

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL GOLDMAN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Minneapolis, Minn.

*Docket No. 96-628; Submitted on the Record;
Issued March 17, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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 21, 1995 decision denying appellant's request for a review on the merits of its December 2, 1993 decision.¹ Because more than one year has elapsed between the issuance of the Office's December 2, 1993 decision and December 13, 1995, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the December 2, 1993 decision.²

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: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent

¹ By decision dated December 2, 1993, the Office denied modification of its prior decisions in which it had determined that appellant had no more than a 15 percent permanent impairment of each lower extremity, for which he received schedule awards, and that appellant did not sustain a back injury consequential to his lower extremity injuries. The Office had accepted that appellant sustained severe burns of both feet, reflex sympathetic dystrophy, and sympathetic dysfunction and awarded schedule awards for a 15 percent impairment of each lower extremity.

² See 20 C.F.R. § 501.3(d)(2).

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).

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, 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 Act.⁶

By letter dated November 28, 1994, appellant requested reconsideration of the Office's December 2, 1993 decision.⁷ Appellant submitted September 22, 1994 reports in which Dr. Richard Timming, an attending Board-certified physical medicine and rehabilitation physician, and Dr. Lynn Solem, an attending Board-certified surgeon, evaluate appellant's permanent impairment based on findings obtained during an April 12, 1993 examination. These reports are similar to evidence already considered by the Office, including impairment evaluations by Drs. Timming and Solem which were contained in reports dated April 12 and September 13, 1993. 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 The September 22, 1994 reports of Drs. Timming and Solem are duplicative to their April 12 and September 13, 1993 reports in that it also improperly evaluates appellant's permanent impairment in terms of the whole body and the back.⁹

In the present case, appellant has not established that the Office abused its discretion in its September 21, 1995 decision by denying his request for a review on the merits of its December 2, 1993 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 evidence not previously considered by the Office.¹⁰

The decision of the Office of Workers' Compensation Programs dated September 21, 1995 is affirmed.¹¹

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ Appellant's reconsideration request was initially sent to his congressional office.

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

⁹ A schedule award is not payable under section 8107 of the Act for an impairment of the whole person. See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990). Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹⁰ On appeal to the Board, appellant submitted additional evidence in support of his claim, but the Board cannot consider such evidence for the first time on appeal; see 20 C.F.R. § 501.2(c).

¹¹ The record contains a December 29, 1995 decision in which the Office again denied appellant's request for merit review, but this decision was issued after appellant filed his appeal with the Board on December 13, 1995. Following the docketing of an appeal on the same issue with the Board, the Office does not have jurisdiction to

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

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decisions rendered by the Office on the same issues for which an appeal is filed are null and void; *see Jimmy W. Galetka*, 43 ECAB 432, 433-44 (1992).