

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROCK R. WOLF and DEPARTMENT OF THE INTERIOR,  
NATIONAL PARK SERVICE, YELLOWSTONE NATIONAL PARK, WY

*Docket No. 00-499; Submitted on the Record;  
Issued December 27, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
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 has duly reviewed the case record in the present appeal and 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.

The only decision before the Board on this appeal is the Office's September 1, 1999 decision denying appellant's application for a reconsideration of the Office's August 31, 1998 merit decision.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's August 31, 1998 merit decision and October 26, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the August 31, 1998 decision.<sup>2</sup>

The Federal Register dated November 25, 1998 advised that, effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The revised Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

“(b) The application for reconsideration, including all supporting documents, must:

(1) Be submitted in writing;

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<sup>1</sup> By this decision, the Office denied modification its November 12, 1997 decision denying appellant's claim for a recurrence of disability commencing July 22, 1997.

<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

(2) Set forth arguments and contain evidence that either:

- (i) Shows that OWCP erroneously applied or interpreted a specific point of law;
- (ii) Advances a relevant legal argument not previously considered by OWCP; or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>3</sup>

When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Federal Employees’ Compensation Act.<sup>4</sup>

In support of his reconsideration request, appellant submitted a new argument from his attorney contending that the Office failed to consider the remedial nature of the Act, that the Office failed to see that justice was done and that the Office failed to request information from the employing establishment to support appellant’s claim. The Office therefore was required to apply the second standard, whether appellant’s representative advanced a relevant legal argument not previously considered by the Office. The Office found that the arguments were without merit, as it found that the record contained no evidence to suggest that the Office failed to consider the remedial nature of the Act, that there was no evidence that justice was not done, as none of the previously submitted medical evidence addressed the specific issue of appellant’s claim, which was whether he sustained a recurrence of disability commencing July 22, 1997 and that it was appellant’s burden of proof to establish his July 22, 1997 recurrence claim and not the Office’s burden to collect supportive evidence to establish such a recurrence claim.<sup>5</sup> The Office found, therefore, that these arguments, along with appellant’s representative’s assertions that appellant sustained a shoulder injury in 1985, were not relevant to the issue of the Office’s August 31, 1998 decision, which was whether appellant sustained a July 22, 1997 recurrence of disability causally related to his accepted cerebral concussion, fractures of his first left rib and left ankle and memory loss and anxiety conditions. Consequently, the argument submitted in support of appellant’s request for reconsideration of the August 31, 1998 Office decision does not constitute a basis for reopening a claim for further merit review. The Office properly denied appellant’s application for reopening his case for a review on its merits.

In the present case, appellant has not established that the Office abused its discretion by denying his request for review of its August 31, 1998 decision.

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<sup>3</sup> 20 C.F.R. § 10.606(b)(1),(2)

<sup>4</sup> See *Mohamed Yunis*, 46 ECAB 827 (1995); *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>5</sup> See 20 C.F.R. § 10.104(b).

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 1, 1999 is hereby affirmed.

Dated, Washington, DC  
December 27, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Valerie D. Evans-Harrell  
Alternate Member