

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

K.B., Appellant)	
)	
and)	Docket No. 09-1665
)	Issued: March 11, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
St. Louis, MO, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2009 appellant, through her attorney, filed a timely appeal from a May 8, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration and a June 16, 2009 nonmerit decision denying her request for a hearing.¹ As there is no merit decision within 180 days, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for further review of the merits of the case under 5 U.S.C. § 8128; and (2) whether the Office properly denied her request for an oral hearing under 5 U.S.C. § 8124.

¹ Appellant's appeal was postmarked June 18, 2009. The last merit decision in the case was issued on June 12, 2008.

FACTUAL HISTORY

On June 14, 2007 appellant, then a 39-year-old clerk, filed a claim for an injury to her left elbow occurring on that date when she lifted a tub of mail. The Office accepted the claim for a sprain of the left elbow and forearm and left lateral epicondylitis of the elbow.

On June 19, 2007 Dr. Karen D. Shockley, who specializes in occupational medicine, diagnosed a left elbow strain and acute strain of the biceps tendon. She found that appellant could return to work on that date with restrictions against use of the left arm.

On June 18, 2007 the employing establishment offered appellant a limited-duty position as a modified clerk. The position did not require any work with the left hand or arm. On June 20, 2007 appellant accepted a limited-duty job offer from the employing establishment. She did not return to work.

On October 4, 2007 appellant filed a claim for compensation from June 14 through September 14, 2007.

By decision dated December 4, 2007, the Office denied her claim for compensation from June 14 through September 14, 2007 on the grounds that the medical evidence did not establish that she was disabled due to her accepted work injury.

On December 13, 2007 appellant requested reconsideration. In a decision dated January 30, 2008, the Office modified the December 4, 2007 decision and accepted her claim for compensation for dates on which she received medical treatment. It found that appellant had not established that she was totally disabled from June 14 through September 14, 2007.

On February 26, 2008 appellant requested reconsideration. By decision dated April 21, 2008, the Office denied modification of its January 30, 2008 decision.²

On April 7, 2009 appellant, through her attorney, requested reconsideration of the April 21, 2008 decision.³ He asserted that the employing establishment did not offer her limited duty within her restrictions. Counsel stated, "Evidence of the employer's wrongful acts is on file."

By decision dated May 8, 2009, the Office denied appellant's request for further review of the merits of her claim under section 8128. On May 19, 2009 counsel requested a telephone hearing on the May 8, 2009 decision. In a decision dated June 16, 2009, the Office denied appellant's request for a hearing as she had previously received reconsideration under section 8128.

² In a decision dated June 11, 2008, the Office reduced appellant's compensation to zero based on her failure to participate fully with vocational rehabilitation. It does not appear, however, that she was receiving disability compensation at that time.

³ On March 18, 2008 appellant filed a claim for compensation from September 15, 2007 to March 3, 2008. By decision dated June 12, 2008, the Office denied her claim for compensation from September 15 to November 20, 2007. It noted that it had paid her compensation from the date of her surgery on November 21, 2007 to March 8, 2008.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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.⁵ 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.⁶ 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.⁷

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.⁸ 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.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a left elbow and forearm sprain and left lateral epicondylitis of the elbow due to a June 14, 2007 work injury. Appellant's attending physician released her to return to modified work on June 19, 2007. On June 20, 2007 appellant accepted a modified assignment from the employing establishment but did not return to work. She filed a claim for compensation for total disability from June 14 through September 14, 2007. The Office paid appellant's compensation for lost time due to medical treatment but found that she had not established that she was totally disabled from the limited-duty employment during this period.

On April 7, 2009 appellant, through her attorney, requested reconsideration. Counsel generally argued that the employing establishment did not offer her limited-duty work within her restrictions. He did not, however, identify how or why the limited-duty job offered by the employing establishment violated appellant's work restrictions or provide any evidence in

⁴ 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."

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

support of his contention. Counsel's argument is insufficient to warrant reopening her case for merit review.¹¹

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 she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹² The Office regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹³

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁴ The Office procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁵

ANALYSIS -- ISSUE 2

On May 19, 2009 appellant, through her attorney, requested an oral hearing on the May 8, 2009 decision denying her request for further review of the merits of her claim pursuant to section 8128. As the Office had previously issued a decision denying her request for reconsideration, she was not entitled to an oral hearing as a matter of right.¹⁶

In its June 16, 2009 decision, the Office properly exercised its discretion in considering whether to grant an oral hearing and found that the matter could be equally well addressed through the reconsideration process. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable

¹¹ *Elaine M. Borghini*, 57 ECAB 549 (2006).

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. § 10.616(a).

¹⁴ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁵ *Teresa M. Valle*, 57 ECAB 542 (2006); *Sandra F. Powell*, 45 ECAB 877 (1994); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (June 1997).

¹⁶ 5 U.S.C. § 8124(b); 20 C.F.R. § 10.616(a).

deductions from known facts.¹⁷ The evidence in this case does not establish that the Office committed any action in connection with its denial of appellant's request for an oral hearing that constitutes an abuse of discretion. The Office consequently properly denied her request for an oral hearing.¹⁸

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of the case under 5 U.S.C. § 8128 and properly denied her request for an oral hearing under 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 16 and May 8, 2009 are affirmed.

Issued: March 11, 2010
Washington, DC

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

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

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

¹⁷ *Lon E. Grinage*, 57 ECAB 177 (2005).

¹⁸ Appellant's attorney submitted new medical evidence on appeal; however, the Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c); *Avalon C. Bailey*, 56 ECAB 223 (2004).