

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

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**ALFRED MAROTTA, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Baltimore, MD, Employer**

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**Docket No. 04-964  
Issued: July 20, 2004**

*Appearances:*

*J. Stevens Huffines, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On March 1, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated February 11, 2004 denying his request for reconsideration. Because more than one year has elapsed since the last merit decision dated July 30, 2002 and the filing of this appeal on March 1, 2004, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

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

**FACTUAL HISTORY**

On June 23, 1998 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that he was pinned by a forklift against a hopper on June 20, 1995. Appellant was treated in the shock trauma unit for one week, before being released. On August 26, 1998 the

Office accepted the claim for left pneumothorax, left rib fractures, contusions and abrasions to the upper torso. Appellant received appropriate total disability benefits.

In a March 2, 1999 report, Dr. John O'Donnell, an orthopedic surgeon and Office referral physician, stated that appellant presented with left shoulder pain.<sup>1</sup> He noted that appellant had no visible atrophy, acromioclavicular or sternoclavicular tenderness, a full range of motion of 60 degrees, full internal rotation to T8 and full forward flexion. Dr. O'Donnell diagnosed impingement syndrome with an intact rotator cuff causally related to the accepted injury. Appellant remained off work until March 18, 1999 when he returned to full-time light duty with no lifting above his head with his left arm and lifting restricted to 30 pounds intermittently.

In a February 11, 2000 report, Dr. George Bedon, a pulmonologist, stated that results of a spirometry indicated a severe obstructive ventilatory defect, based on a suboptimal effort by appellant. Results of a lung volume test, also based on a suboptimal effort, indicated vital capacity was severely reduced and the residual volume and functional residual capacity were increased, indicating an air trapping affect and consistent with an obstructive ventilatory defect. Dr. Bedon also found that appellant's single breath diffusing capacity was severely diminished.

In an April 11, 2000 letter, appellant, through his representative, stated that he was submitting an impairment evaluation from an orthopedic referral that indicated a 15 percent loss of use of the upper left extremity and difficulty performing activities requiring his left side.<sup>2</sup> He also indicated that the medical evidence suggested a significant loss of vital lung capacity and an obstructive ventilatory defect. Appellant requested that the Office review these documents for an impairment rating.

In a November 7, 2000 report, Dr. Richard Mack, an orthopedic surgeon, stated that appellant could return to regular duty as his shoulder problem had resolved, though he would continue to receive treatment for his ribs.

On January 15, 2001 Dr. Bedon stated that he examined appellant again on November 13, 2000 and found that he had essentially a normal spirometry, normal lung volumes and normal breath diffusing capacity. There was no evidence of sustained critical oxygen desaturation with activities. He concluded that appellant had no pulmonary (lung) impairment.

In a February 6, 2001 report, Dr. Joshua Aaron, a pulmonologist and Office referral physician, stated that appellant reported that he recently walked about two miles on flat ground and regularly walked up two and a half flights of stairs with no difficulty, did not have a cough, had some sputum and smoked less than a pack of cigarettes a day. Appellant indicated that any limitations at work were due to pain and not to shortness of breath. He reported occasional wheezing and pain under the armpit at the exit points where chest tubes were inserted at the time of the accident. On examination, Dr. Aaron found clear lungs and no limitation to breathing.

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<sup>1</sup> Dr. O'Donnell reviewed appellant's history of injury, noting that appellant did not recall any injury to his left shoulder on the date of injury but experienced pain upon the removal of chest tubes and rehabilitation.

<sup>2</sup> It is not clear from the record what orthopedic report appellant is referring to as there is no evidence in the record indicating an impairment of appellant's upper extremity.

Results of a spirometry were normal with adequate effort. He concluded that appellant's lung injury had resolved except for a small amount of fibrotic change in the left lung that was too small to cause any disability. Dr. Aaron opined that Dr. Bedon's test results in February 2000 were different due to appellant's suboptimal effort at that time.

In a November 30, 2001 letter, appellant, through his representative, requested that the Office adjudicate his claim for a schedule award for his left shoulder impairment.

In a July 30, 2002 decision, the Office denied entitlement to a schedule award, finding that the medical evidence indicated no impairment to his left lung. The Office noted that schedule awards were considered only for impairments of listed body members due to accepted injuries.

In an October 1, 2002 letter, appellant requested reconsideration and stated that the July 30, 2002 decision did not address the shoulder; contending that his shoulder injury had been accepted. Appellant resubmitted several medical reports related to his left shoulder.

On November 11, 2003 appellant submitted a recurrence claim of disability, alleging that since the accepted injury he experienced constant pain. On February 6, 2004 the Office requested more information related to the recurrence claim.

In a February 11, 2004 decision, the Office denied appellant's request for reconsideration of its July 30, 2002 denial finding that he failed to submit new evidence or raise a new legal argument.

### **LEGAL PRECEDENT**

The only decision before the Board on this appeal is the Office's February 11, 2004 decision denying appellant's request for reconsideration of its July 30, 2002 decision. Because more than one year has elapsed between the issuance of the Office's July 30, 2002 decision and March 1, 2004, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 30, 2002 decision.<sup>3</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>4</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>5</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

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<sup>3</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>4</sup> 5 U.S.C. § 8101 *et seq.* 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>5</sup> 20 C.F.R. § 10.606(b)(2).

within one year of the date of that decision.<sup>6</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>7</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>8</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>9</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>10</sup>

### **ANALYSIS**

In the present case, appellant has not established that the Office abused its discretion in the February 11, 2004 decision by denying his request for reconsideration of its July 30, 2002 decision. The Board notes that appellant submitted no new evidence related to establishing any permanent impairment of his lungs. As he submitted no new evidence related to the subject of the July 30, 2002 denial, appellant has not shown 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.<sup>11</sup>

### **CONCLUSION**

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.

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<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>8</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>9</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>10</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>11</sup> Appellant's representative addressed the issue of a schedule award for a left shoulder condition. The Board notes that this issue was not subject of a final decision by the Office and is not an issue in the present appeal. *See* 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision by the Office of Workers' Compensation Programs dated February 11, 2004 is affirmed.

Issued: July 20, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member