



medical evidence showing that he sustained a right rotator cuff tear for which he underwent surgery on June 6, 2002. Appellant also submitted documentary evidence showing that he was injured in the line of duty and a Department of Justice credential dated September 30, 1999 stating that he was deputized as a U.S. Marshal, with the appointment to expire October 31, 2001. On January 15, 2004 accidental disability retirement was approved by the NYPD. By letter dated March 24, 2004, Lieutenant Joseph F. Campisi of the NYPD noted that appellant had been working with the arson/explosives squad on September 11, 2001 and was a first responder to the World Trade Center. He stated that appellant was requesting coverage under section 8191 of the Federal Employees' Compensation Act.<sup>1</sup>

By letter dated April 1, 2004, the Office informed appellant of the specific requirements of section 8191. In an April 21, 2004 letter, Lieutenant Campisi opined that appellant fulfilled the requirements of section 8191 as he was both preventing a crime against the United States and was also attempting to apprehend those who committed the crime.

In a June 7, 2004 decision, the Office denied the claim, finding that the evidence did not establish that appellant's injury was covered by section 8191.

On June 26, 2004 appellant requested a review of the written record. In a November 24, 2004 decision, an Office hearing representative affirmed the June 7, 2004 decision. On March 22, 2005 appellant requested reconsideration, alleging that he additionally sustained a nasal polyp condition in the line of duty and submitted supportive medical evidence. By decision dated May 23, 2005, the Office denied modification of the previous decisions.

On April 7, 2006 appellant again requested reconsideration, reiterating his argument that his claim fell under the purview of section 8191. In an April 13, 2006 decision, the Office denied his request for reconsideration of the merits.

### **LEGAL PRECEDENT -- ISSUE 1**

Under the Act, an individual seeking compensation benefits has the burden of proof to establish the essential elements of his claim, including the fact that he is an employee of the United States within the meaning of the Act.<sup>2</sup> Appellant makes no claims to federal employment and asserts that he is covered as an officer as explained below.

In pertinent part, 5 U.S.C. § 8191 provides that an eligible officer is any person who is determined by the Secretary of Labor in her discretion to have been on any given occasion:

“(1) A law enforcement officer and to have been engaged on that occasion in the apprehension or attempted apprehension of any person --

(A) for the commission of a crime against the United States; or

---

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See *Louis T. Blair, Jr.*, 54 ECAB 348 (2003).

(B) who at that time was sought by a law enforcement authority of the United States for the commission of a crime against the United States; or

(C) who at that time was sought as a material witness in a criminal proceeding instituted by the United States; or

“(2) a law enforcement officer and to have been engaged on that occasion in protecting or guarding a person held for the commission of a crime against the United States or as a material witness in connection with such a crime; or

“(3) a law enforcement officer and to have been engaged on that occasion in the lawful prevention of or lawful attempt to prevent, the commission of a crime against the United States....”<sup>3</sup>

Office regulations provide that benefits are available to law enforcement officers who are not “employees” under 5 U.S.C. § 8101, who are determined in the discretion of the Office to have been engaged in the activities listed in section 8191 of the Act.<sup>4</sup> Benefits are payable when an officer is injured while apprehending or attempting to apprehend an individual for the commission of a federal crime. The fact that an injury is related in some way to the commission of a federal crime does not necessarily bring the injury within the coverage of the Act.<sup>5</sup> For benefits to be payable when an officer is injured preventing or attempting to prevent a federal crime, there must be objective evidence that a federal crime is about to be committed.<sup>6</sup> Based on the facts available at the time of the event, the officer must have an awareness of sufficient information which would lead a reasonable officer, under the circumstances, to conclude that a federal crime was in progress or about to occur and there must be sufficient evidence that the officer was in fact engaged in actual or attempted apprehension of a federal criminal or prevention of a federal crime.<sup>7</sup>

The Board has recognized that the issue of whether a law enforcement officer was attempting to apprehend someone for or prevent the commission of a federal crime turns initially on the question of whether, at the time the injury was sustained, the local law enforcement officer knew that a federal crime or potential federal crime was being committed and, therefore, formed the intent to apprehend someone for or to prevent the commission of a federal crime. Knowledge of a potential federal crime at the time of injury or death does not, alone establish eligibility to receive benefits under the Act. The claimant must establish that the activities in

---

<sup>3</sup> 5 U.S.C. § 8191.

<sup>4</sup> 20 C.F.R. § 10.735(b).

<sup>5</sup> 20 C.F.R. § 10.738(a).

<sup>6</sup> 20 C.F.R. § 10.738(b).

<sup>7</sup> 20 C.F.R. § 10.739.

which he was engaged at the time of injury constituted the apprehension or attempted apprehension of a federal offender or the lawful prevention of or lawful attempt to prevent the commission of a federal crime.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant is not entitled to coverage under section 8191 of the Act for the shoulder injury he sustained on September 12, 2001 at the World Trade Center. Appellant alleged that he was engaged in the apprehension or attempted apprehension of a person for the commission of a crime against the United States because he was specifically looking for an Arabic male and was thus entitled to coverage under parts (1) or (2) of section 8191. The record, however, supports that on September 12, 2001 he was working in his capacity as an NYPD detective engaged in search and rescue efforts at the World Trade Center site following after the September 11, 2001 terrorist attack. He sustained his right rotator cuff injury while moving a large section of metal from a collapsed building. Language in the legislative history of section 8191 indicates that Congress intended this section to apply to injuries sustained by local law enforcement officials “where the injury was sustained in active pursuit of a federal law breaker.”<sup>9</sup> There is no evidence of record that appellant was injured while actively engaged in the apprehension or attempted apprehension of a person who had committed a crime against the United States but was rather performing laudable search and rescue duties at the World Trade Center site.<sup>10</sup>

Appellant also contends that he is entitled to coverage under part (3) of section 8191 as on September 12, 2001 he was engaged in the lawful prevention of a crime against the United States because he was part of an effort to identify, locate and prevent other attacks. This is not supported by the record. The Board has recognized that the issue of whether a local law enforcement office was attempting to prevent the commission of a federal crime turns initially on the question of whether, at the time the injury was sustained, the officer had knowledge that a federal crime was being or about to be committed and, therefore, formed the intent to prevent the commission of a federal crime.<sup>11</sup> The Board has held that section 8191 requires that the threat must be actual and imminent.<sup>12</sup> In this case, the record does not reflect that appellant had the intent to prevent the commission of a federal crime or that he knew a federal crime was being committed at the time he was injured on September 12, 2001. Rather, the terrorist attack had occurred on September 11, 2001. At the time appellant sustained his shoulder injury, he was engaged in rescue and recovery efforts. Appellant, therefore, did not establish that he was entitled to coverage under part 3 of section 8191.

---

<sup>8</sup> *Michael Kosowski*, 57 ECAB \_\_\_\_ (Docket No. 04-2263, issued November 22, 2005).

<sup>9</sup> Statement by Congressman Poff, Congressional Record, March 27, 1968, cited in *Kenneth Dudonis*, 37 ECAB 287 (1986) at note 7.

<sup>10</sup> *Id.*

<sup>11</sup> See *Morris W. Farlow*, 48 ECAB 659 (1997).

<sup>12</sup> See *Alfred A. Danna*, 47 ECAB 789 (1996).

While the Act is remedial in nature and should be broadly and liberally construed in accord with its purpose, the primary rule of statutory construction is to give effect to legislative intent.<sup>13</sup> The Board has held that section 8191 was not intended to cover every event that could be remotely connected to the real or alleged commission of a federal crime, but rather to cover the specific occurrence or prevention of a federal crime.<sup>14</sup> Although section 8191 does not explicitly state that in order to be eligible an officer must be aware of a federal link, the legislative history supports that the local officer must be purposely, not accidentally, engaged in the federal law enforcement activity.<sup>15</sup> The purpose of section 8191 is to provide compensation benefits for state and local law enforcement officers who expose themselves to the dangers of enforcing federal laws or who provide assistance to federal authorities.<sup>16</sup>

Appellant's argument that he prevented the commission of a crime against citizens of the United States on September 12, 2001 is not convincing. His search and rescue effort cannot be construed as "the lawful prevention of or lawful attempt to prevent the commission of a crime against the United States."<sup>17</sup> While his actions were certainly praiseworthy, he did not act with the necessary intent to prevent the commission of a federal crime. The Board finds this lack of intent precludes coverage under part 3 of section 8191.

The Board has no power to enlarge upon the specific terms or the statute or to grant benefits on a basis other than those provided by the Act.<sup>18</sup> At the time of his shoulder injury on September 12, 2001, appellant was not attempting to apprehend someone for or to prevent the commission of a federal crime. He, therefore, is not eligible to receive compensation benefits under section 8191 of the Act.<sup>19</sup> The Board will not rule on the question of the significance, if any, of the Intergovernmental Personnel Act or appellant's status, at the time of his injury, as a special Deputy United States Marshal.<sup>20</sup> These questions were raised only obliquely in the record and were not asserted by appellant as a basis for eligibility nor developed by the Office.

---

<sup>13</sup> *Michael Kosowski, supra* note 8.

<sup>14</sup> *See Michael Ponenti*, 34 ECAB 319 (1982).

<sup>15</sup> *See Lance D. Coleman*, 41 ECAB 604 (1990) (listing congressional comments to this effect).

<sup>16</sup> *Michael Kosowski, supra* note 8.

<sup>17</sup> 5 U.S.C. § 8191(3).

<sup>18</sup> *Morris W. Farlow, supra* note 11.

<sup>19</sup> With his March 22, 2005 reconsideration request, appellant also contended that his nasal condition should be covered under section 8191. The Board has no jurisdiction over this claim as the Office has not adjudicated whether his nasal condition was related to federal employment. The Board's jurisdiction is limited to the deliberation of appeals from final decisions of the Office. 20 C.F.R. § 501.2c. The Board notes that this claim would also not fall within the purview of section 8191 of the Federal Employees' Compensation Act for the reasons stated above. The record also does not support that appellant established entitlement under the Intergovernmental Personnel Act, which permits temporary assignments between eligible governments and institutions and the Federal Government. 5 U.S.C. § 3371 *et seq.*; *see Cary S. Brenner*, 55 ECAB 739 (2004).

<sup>20</sup> The Intergovernmental Personnel Act establishes a process for the temporary assignment or State of municipal employees to Federal Government activities or projects. 5 U.S.C. § 3371 *et seq.*, *see Cary S. Brenner, supra* note 19.

## LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>21</sup> Section 10.606(b)(2) of Office 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.<sup>22</sup> Section 10.608(b) provides that when an application for reconsideration 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.<sup>23</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>24</sup> Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>25</sup>

## ANALYSIS -- ISSUE 2

With his April 7, 2006 reconsideration request, appellant merely reiterated his arguments that his claim fell under the purview of section 8191 of the Federal Employees' Compensation Act, arguments that had been previously considered by the Office. The submission of evidence or argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case.<sup>26</sup> He, therefore, did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office and consequently was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>27</sup> Furthermore, appellant submitted no additional evidence. As he did not submit relevant and pertinent new evidence not previously considered by the Office, he did not meet the requirements of the third above-noted element of section 10.606(b)(2)<sup>28</sup> and the Office properly denied his reconsideration request.<sup>29</sup>

---

<sup>21</sup> 5 U.S.C. § 8128(a).

<sup>22</sup> 20 C.F.R. § 10.606(b)(2).

<sup>23</sup> 20 C.F.R. § 10.608(b).

<sup>24</sup> *Helen E. Paglinawan*, 51 ECAB 591 (2000).

<sup>25</sup> *Kevin M. Fatzner*, 51 ECAB 407 (2000).

<sup>26</sup> *Helen E. Paglinawan*, *supra* note 24.

<sup>27</sup> 20 C.F.R. § 10.606(b)(2)(1), (2).

<sup>28</sup> 20 C.F.R. § 10.606(b)(2)(3).

<sup>29</sup> 20 C.F.R. § 10.606(b)(3).

**CONCLUSION**

The Board finds that appellant's September 12, 2001 injury does not fall within the purview of 5 U.S.C. § 8191. The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 12, 2006 and May 23, 2005 be affirmed.

Issued: January 29, 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