJESUS and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

*Docket No. 01-23; Submitted on the Record;
Issued July 9, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On July 9, 1997 appellant, then a 22-year-old casual carrier, was injured in the performance of duty when he fell down a flight of stairs. Appellant was off work and received continuation of pay from July 10 to August 1, 1997. She returned to limited duty on August 5, 1997 and was separated from her employment on September 27, 1997.

On August 22, 1999 appellant requested a schedule award.

On March 28, 2000 the Office issued appellant a schedule award for a 25 percent permanent loss of the use of the right ankle. The weekly pay rate was listed as \$160.00, the percentage of pay rate was 75 for a weekly compensation of \$120.00. The period of the award was September 22, 1998 to February 11, 2000.

By letter dated July 8, 2000, appellant requested reconsideration, alleging that the Office had erroneously calculated the amount of his schedule award based on an incorrect weekly pay rate.

In an August 24, 2000 decision, the Office denied appellant's request for reconsideration on the merits.

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against

compensation.¹ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.² When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.³ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁴ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.⁵

The Board notes that appellant has raised a legal contention on reconsideration that was not previously considered by the Office in determining his schedule award. The Office calculated appellant's schedule award based on a 20-hour week at \$8.00 per hour consistent with the hours stated on appellant's CA-1 form for a traumatic injury.⁶ However, appellant contends that he was scheduled to work eight hours per day on the date of his injury at the rate of \$8.00 per hour. This would mean that appellant's weekly rate would be \$320.00 and not \$160.00 as calculated by the Office. Appellant correctly points out that the CA-7 form completed by the employing establishment does not set forth appellant's hours of work for the two weeks proceeding his injury as requested. Although the employing establishment may contend that appellant was only a part-time employee at the date of injury on July 9, 1997, there is a questionable discrepancy on the CA-1, which states that appellant was injured at 1:30 p.m. despite the fact that his hours are listed as 8:00 a.m. to 12:00 p.m.

Because appellant has raised a legal argument not previously considered by the Office, which if correct could entitle him to an increased schedule award, the Board finds that the case must be remanded for further consideration and a merit review of the record on this issue.

¹ 5 U.S.C. § 8128; see *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² 20 C.F.R. § 10.606(b) (1999).

³ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁴ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁵ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁶ The portion of the application in question was completed by appellant's supervisor.

The decision of the Office of Workers' Compensation Programs dated August 24, 2000 is hereby vacated and the case is remanded for consideration consistent with this opinion.

Dated, Washington, DC
July 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member