

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

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O.B., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Phillipsburg, NJ, Employer

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**Docket No. 07-704  
Issued: July 2, 2007**

*Appearances:*  
*Appellant, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 16, 2007 appellant filed a timely appeal of an October 20, 2006 decision of the Office of Workers' Compensation Programs, denying merit review of her claim. Since more than one year has elapsed between the last merit decision on September 27, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

**ISSUE**

The issue is whether the Office properly refused to reopen the case for merit review pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

Appellant filed an occupational disease claim (Form CA-2) on January 20, 2003 alleging that she sustained a back injury causally related to her federal employment as a city carrier. A February 11, 2003 memorandum indicated that appellant was currently on the periodic rolls with respect to an April 2002 employment-related back injury. By decision dated September 15,

2004, an Office hearing representative found that the evidence was sufficient to accept an aggravation of degenerative disc disease. The Office was directed to determine the period of disability.

By decision dated February 3, 2005, the Office determined that appellant was not entitled to continuing compensation for wage loss. The Office determined that the accepted condition had resolved as of May 14, 2003, the date of a report by Dr. Thomas DiBenedetto, an orthopedic surgeon.<sup>1</sup>

Appellant requested a review of the written record. By decision dated September 27, 2005, an Office hearing representative affirmed the February 3, 2005 decision.

In a letter dated September 20, 2006, appellant requested reconsideration of her claim. She argued that the Office had improperly used medical evidence by using the same evidence to reopen and rescind the claim. Appellant submitted medical reports dated August 13, 2003 and June 9, 2005 from Dr. Kenneth Zahl, an anesthesiologist. She also submitted a November 22, 2002 report from Dr. Michael Busch, an orthopedic surgeon. These reports had previously been submitted prior to the September 27, 2005 merit decision.

By decision dated October 20, 2006, the Office determined that the application for reconsideration and accompanying evidence were insufficient to warrant reopening the claim for merit review.

### **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 regulation provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that set forth arguments and contains evidence that either "(1) shows that [the Office] erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by [the Office]; or (3) constitutes relevant and pertinent evidence not previously considered by [the Office]."<sup>3</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.<sup>4</sup>

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<sup>1</sup> Appellant was referred to Dr. DiBenedetto pursuant to development of the April 2002 claim. The Office noted that appellant had received compensation through December 27, 2003 pursuant to the April 2002 injury claim.

<sup>2</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

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

<sup>4</sup> 20 C.F.R. § 10.608(b); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

### ANALYSIS

Appellant submitted a written application for reconsideration dated September 20, 2006. She stated that she was raising a legal argument that the Office had improperly used medical evidence as they used the same evidence for reopening and rescinding the claim. The Board notes that the Office did not rescind acceptance of the claim. The Office determined that appellant was not entitled to any additional compensation for wage loss with respect to this claim. Appellant did not discuss the evidence, refer to supporting legal authority or otherwise provide a new and relevant legal argument. Where the legal argument presented has no reasonable color of validity, the Office is not required to reopen the case for merit review.<sup>5</sup> The Board finds that appellant did not advance a relevant legal argument not previously considered, or show that the Office erroneously applied or interpreted a point of law.

With respect to the medical evidence submitted, the reports from Drs. Zahl and Busch were previously of record and considered prior to the last merit decision. Appellant did not submit relevant and pertinent evidence not previously considered by the Office. Accordingly, the Board finds that she did not meet any of the requirements of section 10.606(b)(2). Since appellant did not meet the requirements of section 10.606(b)(2), she is not entitled to a merit review of her claim.

### CONCLUSION

The Office properly refused to reopen the claim for merit review under 5 U.S.C. § 8128(a).

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<sup>5</sup> See *Norman W. Hanson*, 40 ECAB 1160 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 20, 2006 is affirmed.

Issued: July 2, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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