

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

J.Z., Appellant

and

**NEW YORK CITY POLICE DEPARTMENT,
New York, NY, Employer**

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**Docket No. 06-874
Issued: August 3, 2006**

Appearances:

Gary J. Gogerty, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 10, 2006 appellant filed a timely appeal¹ from a March 9, 2005 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction to review the March 9, 2005 nonmerit decision.

ISSUE

The issue is whether the Office abused its discretion by denying appellant's request for reconsideration.

¹ The record contains a postmark demonstrating that appellant mailed his letter requesting appeal on March 2, 2006, within one year of the March 9, 2005 decision. Therefore, appellant's appeal was timely filed under 20 C.F.R. § 501.3(d)(3)(ii), which provides that, if appellant's request for appeal was "sent by mail and the fixing of the date of delivery as the date of filing would render the appeal untimely, it will be considered to have been filed as of the date of mailing" as established by postmark or other evidence competent to establish the date of mailing.

FACTUAL HISTORY

On January 14, 2003 appellant, then a 43-year-old retired police lieutenant, filed a law enforcement officer's injury or occupational disease claim (Form CA-721a), alleging that he sustained post-traumatic stress disorder in his duties at the site of the World Trade Center from September 11 to November 25, 2001. He described witnessing the deaths of persons jumping or falling from both the North and South Towers, being engulfed in clouds of ash and debris as the first tower collapsed, removing survivors from imminent peril while he himself was still covered in ash, and bagging body parts at the attack site through November 25, 2001. Appellant asserted that his efforts, in concert with other officers and emergency personnel, prevented numerous homicides that would have occurred due to the terrorist attacks. He contends that his actions thus fell within the purview of 5 U.S.C. § 8191(3), a law enforcement officer engaged "in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States."

Appellant submitted witness statements from his supervisors and coworkers, as well as a departmental commendation, attesting to his many heroic efforts on September 11, 2001 and in subsequent days. He also submitted reports dated from March 3 to June 7, 2002 from attending psychiatrists Drs. Sashi Makam, Shyam Patil and Linden Schild, opining that appellant sustained post-traumatic stress disorder due to his duties on and after September 11, 2001. Appellant also submitted a September 30, 2002 report by three psychiatrists consulting to the employing establishment, finding that appellant qualified for disability retirement.

In a November 20, 2003 letter, the Office advised appellant that the evidence submitted was insufficient to establish his claim and requested additional information regarding whether his employment activities were under the purview of 5 U.S.C. § 8191. The Office specifically requested additional evidence indicating whether appellant was preventing a crime against the United States, protecting a person held for the commission of a crime against the United States or apprehending an individual for a crime against the United States. In response, appellant submitted copies of documents previously of record.

By decision dated December 21, 2003, the Office denied appellant's claim on the grounds that he submitted insufficient evidence to establish that his emotional condition "occurred under circumstances to bring it within the purview of 5 U.S.C. § 8191." The Office found that there was no evidence demonstrating that appellant sustained the claimed condition while guarding or protecting a person held for the commission of a crime against the United States, while lawfully preventing or attempting to prevent a crime against the United States, or while attempting to apprehend a person or persons sought for committing a crime against the United States. The Office further found that appellant's activities did not fall under the purview of 18 U.S.C. §§ 1951 and 1961 *et seq.* related to racketeering or 18 U.S.C. § 1073 relating to flight to avoid prosecution, custody or confinement after conviction. The Office concluded that a sufficient nexus between appellant's employment activities and "a crime against the United States ha[d] not been demonstrated in th[e] record. As such, [appellant] failed to establish that the injury occurred under circumstances enumerated" in 5 U.S.C. § 8191.

In a December 22, 2004 letter, appellant requested reconsideration. He contended that there was clear evidence of a crime against the United States on September 11, 2001, as

evidenced by the federal prosecution of Zacarias Moussaoui. Appellant asserted that Mr. Moussaoui and others violated federal law by conspiring to commit terrorist acts, including aircraft piracy, destruction of aircraft and the use of weapons of mass destruction. He explained that his employment activities prevented crimes against the United States under 18 U.S.C. §§ 1114 and 1117, Conspiracy to Murder United States Employees and 18 U.S.C. §§ 844(f),(i), (n), Conspiracy to Destroy Property. Appellant asserted that his actions thus fell under the purview of 5 U.S.C. § 8191(3), “a law enforcement officer … engaged … in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States.”

By decision dated March 9, 2005, the Office denied reconsideration on the grounds that appellant’s letter did not raise substantive legal questions or include new or relevant evidence.²

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (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.³ Section 10.608(b) provides that when an application for review of the merits of a claim 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

In support of his request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.⁵ Appellant need only submit relevant, pertinent evidence not previously considered by the Office.⁶ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant’s application for reconsideration and any evidence submitted in support thereof.⁷

ANALYSIS

Appellant claimed that his duties from September 11 to November 25, 2001 fell under the purview of 5 U.S.C. § 8191 as he was trying to prevent the commission of crimes against the

² The record indicates that the Office send the March 9, 2005 decision to appellant’s address of record. However, in a November 1, 2005 letter, appellant’s attorney asserted that appellant had not received a response to his December 17, 2004 request for reconsideration. While the record indicates that the Office mailed appellant a second copy of the decision on November 10, 2005, there is no evidence that the decision was formally reissued.

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b).

⁵ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁶ See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

⁷ *Annette Louise*, 54 ECAB 783 (2003).

United States precipitated by the September 11, 2001 terrorist attack on the World Trade Center. The Office denied appellant's emotional condition claim, finding that his employment activities did not bring him within the purview of 5 U.S.C. § 8191 as he was not involved in the prevention or attempted prevention of a federal crime or the apprehension, attempted apprehension or custody of federal suspects or criminals as contemplated by the statute.

Appellant submitted December 22, 2004 request for reconsideration, again asserting that his employment activities should bring him under the coverage of 5 U.S.C. § 8191(3) as he was "a law enforcement officer ... engaged ... in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States." Although he newly asserted that he prevented federal offenses in addition to homicide, his letter essentially reiterates his prior statements and arguments. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.⁸ The duplicative nature of appellant's arguments does not require reopening the record for further merit review.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent new evidence not previously considered by the Office, he is not entitled to a review of the merits of his claim. Therefore, the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied a merit review of appellant's claim pursuant to his December 22, 2004 request for reconsideration, as he failed to submit relevant and pertinent evidence addressing the critical issue of whether his employment activities fell within the purview of 5 U.S.C. § 8191.

⁸ *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 9, 2005 is affirmed.

Issued: August 3, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board