



2003, in Palm Springs, California. On November 21, 2003 the employee and another CAP member, Second Lieutenant Donald Munroe, departed Big Bear, California, and flew to Palm Springs for the first evening of the training mission. The flight was approximately 45 minutes. After attending the first evening of the training mission, the employee and Lieutenant Munroe expressed their intention to fly home to sleep and return in the morning for the second day of the training mission. His return flight was approved and he departed Palm Springs with Lieutenant Munroe. The aircraft crashed on the return flight and both the employee and Lieutenant Munroe were killed. On July 19, 2004 Major Jodi Kraft, an employing establishment staff judge advocate, controverted appellant's claim for survivor's benefits noting that the employee was not in the performance of duty as he deviated from duty when he decided to fly home before the training mission was complete. In a June 17, 2004 supervisor's report, Lieutenant Colonel Michael R. Penning, Commander of the Pacific Liaison Region for CAP, checked a box indicating that the employee was not in the performance of duty at the time of his fatal accident.

On August 2, 2004 the Office requested additional information concerning appellant's claim for survivor's benefits.

In an August 31, 2004 letter, Gordon O'Dell, for CAP's national legal office, determined that the employee was killed in the performance of duty and outlined the rationale behind his position that appellant's claim for survivor's benefits should be approved. He explained that the employee was traveling from active service within the meaning of the Federal Employees' Compensation Act's section pertaining to CAP volunteers.<sup>1</sup> Mr. O'Dell contended that the employing establishment's position that the employee was not killed in the performance of duty, and consequently that appellant's claim for survivor's benefits must be denied, was an incorrect application of the laws.

In an August 27, 2004 witness statement, Incident Commander Joseph J. Orchard explained that CAP volunteers choose whether or not to participate in various missions and are generally required to fund their own lodging expenses although transportation expenses were typically reimbursed. He stated that CAP missions are "day to day" and that "at the end of a 'duty day,' the vast majority (if not all) local members return home." Commander Orchard noted that, as the 45-minute flight between the mission location and the employee's home was within a normal commuting distance for the area, it would have been unusual for the employee and Lieutenant Munroe to stay in a hotel.

By decision dated September 10, 2004, the Office denied appellant's claim for survivor's benefits on the grounds that the evidence submitted did not establish that the employee was killed while in the performance of duty.

Appellant requested reconsideration on May 15, 2005, advancing several legal arguments. She asserted that the Office did not make sufficient findings of fact and that the denial of survivor's benefits violated due process of law because the Office relied upon the employing establishment's assessment that the employee was not killed in the performance of duty.

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<sup>1</sup> 5 U.S.C. § 8141(b)(4).

By decision dated October 24, 2005, the Office denied modification of the September 10, 2004 decision. The Office found that the employee had deviated from duty when he left the training mission for personal reasons. The Office noted that CAP operated under the direction of the employing establishment for purposes of coverage under the Act such that it was proper to consider evidence from the employing establishment with regard to the claim.

Appellant requested reconsideration on October 17, 2006. In support of her request for reconsideration, she asserted that the plain language of the statute unambiguously provided that travel to and from active service, as she characterized the employee's flight, was covered. Appellant also contended that cases cited by the employing establishment were not on point, that sleeping accommodations were not provided, that appellant was cleared to travel home by his commanding officer, who stated that appellant was killed in the line of duty, and that public policy and general principles of equity supported approving her claim for survivor's benefits.

By decision dated January 11, 2007, the Office denied appellant's request for reconsideration without conducting further merit review. It found that appellant's legal arguments were either duplicative of arguments previously raised and duly considered or were irrelevant to the question of whether the employee was killed in the performance of duty.

### **LEGAL PRECEDENT**

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.<sup>2</sup> The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”<sup>3</sup>

Section 10.608(b) provides that when an application for review of the merits of a claim 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>4</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section

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<sup>2</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>3</sup> *Id.*

<sup>4</sup> 20 C.F.R. § 10.608(b) (1999).

10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>5</sup>

### ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration. Appellant's legal arguments did not constitute new arguments not previously considered by the Office. She reiterated arguments previously advanced through her August 31, 2004 letter as well as Commander Orchard's August 27, 2004 statement. The issues of equity and public policy had been previously advanced and were addressed in the Office's October 24, 2005 decision.<sup>6</sup> The question of whether sleeping arrangements would have been reimbursed is irrelevant to the question of whether appellant was killed while in the performance of duty, as the statutory language does not provide for consideration of such concerns in the determination of whether a CAP volunteer was killed in the performance of duty.<sup>7</sup> Appellant has not otherwise supported how this is relevant to the Office's finding that the employee deviated from duty. Moreover, appellant's argument asserting that the Office erroneously relied on evidence from the employing establishment which was previously considered. In any event, such argument is not relevant as the Act specifically authorizes the Office to obtain advice from the secretary of the employing establishment "concerning the facts with respect to the injury, including the question of whether at the time of injury the member of the CAP was rendering service, or engaged in travel to or from such service, in performance or support of an operational mission of the CAP at the time of injury."<sup>8</sup>

The Board finds that appellant has not otherwise shown that the Office misinterpreted a question of fact or presented new and relevant evidence not previously considered by the Office. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review.

### CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review.

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<sup>5</sup> *Annette Louise*, 54 ECAB 783 (2003).

<sup>6</sup> See *Brent A. Barnes*, 56 ECAB \_\_\_ (Docket No. 04-2025, issued February 15, 2005) (submitting evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim).

<sup>7</sup> See 5 U.S.C. § 8141(b)(4) (provides that "performance of duty" means only active service, and travel to and from that service, rendered in the performance or support of operation missions of CAP under the direction of the employing establishment and under written authorization by competent authority covering a specific assignment and prescribing a time limit for the assignment).

<sup>8</sup> 5 U.S.C. § 8141(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 24, 2007  
Washington, DC

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

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