

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PERCY MARTIN and GENERAL SERVICES ADMINISTRATION,
CLASSIFICATIONS & PAY BRANCH, Chicago, IL

*Docket No. 99-2136; Submitted on the Record;
Issued October 3, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order¹ on January 11, 1999 in which it affirmed the April 16 and June 13, 1996 decisions of the Office on the grounds that the Office properly reduced appellant's compensation effective April 30, 1995 based on his capacity to earn wages as a security guard monitor and that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim did not constitute an abuse of discretion.² The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

¹ Docket No. 96-2086.

² The Office accepted that appellant sustained employment-related aggravation of degenerative disc disease of the lumbar spine; permanent aggravation of degenerative arthritis of the left knee; internal derangement of the left knee; and a torn medial meniscus of the left knee. The Office authorized left knee and leg surgery in 1991 and 1992. By decision dated May 3, 1995, the Office reduced appellant's compensation effective April 30, 1995 based on his capacity to earn wages as a security guard monitor. The Office based its determination that appellant was vocationally able to perform the position on the opinion of the vocational rehabilitation counselor; it based its determination that appellant was medically able to perform the position on the opinion of Dr. Charles J. Paquelet, a Board-certified orthopedic surgeon, to whom it referred appellant. By decision dated and finalized April 16, 1996, an Office hearing representative affirmed the Office's May 3, 1995 decision and, by decision dated June 13, 1996, the Office denied appellant's request for merit review.

On April 11, 1999 appellant, through his attorney, submitted additional evidence and requested reconsideration of his claim. By decision dated May 14, 1999, the Office denied appellant's request for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant must: (i) show that the Office erroneously applied or interpreted a point of law; (ii) advance a point of law or a fact not previously considered by the Office; or (iii) submit relevant and pertinent evidence not previously considered by the Office.⁴ 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.⁵ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶

In support of his reconsideration request, appellant submitted a March 19, 1999 letter in which he indicated that he contacted several security firms but that no security guard monitor jobs were available. He also submitted an April 14, 1999 letter in which his attorney argued that the labor market had changed and the relevant issue was factual in nature. The submission of these documents would not require reopening of appellant's claim in that appellant has advanced a similar argument on several prior occasions and the Office and the Board have considered and rejected these arguments on several occasions.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 Appellant also submitted reports from April 1999 in which Dr. Amir Abdollahian, an attending Board-certified orthopedic surgeon, indicated that he could sit three hours per day, walk two and one-half hours per day, and stand two hours per day.⁹ This evidence is not relevant to the main issue of the present case in that it does not contain a clear opinion that appellant could not perform the security guard monitor position.¹⁰ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹

³ 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 his own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.608(b).

⁷ The Office had previously indicated that such ad hoc contacts by appellant did not establish unavailability of the security guard monitor position.

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁹ The reports also equivocally indicate that appellant could work two and one-half hours per day.

¹⁰ The security guard monitor position required performing light duties for four hours per day.

¹¹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

In the present case, appellant has not established that the Office abused its discretion in its May 14, 1999 decision by denying his request for a merit review of his claim under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated May 14, 1999 is affirmed.

Dated, Washington, DC
October 3, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member