

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

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**HORACE L. FULLER, JR., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Fort Worth, TX, Employer**

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**Docket No. 06-821  
Issued: July 3, 2006**

*Appearances:*  
*Horace L. Fuller, Jr., pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 8, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 8, 2006 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was issued December 14, 2004, more than one year prior to the date appellant filed the present appeal. Therefore the Board does not have jurisdiction over the merits of this case.<sup>1</sup>

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains a November 2, 2005 decision of the Board affirming the Office's determination that appellant did not meet his burden of proof to establish that he sustained an employment-related recurrence of disability and the Office's denial of his January 2005 request for further review of the merits of his claim. In the absence of further review by the Office on the issues addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

## ISSUE

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

## FACTUAL HISTORY

This is the second appeal in this case. In the first appeal,<sup>2</sup> the Board issued a decision on November 2, 2005 affirming the Office's determination that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after June 15, 2002 due to his August 23, 2001 employment injury. It also affirmed the Office's denial of his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).<sup>3</sup> The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

By letter dated February 3, 2006, appellant requested reconsideration of his claim. He submitted a November 16, 2005 report in which Dr. James E. Elbaor, an attending Board-certified orthopedic surgeon, stated that he reported left great toe pain of 4 to 7 on a scale of 10, weakness, numbness and tingling in both legs, and lessened left leg limping and right knee pain than previously reported. Dr. Elbaor noted that appellant was injured on August 23, 2001 when an ice machine door fell on the dorsal aspect of his left foot in the great toe area.<sup>4</sup>

By decision dated February 8, 2006, the Office denied appellant's request for further review of the merits of his claim.<sup>5</sup>

## LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>6</sup> 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

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<sup>2</sup> Docket No. 05-1437 (issued November 2, 2005).

<sup>3</sup> On August 24, 2001 appellant, then a 51-year-old postal clerk, filed a traumatic injury claim alleging that he sustained injury to his left foot at work on August 23, 2001 when he was getting ice out of a machine and the door fell on his left foot. On November 6, 2001 he returned to performing regular duty for the employing establishment. The Office accepted appellant's claim for left foot contusion and paid appropriate compensation. Appellant claimed that beginning June 15, 2002 he sustained a recurrence of disability due to his August 23, 2001 employment injury.

<sup>4</sup> Appellant also submitted copies of a compensation claim form and the Office's May 5, 2005 decision.

<sup>5</sup> Appellant submitted additional evidence after the Office's February 8, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

<sup>6</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).

considered by the Office.<sup>7</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 within one year of the date of that decision.<sup>8</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>9</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>10</sup>

### ANALYSIS

The Office accepted that appellant sustained an employment-related left foot contusion on August 23, 2001. Appellant claimed that he sustained a recurrence of disability beginning June 15, 2002 due to his August 23, 2001 employment injury and the Office denied his claim on the grounds that he did not submit sufficient medical evidence. By decision dated February 8, 2006, the Office denied appellant's February 3, 2006 reconsideration request.

In support of his reconsideration request, appellant submitted a November 16, 2005 report in which Dr. Elbaor stated that he reported left great toe pain of 4 to 7 on a scale of 10, weakness, numbness and tingling in both legs, and lessened left leg limping and right knee pain than previously reported.

The submission of this report does not require reopening of appellant's claim for further review of the merits, because it is not relevant to the underlying issue of the present case, *i.e.*, whether he submitted sufficient medical evidence to establish that he sustained a recurrence of disability on or after June 15, 2002 due to his August 23, 2001 employment injury.<sup>11</sup> Although Dr. Elbaor noted that appellant was injured on August 23, 2001 when an ice machine door fell on the dorsal aspect of his left foot in the great toe area, he did not provide any opinion on whether appellant sustained a recurrence of disability due to his August 23, 2001 employment injury. Therefore, his report is not relevant to the merit issue of this case.<sup>12</sup>

In the present case, appellant has not established that the Office improperly denied his request for further review of the merits of his claim under section 8128(a) of the Act, because his reconsideration request did not show that the Office erroneously applied or interpreted a specific

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<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> 20 C.F.R. § 10.608(b).

<sup>10</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>11</sup> *See supra* note 6 and accompanying text.

<sup>12</sup> Appellant also submitted copies of a compensation claim form and the Office's May 5, 2005 decision, but these documents also would not be relevant to the merit issue of this case.

point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' February 8, 2006 decision is affirmed.

Issued: July 3, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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