

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

D.C., Appellant)

and)

**DEPARTMENT OF JUSTICE, DRUG
ENFORCEMENT AGENCY, Boston, MA,
Employer**)

**Docket No. 08-1724
Issued: January 26, 2009**

Appearances:

*Artin H. Coloian, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 2, 2008 appellant, through his attorney, filed a timely appeal from a February 27, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As more than one year has elapsed since the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

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 See 20 C.F.R. §§ 501.2(c), 501.3.

FACTUAL HISTORY

On April 26, 1989 appellant, then a 28-year-old special agent, filed a claim alleging that he sustained an injury to his lungs on March 2, 1989 when he inhaled sulphuric acid while destroying a chemical lab. He did not stop work. The Office accepted his claim for diffuse pulmonary bronchospasm.

On October 25, 2005 appellant filed a claim for a schedule award. He submitted a report dated March 4, 2005 from Dr. Nick Mucciardi, a Board-certified internist, in support of his schedule award request. On February 5, 2006 an Office medical adviser reviewed Dr. Mucciardi's report and opined that appellant had a 45 percent whole person impairment of the lungs. On February 15, 2006 the employing establishment notified the Office that appellant had not received continuation of pay and had not lost time from work due to his employment injury.

By decision dated March 9, 2006, the Office granted appellant a schedule award for a 45 percent impairment to the lungs.² The period of the award ran for 104.4 weeks from March 24, 2005 to December 1, 2007. The Office found that March 2, 1989, the date of injury, was the effective pay rate date.³

On September 19, 2006 appellant, through his attorney, requested reconsideration of the March 22, 2006 decision. Counsel contended that the Office should have used appellant's pay rate on the date of his diagnosis by Dr. Mucciardi rather than the date of injury. He noted that the extent of appellant's injury after his chemical exposure was latent for many years. On November 6, 2006 the attorney argued that the Office should base his pay rate on the date of maximum medical improvement rather than the date of injury.

By decision dated November 28, 2006, the Office denied modification of its March 9, 2006 decision. It found that the date of injury was March 2, 1989, the date that appellant was last exposed to the conditions which caused his condition. The Office noted that the date of maximum medical improvement was not a potential date for determining pay rate under the Federal Employees' Compensation Act.⁴

On November 23, 2007 appellant, through his attorney, requested reconsideration. Counsel asserted that he sustained chemical exposure on two occasions after the March 2, 1989 incident, from November 1989 through April 1990 and June through October 1990. He further argued that appellant experienced multiple recurrences of his condition which required medical

² The Office initially issued its schedule award decision on February 22, 2006. On March 9, 2006 it reissued the decision and sent a copy to appellant's authorized representative. The Office indicated that it was granting him a schedule award for 45 percent whole person impairment rather than a 45 percent impairment of the lungs; however, this is a typographical error. It properly multiplied the percentage for the applicable class of whole person respiratory impairment by 312 weeks to obtain the number of week's payable in the schedule award. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(1) (March 2005).

³ It does not appear that the Office updated appellant's date-of-injury pay rate to include cost-of-living increases.

⁴ 5 U.S.C. §§ 8101-8193.

treatment. Appellant did not take time off work because he believed that his impairment was mild. He stopped work on May 20, 2004 to undergo surgery for thyroid cancer. The attorney asserted that his chemical exposure caused his thyroid cancer. He reiterated that appellant's compensation should be based on the pay rate applicable when Dr. Mucciardi diagnosed his condition. The attorney described in detail appellant's employment history and medical treatment received. He submitted medical evidence from 1989. In a form report dated July 25, 1989, Dr. Charles J. Hatem, a Board-certified internist, diagnosed diffuse pulmonary bronchospasm secondary to sulfuric acid inhalation and opined that appellant was disabled from February 1989 to the present. Dr. Hatem indicated that he could attend school but not perform physical work.

By decision dated February 27, 2008, the Office denied appellant's request for reconsideration after finding that the evidence submitted was insufficient to warrant merit review of the claim. It noted that he did not document any exposure to chemicals after March 2, 1989 or establish any dates that he was disabled from employment due to his accepted employment injury. The Office further found that it had previously addressed appellant's contention that his pay rate should be based on the date of Dr. Mucciardi's March 4, 2005 report.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ While the reopening of a case may be predicated

⁵ 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."

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

¹⁰ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

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.¹¹

ANALYSIS

The Office accepted that appellant sustained diffuse pulmonary bronchospasm due to chemical exposure on March 2, 1989. In a decision dated March 9, 2006, it granted him a schedule award for a 45 percent permanent impairment of the lungs. The Office based appellant's pay rate on the date that his injury occurred, March 2, 1989. Appellant requested reconsideration of the schedule award, arguing that his pay rate should be the date he reached maximum medical improvement on March 24, 2005 or the date of Dr. Mucciardi's March 4, 2005 medical report. By decision dated November 28, 2006, the Office denied modification of its schedule award decision. The Office noted that the Act provided that an employee's pay rate for compensation purposes was the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work.¹²

On November 23, 2007 appellant again requested reconsideration. His attorney argued that he experienced chemical exposure in the performance of duty on two occasions subsequent to March 2, 1989. Appellant did not, however, submit any evidence supporting his contention. Consequently, his argument does not have a reasonable color of validity such that it would warrant reopening his case for merit review.¹³

Appellant further argued that he experienced multiple recurrences of his bronchial condition. He did not miss time from work because he believed that his condition was not serious. Appellant's attorney noted that appellant missed time from work beginning March 20, 2004 due to thyroid cancer. The Office has not accepted the condition of thyroid cancer as employment related.¹⁴ The record contains no evidence that appellant sustained any period of disability due to his accepted work injury. He has not raised any argument with sufficient color of validity to require the Office to reconsider whether it properly applied the provisions of section 8101(4) in determining the applicable pay rate.¹⁵

Appellant's attorney further argued that the pay rate should be based on either the date of maximum medical improvement or the date of the medical report upon which the Office based its schedule award determination. The Office, however, previously considered these arguments

¹¹ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹² 5 U.S.C. § 8101(4).

¹³ *M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007); *Elaine M. Borghini*, 57 ECAB 549 (2006).

¹⁴ It is appellant's burden to establish any conditions not accepted by the Office as employment related through the submission of rationalized medical evidence. *Charles W. Doney*, 54 ECAB 421 (2003).

¹⁵ See *M.E.*, *supra* note 13.

in its November 28, 2006 decision. The submission of evidence or argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case.¹⁶

Appellant submitted medical evidence from 1989. However, the medical evidence either duplicates that already in the case record or is not relevant to the pertinent issue of whether the Office properly determined his pay rate for compensation purposes. As discussed, the submission of evidence which duplicates that already in the record or which is not relevant to the issue at hand is insufficient to establish entitlement to further merit review.¹⁷

Appellant's attorney argued that the medical evidence showed that he experienced recurrences of his condition. He cited a form report dated July 25, 1989 from Dr. Hatem, who opined that appellant was disabled from February 1989 to the present due to his inhalation of sulfuric acid. Dr. Hatem noted on the form that he could attend school but not perform physical work. A recurrence of disability, however, is an "inability to work after an employee has returned to work..."¹⁸ The record contains no evidence that appellant stopped work due to his employment injury and thus the attorney's argument lacks a reasonable foundation.

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 pertinent 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.

¹⁶ *Edward W. Malaniak*, 51 ECAB 279 (2000).

¹⁷ *See F.R.*, 58 ECAB ___ (Docket No. 05-15, issued July 10, 2007).

¹⁸ 20 C.F.R. § 10.5(x).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 27, 2008 is affirmed.

Issued: January 26, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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