

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rockford, IL, Employer**

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**Docket No. 07-1530
Issued: November 7, 2007**

Appearances:
Appellant, pro se
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 May 16, 2007 appellant filed a timely appeal from a February 23, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As there is no merit decision of the Office within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of this case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the February 23, 2007 nonmerit decision.¹

ISSUE

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

¹ The Office initially sent the February 23, 2007 decision to an incorrect address; however, appellant indicated on appeal that he received a copy of the decision in April 2007.

FACTUAL HISTORY

This case is before the Board for the fourth time. On May 1, 2003 the Board set aside a July 16, 2001 decision denying appellant's request for reconsideration under section 8128. The Board remanded the case for the Office to consider whether he refused an offer of suitable work.² In a decision dated October 27, 2004, the Board affirmed an October 31, 2003 decision denying modification of its termination of appellant's compensation for refusing suitable work under 5 U.S.C. § 8106.³ By decision dated March 2, 2006, the Board affirmed a July 6, 2005 decision denying his request for review of the merits of his claim under section 8128.⁴ The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On January 30, 2007 appellant again requested reconsideration. He asserted that the Office did not meet its burden of proof to terminate his compensation benefits for refusing suitable work. Appellant alleged that the employing establishment did not notify him that it had modified the job offer based on the recommendations of Dr. Richard A. Geline, a Board-certified orthopedic surgeon and impartial medical examiner. He noted that Dr. Rokshana Zaheen, his attending Board-certified family practitioner, found that he was unable to work. Appellant further challenged the Office's authority to refer him to Dr. Danilo V. Domingo, a Board-certified psychiatrist, for a second opinion examination. He asserted that Dr. Domingo falsely indicated that he had a history of drug use.

By decision dated February 23, 2007, the Office denied appellant's request for reconsideration on the grounds that he did not specify the basis for his request and did not submit evidence or argument sufficient to warrant merit review of his claim.⁵

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁶ the Office's regulations provide that 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.⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her

² Docket No. 02-1027 (issued May 1, 2003).

³ Docket No. 04-805 (issued October 27, 2004).

⁴ Docket No. 06-16 (issued March 2, 2006). The Board further denied appellant's petition for reconsideration. Order Denying Petition for Reconsideration, Docket No. 06-16 (issued July 18, 2006).

⁵ See 20 C.F.R. §§ 501.2(c), 501.3.

⁶ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

⁷ 20 C.F.R. § 10.606(b)(2).

application for review within one year of the date of that decision.⁸ 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.⁹

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.¹⁰ 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.¹¹ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹²

ANALYSIS

The Board affirmed the Office's termination of appellant's compensation benefits on the grounds that he refused an offer of suitable work under section 8106(c).¹³ In his request for reconsideration, he contended that the Office improperly terminated his compensation as the employing establishment did not inform him that it modified the job offer based on the opinion of the impartial medical examiner. Appellant also noted that Dr. Zaheen found that he was totally disabled from employment. As the Board previously affirmed the Office's termination of his compensation under section 8106, the issue is *res judicata* and not subject to further consideration by the Board.¹⁴

Appellant further argued that the Office did not have the authority to refer him for a second opinion examination with Dr. Domingo. He asserted that only the employing establishment could require fitness-for-duty examinations. The Office, however, has the authority to order examinations of an injured employee as frequently and at such times and places as may be reasonably required.¹⁵ Consequently, appellant's argument does not have a reasonable color of validity such that it would warrant reopening his case for merit review.¹⁶

Appellant also argued that Dr. Domingo erroneously referred to a history of drug use. As discussed by the Board on prior appeal, this contention is not relevant to the issue of the

⁸ 20 C.F.R. § 10.607(a).

⁹ 20 C.F.R. § 10.608(b).

¹⁰ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹² *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹³ *See supra* note 3.

¹⁴ *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁵ *See* 5 U.S.C. § 8123(a); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Second Opinion Examinations*, Chapter 3.500.3 (March 1994).

¹⁶ *Elaine M. Borghini*, 57 ECAB ____ (Docket No. 05-1102, issued May 3, 2006).

termination of his compensation under section 8106. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷

Appellant 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 submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2007 is affirmed.

Issued: November 7, 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

¹⁷ *Judy L. Kahn*, 53 ECAB 321 (2002).