

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE K. GIBSON and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Leesburg, Va.

*Docket No. 96-1337; Submitted on the Record;
Issued February 17, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his request for appeal on March 18, 1996,² the only decision before the Board is the September 6, 1995 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the August 19, 1994 decision of the Office.

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.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.³ Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),⁴ the Office, through

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² Appellant initially filed his appeal on December 8, 1995, which was docketed as Number 96-578, and an Order Dismissing Appeal was issued by the Board on February 13, 1996 finding that it did not have jurisdiction. This earlier filing date would not change the disposition of the case.

³ *Gregory Griffin*, 41 ECAB 186 (1989).

⁴ *See Charles E. White*, 24 ECAB 85 (1972).

regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁵

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁶

Evidence which does not address the particular issue involved,⁷ or evidence which is repetitive or cumulative of that already in the record,⁸ does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁹

With his June 29, 1995 reconsideration request appellant contends that the accepted aggravation of his preexisting irritable bowel condition was not temporary, but was a permanent worsening which persisted even after he left his employment, and in support he submitted an April 30, 1994 medical report from Dr. Eugene O.S. Stevenson that was previously of record and had been considered in the August 19, 1994 Office decision.

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁸ *Eugene F. Butler*, 36 ECAB 393 (1984).

⁹ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

The Board has undertaken a limited review of this evidence and argument and notes that this evidence and argument is repetitious of evidence and argument previously submitted or made. Therefore, they do not constitute a basis for reopening appellant's claim for further merit consideration, and the Office did not abuse its discretion by refusing to reconsider appellant's claim on its merits.

Consequently, the decision of the Office of Workers' Compensation Programs dated September 6, 1995 is hereby affirmed.

Dated, Washington, D.C.
February 17, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member