

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH R. WINKLER and U.S. POSTAL SERVICE,  
POST OFFICE, Indianapolis, IN

*Docket No. 01-2049; Submitted on the Record;  
Issued May 29, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

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

On August 13, 1997 appellant, then a 43-year-old tractor trailer operator, sustained an employment-related left knee contusion and left medial and lateral meniscus tears. On December 1, 1997 appellant underwent left knee surgery which was authorized by the Office. Appellant received compensation from the Office for periods of disability. By decision dated April 21, 2000, the Office granted appellant a schedule award for a seven percent permanent impairment of his left leg. By decision dated April 26, 2001, the Office denied appellant's request for merit review.

The only decision before the Board on this appeal is the Office's April 26, 2001 decision denying appellant's request for a review on the merits of its April 21, 2000 decision. Because more than one year has elapsed between the issuance of the Office's April 21, 2000 decision and July 18, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the April 21, 2000 decision.<sup>1</sup>

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.<sup>4</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>5</sup>

In support of his April 12, 2001 reconsideration request, appellant submitted various medical documents of attending physicians, including reports dated between April 2000 and March 2001 of Dr. Leighton C. Johnson, an attending Board-certified orthopedic surgeon. However, none of the reports contained an opinion regarding the extent of the permanent impairment of appellant's left leg. Therefore, these reports are not relevant to the main issue of the present case, *i.e.*, whether the medical evidence shows that appellant has more than a seven percent permanent impairment of his left leg, for which he received a schedule award.<sup>6</sup> 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.<sup>7</sup>

In the present case, appellant has not established that the Office abused its discretion in its April 26, 2001 decision by denying his request for a review on the merits of its April 21, 2000 decision under section 8128(a) of the Act, because he 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 submit relevant and pertinent new evidence not previously considered by the Office.

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<sup>2</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>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> 20 C.F.R. § 10.608(b).

<sup>6</sup> In fact, one of the reports related to appellant's tinnitus condition. Appellant submitted a recurrence of disability claim dated April 13, 2001, but the record does not contain a final decision regarding this matter and it is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

<sup>7</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The decision of the Office of Workers' Compensation Programs dated April 26, 2001 is affirmed.<sup>8</sup>

Dated, Washington, DC  
May 29, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> Appellant submitted additional evidence after the Office's April 26, 2001 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).