

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. CASTAGNO and DEPARTMENT OF JUSTICE,
U.S. MARSHALS SERVICE, Atlanta GA

*Docket No. 02-975; Submitted on the Record;
Issued September 19, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

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.

On July 14, 1999 appellant, then a 53-year-old criminal investigator filed a notice of occupational disease and claim for compensation alleging that he sustained a hearing loss as a result of his federal employment duties.

In a January 19, 2000 decision, the Office accepted appellant's claim for a 20 percent hearing loss.

Appellant requested a hearing. In a hearing held on August 17, 2000, he argued that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* were the sole criteria for determining the percentage of impairments and the A.M.A., *Guides* required more than simple numbers and percentages for calculating an award; specifically doctors applying the A.M.A., *Guides* must also consider the "comprehensive medical picture."

Second, appellant argued that the A.M.A., *Guides* discriminated against individuals with hearing loss and third, that the Office did not consider the psychological factors in determining appellant's impairment.

In a November 13, 2000 decision, the Office hearing representative affirmed the Office's January 19, 2000 decision.

On May 22, 2001 appellant requested that the Office reconsider his case. His representative thereafter on October 31, 2001 submitted a brief to the Office in support of appellant's request for reconsideration. Appellant's representative argued that the A.M.A., *Guides*, were not just a mathematical formula of calculation, but were a formula which also

considered the comprehensive medical picture including limitations of claimant's daily activities. Appellant's representative alleged that appellant had a 68 percent binaural hearing loss.

The Office denied appellant's request for reconsideration, without merit review, on November 28, 2001.

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.

The only decision before the Board on this appeal is the Office's November 28, 2001 decision denying appellant's request for a review on the merits of its November 13, 2000 decision. Because more than one year has elapsed between the issuance of the Office's November 13, 2000 decision and March 8, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the November 13, 2000 decision.¹

Under section 8128(a) of the Federal Employees' Compensation Act², the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,³ which provides that a claimant may obtain a review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office], or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁴

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.⁵

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2) (1999).

⁴ 5 U.S.C. § 10.608(b).

⁵ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

In the present case, appellant has not established that the Office abused its discretion in its November 28, 2001 decision by denying his request for a review on the merits of its November 13, 2000 decision 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 new evidence not previously considered by the Office.

In his October 31, 2000 reconsideration request, appellant submitted no new evidence and reiterated the same arguments made in his hearing.

Accordingly, the Board finds the Office did not abuse its discretion in denying appellant a merit review.

The November 28, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.⁶

Dated, Washington, DC
September 19, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

⁶ Additional factors such as employability or limitations on daily activities do not go into the calculation of the schedule award. See *Timothy McGuire*, 34 ECAB 189 (1982); *Smith Littlefield*, 30 ECAB 814 (1979).