

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

<b>C.J., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 09-1669</b>
	)	<b>Issued: February 26, 2010</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Omaha, NE, Employer</b>	)	
	)	

*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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On June 22, 2009 appellant filed a timely appeal from the nonmerit decision of the Office of Workers' Compensation Programs dated June 10, 2009 denying appellant's request for reconsideration of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the appeal. Because more than one year has elapsed between the Office's last merit decision dated November 1, 2007 and the filing of this appeal on June 22, 2009, the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> The record contains a January 27, 2009 decision of the Board which was issued less than one-year prior to appellant's filing of the present appeal on June 22, 2009. Docket No. 08-537 (issued January 27, 2009) *petition for recon. denied* (issued May 5, 2009). In the absence of further review by the Office on the issue addressed by the January 27, 2009 decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

On appeal appellant contends that the new evidence that he submitted with his request for reconsideration provided proof that the employing establishment should have reemployed him.

### **FACTUAL HISTORY**

This case was previously before the Board on several occasions.<sup>2</sup> In the most recent decision dated January 27, 2009, the Board found that appellant had not submitted sufficient medical evidence to show that he was disabled as a result of work-related tinnitus and accordingly affirmed the Office's determination that appellant was not entitled to wage-loss compensation for tinnitus.<sup>3</sup> The Office had previously accepted appellant's claim for mild binaural hearing loss. The facts as set forth in the Board's previous decisions and orders are hereby incorporated by reference.<sup>4</sup>

On May 18, 2009 appellant requested reconsideration of the denial of his claim for tinnitus. Appellant reiterated his previous argument that he retired on November 20, 1992 because he could not perform the job offered him on November 18, 1992 due to his medical condition. With his request for reconsideration, appellant submitted pages which he indicated were from the employing establishment's employment and labor relations manual with regard to reassignment or reemployment of employees injured on duty. Appellant contends that the employing establishment erred in not fulfilling its responsibilities to rehire him. In addition, appellant has resubmitted numerous medical reports, pleadings, and copies of prior decisions that were already in the record.

By decision dated June 10, 2009, the Office denied merit review of appellant's claim. It found that the information from the employing establishment's manual was already in the file as it was previously received on March 16, 2009. The Office also noted that disability from work was a medical issue which must be determined by medical evidence, and that pages from the aforementioned manual were not sufficient to support disability from work and were not relevant to the issue at hand. It also noted that other documents submitted since the last merit decision were already in the file.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>5</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or

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<sup>2</sup> *Id.*

<sup>3</sup> Docket No. 08-537 (issued January 27, 2009), *petition for recon. denied* (issued May 5, 2009).

<sup>4</sup> *Id.*, see also Docket No. 01-1297 (issued July 1, 2002), *petition for recon. denied* (issued October 8, 2002); Docket No. 03-2176 (issued February 24, 2004), *petition for recon. denied* (issued June 10, 2004); Docket No. 04-1254 (issued October 28, 2004); Docket No 05-1219 (issued September 30, 2005), *petition for recon. denied* (issued January 18, 2006); *Order Remanding Case*, Docket No. 06-1270 (issued May 7, 2007).

<sup>5</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

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.<sup>6</sup> To be entitled to a merit 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.<sup>7</sup> 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.<sup>8</sup>

### ANALYSIS

In the instant case, appellant filed a timely request for reconsideration of the Office's determination that appellant was not disabled due to work-related tinnitus, a finding that was affirmed by the Board in its decision dated January 27, 2009.<sup>9</sup> In a decision dated June 10, 2009, the Office denied his request for reconsideration without reviewing the merits of his case.

The Board finds that the Office properly denied appellant's request for reconsideration of the merits of his claim. Appellant has not shown that the Office erroneously applied or interpreted a specific point of law. His argument that the Office erroneously failed to rehire him does not constitute a relevant legal argument not previously considered by the Office. Although the argument is new, appellant's claim was denied due to lack of rationalized medical evidence in support of his claim for tinnitus. Accordingly, the hiring practices of the employing establishment are not relevant to the issue at hand. For the same reason, the Board finds that the pages from the employing establishment's manual do not constitute relevant and pertinent new evidence not previously considered by the Office. Although this evidence is new, it is not medical evidence sufficient to establish employment-related tinnitus that was totally disabling. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup> The remaining evidence submitted was already in the record. The Board has held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.<sup>11</sup>

Appellant has not established that the Office improperly refused to reopen his claim for review of the merits under section 8128(a) of the Act. He 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 relevant and pertinent new evidence not

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<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *Supra* note 1.

<sup>10</sup> *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>11</sup> *Eugene F. Butler*, 36 ECAB 393 (1984).

previously considered by the Office. Accordingly, the Office properly denied merit review of appellant's claim.

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 10, 2009 is affirmed.

Issued: February 26, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board