

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

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F.W., Appellant )

and )

DEPARTMENT OF THE AIR FORCE, )  
COMMISSARY, McGUIRE AIR FORCE BASE, )  
NJ, Employer )

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**Docket No. 07-397  
Issued: April 26, 2007**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 1, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 26, 2006 nonmerit decision denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The most recent merit decision of record was the Office's June 15, 2005 decision finding that he did not sustain an employment injury. Because more than one year has elapsed between the last merit decision and the filing of this appeal on December 1, 2006, the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

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

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On February 26, 2004 appellant, then a 47-year-old warehouse store worker, filed a traumatic injury claim alleging that he sustained a back injury when he lifted boxes and pallets at work on February 13, 2004. His supervisor, Carl Rawls, indicated on the form that he responded “no” when asked if he was injured on the job.

In a March 3, 2004 statement, Donna Chew, a store administrator, indicated that on February 23, 2004 she observed appellant and Mr. Rawls walking toward the administrative office. She indicated that appellant noted that he had hurt his back but responded in the negative when she asked him if he hurt his back at work. In a March 4, 2004 statement, Mr. Rawls provided a similar account.

In an undated statement received by the Office on April 28, 2004, appellant stated that he did not remember the conversation that was purported to have occurred with Mr. Rawls and Ms. Chew on February 23, 2004. He indicated that he delayed seeking treatment for his injury because he self-treated himself.

Appellant submitted several reports, dated beginning in April 2004, of Dr. Andre M. Hu, an attending Board-certified orthopedic surgeon, who noted that appellant reported that he injured himself while lifting at work on February 14, 2004.

By decision dated May 7, 2004, the Office denied appellant’s claim on the grounds that he had not established the fact of injury, as he had not shown that the claimed injury occurred at the time, place and in the manner alleged.

Appellant submitted additional medical reports, some of which listed February 13, 2004 as the date of injury and some of which listed the date of injury as February 14, 2004. The record was supplemented to include a February 24, 2004 statement in which appellant indicated that he delayed seeking treatment for his injury because he self-treated himself.

Appellant requested a hearing before an Office hearing representative. At the February 14, 2005 hearing, he testified that he did not remember the conversation that was purported to have occurred with Mr. Rawls and Ms. Chew on February 23, 2004. Appellant discussed his learning disability and his limited English skills.

Appellant submitted a March 9, 2005 report in which Dr. Hu stated that he clarified on February 24, 2005 that he sustained an employment injury on February 13, 2004 rather than February 14, 2004.

By decision dated and finalized June 15, 2005, the Office hearing representative affirmed the Office’s May 7, 2004 decision. The hearing representative indicated that there were such inconsistencies in appellant’s account of the claimed injury to cast doubt on its validity.

In October 2005, appellant submitted a statement reiterating that he did not remember the conversation that was purported to have occurred with Mr. Rawls and Ms. Chew on February 23, 2004. Appellant also discussed his learning disability, his limited English skills, and his hunting activities. He also submitted another copy of Dr. Hu’s March 9, 2005 report.

By decision dated April 24, 2006, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

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 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 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 or her 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>

### **ANALYSIS**

The Office denied appellant's claim that he sustained an employment injury on the grounds that there were such inconsistencies in his claim as to cast doubt on the validity of his claim.

In support of his October 2005 reconsideration request, appellant submitted a statement in which he reported that he did not remember the conversation that was purported to have occurred with Mr. Rawls and Ms. Chew on February 23, 2004. He also discussed his learning disability, his limited English skills and his hunting activities. Appellant also submitted another copy of a previously submitted March 9, 2005 report of Dr. Hu, an attending Board-certified orthopedic surgeon.

The submission of this evidence and argument would not require reopening of appellant's claim because 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>6</sup> Appellant previously advanced similar argument in support of his claim and the March 9, 2005 report had previously been considered in connection with the main issue of the present case. He did not present any new evidence or argument relevant to the underlying point at issue, whether the February 13, 2004 incident occurred as alleged.

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

Appellant has not established that the Office improperly denied his request for further review of the merits of its June 15, 2005 decision under section 8128(a) of the Act, because the evidence and argument he submitted 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 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' April 26, 2006 decision is affirmed.

Issued: April 26, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board