

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

J.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Wayne, IN, Employer**

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**Docket No. 09-1507
Issued: February 18, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 11, 2009 appellant, through his attorney, filed a timely appeal from an April 8, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As there is no merit decision issued within 180 days, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of his case under 5 U.S.C. § 8128.

FACTUAL HISTORY

On January 23, 2006 appellant, then a 65-year-old temporary rural carrier, filed a claim for injuries sustained in a January 21, 2006 motor vehicle accident. The Office accepted the claim for a closed fracture of the mandible, a closed skull fracture, an open wound of the left auditory canal, a cerebral laceration, a posterior dislocation of the left elbow, a dislocated right fifth finger at the proximal interphalangeal joint and a contusion of the face and scalp. Appellant stopped work on January 21, 2006 and underwent surgery on January 22, 2006 for a repair of his

left ear canal laceration, mandible fracture and dislocated left elbow. He returned to limited-duty employment on May 9, 2006 and to full duty on May 22, 2006. The employing establishment terminated appellant from employment on May 23, 2006.

On January 20, 2007 appellant filed a claim for a schedule award. In a report dated September 26, 2007, Dr. Charles R. Kershner, a Board-certified orthopedic surgeon and Office referral physician, reviewed appellant's history of a January 21, 2006 motor vehicle accident "with multiple injuries including a posterior dislocation of his left shoulder and closed injury to the proximal interphalangeal joint of his right little finger." He found that appellant had a six percent permanent impairment of the left upper extremity and a five percent permanent impairment of the right upper extremity due to loss of range of motion of the left elbow and right little finger.

By decision dated February 28, 2008, the Office granted appellant a schedule award for a six percent permanent impairment of the left upper extremity and a five percent permanent impairment of the right upper extremity. The period of the award ran for 34.32 weeks from September 26, 2007 to May 23, 2008. The Office noted that on October 24, 2007 Dr. Nabil Angley, a Board-certified orthopedic surgeon and Office medical adviser, reviewed and concurred with Dr. Kershner's findings.

On February 20, 2009 appellant requested reconsideration. He related that the information that he received with the February 28, 2008 decision contained evidence relevant to another claimant and asserted that his claim was "mixed up" with that other claimant. He noted that the Office, in its February 28, 2008 decision, referred to an injury to his right upper extremity and an examination by Dr. Angley. Appellant denied having a right upper extremity injury or being examined by Dr. Angley.

On April 8, 2009 the Office informed appellant's attorney that it had reviewed his case record and could not find documents relevant to another claimant. It requested that he return any evidence received that pertained to another claimant. In an April 8, 2009 telephone call, a claims examiner informed appellant that she had reviewed the February 28, 2008 decision and that all of the medical evidence discussed referred to him. She noted that the decision thus did not warrant review. By decision dated April 8, 2009, the Office denied merit review of its February 28, 2008 schedule award determination.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ 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) submit relevant and pertinent new evidence not previously considered by the Office.² To be entitled to a merit

¹ 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."

² 20 C.F.R. § 10.606(b)(2).

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.³ 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.⁴

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.⁵ The Board also has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.⁶ 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.⁷

ANALYSIS

The Office accepted that appellant sustained injuries due to a January 21, 2006 motor vehicle accident. By decision dated February 28, 2008, it granted him a schedule award for a five percent permanent impairment of the right upper extremity and a six percent permanent impairment of the left upper extremity. The Office based the schedule award on the September 26, 2007 report of Dr. Kershner, who found that appellant had a right upper extremity impairment of five percent due to loss of range of motion of the right little finger and a left upper extremity impairment of six percent due to loss of range of motion of the left elbow. It further noted that Dr. Angley, the Office medical adviser, concurred with Dr. Kershner's opinion.

In his February 20, 2009 request for reconsideration, appellant asserted that he received evidence relevant to another claimant with the February 28, 2008 Office decision. He did not, however, submit any evidence in support of his contention or show how this would alter the outcome of the Office's schedule award decision. Thus, appellant's argument does not have a reasonable color of validity such that it would warrant reopening his case for merit review.⁸

Appellant additionally maintained that the Office's February 28, 2008 decision referred to a claimant who was examined by Dr. Angley and had a right upper extremity injury. He noted that he was not examined by Dr. Angley and did not sustain an injury to his right upper extremity. Dr. Angley, however, was not an examining physician but instead an Office medical adviser who reviewed Dr. Kershner's September 26, 2007 impairment evaluation at the request of the Office. Dr. Kershner found that appellant had a five percent permanent impairment of the right upper extremity due to loss of range of motion as a result of his dislocated right little finger, an injury he sustained at the time of his January 21, 2006 work injury. Consequently, appellant's

³ *Id.* at § 10.607(a).

⁴ *Id.* at § 10.608(b).

⁵ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

⁶ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

⁷ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

⁸ *M.E.*, 58 ECAB 309 (2007); *Elaine M. Borghini*, 57 ECAB 549 (2006).

argument does not have a reasonable color of validity sufficient to warrant reopening his case for merit review.⁹

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 further review of the merits of his case under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 8, 2009 is affirmed.

Issued: February 18, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁹ *Id.*