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

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| **KERRY KENNEDY, widow of ROBERT S. KENNEDY, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1845**<br>**Issued: April 11, 2006** |
| **DEPARTMENT OF THE AIR FORCE, CIVIL AIR PATROL, Burlington, NC, Employer** | ) | |

*Appearances:*
*Andy W. Gay, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On September 6, 2005 appellant filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated August 26, 2005. As the most recent decision on the merits of her case was issued on August 18, 2004, the Board does not have jurisdiction to review the merits of this case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1]

### ***ISSUE***

The issue is whether the Office properly refused to reopen appellant's case for review of the merits of her claim.

[1] Section 501.3 of the Board's *Rules of Procedure* requires that an appeal be filed no later than one year after the date of issuance of the Office's final decision.

## ***FACTUAL HISTORY***

On September 5, 2002 appellant, the employee's widow, filed a claim for compensation for the death of the employee, a volunteer, in an aircraft crash on July 17, 2002. In a February 21, 2003 memorandum, Allen M. Johnson, the State Director of the Civil Air Patrol-U.S. Air Force Liaison Office, stated that the employee was killed in the crash of a Civil Air Patrol aircraft during a legitimate Drug Enforcement Agency counterdrug mission. In a June 12, 2003 memorandum, Colonel George C. Vogt, commander of the Civil Air Patrol, stated that its investigation revealed that the Civil Air Patrol members aboard the aircraft were local law enforcement officers flying a marijuana eradication mission at the request of a local county sheriff and that there was no evidence of Drug Enforcement Agency coordination, planning, knowledge or authorization as required by the memorandum of understanding between the two federal agencies.[2]

By decision dated October 3, 2003, the Office found that the employee's death did not fall within the purview of section 8141 of the Federal Employees' Compensation Act.[3] Appellant requested a hearing, which was held on May 25, 2004 and submitted additional evidence. In a May 27, 2003 memorandum, Cynthia R. Ryan, Chief Counsel for the Drug Enforcement Agency, stated that her office had concluded that, despite some irregularities surrounding the required protocols for sanctioning the flight pursuant to the memorandum of understanding, the mission was in fact officially sanctioned by the Drug Enforcement Agency as a marijuana eradication mission. She stated that this conclusion allowed the Air Force to certify the flight as an official Civil Air Patrol mission, but that it was her understanding that it had not yet done so. In an affidavit, the sheriff of Chowan County, where the crash occurred, stated, "This was a law enforcement mission flown at the request of the Chowan County Sheriff's Office…." By decision dated August 18, 2004, an Office hearing representative found that the record contained insufficient evidence to support that the employee was in the performance of duty as described under section 8141 of the Act.

By letter dated August 10, 2005, appellant requested reconsideration, stating that the claim on behalf of the pilot of the crashed aircraft had been remanded to the Office by an Office hearing representative for further action, that further information was being obtained through the discovery process in the lawsuit in U.S. District Court regarding the crash and that she hoped that the record could be kept open so that evidence could be submitted as it was produced through discovery. She submitted copies of Mr. Johnson's February 21, 2003 and Ms. Ryan's May 27, 2003 memoranda, a Civil Air Patrol ledger for the North Carolina wing for 2002 and the first page of an affidavit of the chief financial officer for the Civil Air Patrol National Headquarters stating that its North Carolina wing flew a number of Air Force assigned drug eradication missions in 2001 and 2002.

[2] A copy of the memorandum of understanding was submitted.

[3] 5 U.S.C. § 8141, titled "Civil Air Patrol volunteers," states at subsection (a)(4): "'performance of duty' means only active service and travel to and from that service, rendered in performance or support of operational missions of the Civil Air Patrol under direction of the Department of the Air Force and under written authorization by competent authority covering a specific assignment and prescribing a time limit for the assignment."

By decision dated August 26, 2005, the Office found that appellant's request for reconsideration was insufficient to warrant further merit review of its prior decision, as it did not raise a substantive legal question or include new and relevant evidence.

## ***LEGAL PRECEDENT***

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[4] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[5]

## ***ANALYSIS***

The August 10, 2005 request for reconsideration contained only one argument, namely that the claim of the pilot of the aircraft was remanded to the Office for further action. Without evidence of what action was ordered or the nature of the evidence submitted in that claim at that time, does not constitute advancing a relevant legal argument not previously considered by the Office. The memoranda from Mr. Johnson and Ms. Ryan were already in the record at the time of the Office hearing representative's August 18, 2004 decision and, therefore, are not a basis to reopen the case for further merit review. The portion of the affidavit of the employing establishment's chief financial officer does not address the particular mission involved in this case

[4] *Eugene F. Butler*, 36 ECAB 393 (1984).

[5] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

and thus, is not relevant new evidence. Without any explanation of the purpose of its submission, the ledger from the employing establishment also does not constitute relevant new evidence. Appellant's request for reconsideration did not meet any of the criteria for reopening a case set forth in the Office's regulations.[6]

## ***CONCLUSION***

The Office properly refused to reopen appellant's case for further review of the merits of her claim.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 26, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[6] A claimant may not extend the one-year limit to request reconsideration by making such a request and subsequently (after the one year has expired) submitting the required argument or relevant new evidence. *See John B. Montoya*, 43 ECAB 1148 (1992).