

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUADALUPE GONZALEZ and DEPARTMENT OF THE ARMY,
CORPUS CHRISTI ARMY DEPOT, Corpus Christi, Tex.

*Docket No. 97-1117; Submitted on the Record;
Issued January 12, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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 January 12, 1993 appellant, then a 57-year-old mechanic, filed a claim for a schedule award based on his April 29, 1992 work-related injury to his left shoulder.¹ Following medical development and review of appellant's medical record by the Office medical adviser, the Office, in a November 22, 1995 decision, denied appellant's claim for a schedule award greater than the award he had received from April 30, 1990 to December 27, 1991.²

Appellant filed a request for reconsideration on September 30, 1996, alleging that the Office improperly evaluated appellant on his left index finger and wrist rather than his left shoulder, that the October 1, 1992 medical report from Dr. Juan Felipe Santos used an incorrect claim number, and that the Office was confused because appellant had filed two separate claims.

By decision dated December 26, 1996, the Office denied appellant's request for merit review of his claim on the grounds that the evidence submitted by appellant in support of his reconsideration request was irrelevant or repetitious.

The only decision over which the Board has jurisdiction is the December 26, 1996 nonmerit Office decision since more than one year elapsed between the filing of the appeal on January 27, 1997 and the most recent merit decision of the Office, issued on November 22, 1995.

¹ The Office accepted appellant's left shoulder strain as having occurred while in the performance of duty on April 29, 1992.

² The Office stated in its decision that it had previously awarded appellant a 29 percent permanent impairment award for a work-related injury to his left shoulder sustained on June 13, 1988. The award covered April 3, 1990 to December 27, 1991.

The Board's regulations provide that the Board only has jurisdiction over decisions issued within a year of the filing of the appeal.³

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.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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 evidence not previously considered by the Office.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 To be entitled to 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.⁷

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,⁸ and that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁹ However, 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.¹⁰

In his September 30, 1996 reconsideration request, appellant did not show that the Office erroneously applied or interpreted a point of law nor did he advance a point of law or fact not previously considered by the Office. The argument that the Office medical adviser calculated appellant's permanent partial impairment based on his left index finger and wrist was incorrect as he clearly stated that the evaluation was based on appellant's left upper extremity. Further, Dr. Santos' medical report was relied on by the Office in determining appellant's rating of a left shoulder injury in accordance with claim number A16145634, and the Office explained that

³ 20 C.F.R. § 501.3(d)(2).

⁴ 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).

⁵ 20 C.F.R. 10.138(b)(1) and (2).

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

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *Daniel Deparini*, 44 ECAB 657 (1993); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁹ *Richard L. Ballard*, 44 ECAB 146 (1992); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁰ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

compensation for schedule awards shall be reduced by the period of compensation payable under the schedule for an earlier injury to the same member if the Office finds that compensation payable to a later permanent partial impairment would duplicate the compensation payable to the preexisting impairment.¹¹ Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138(b)(1), noted above.

For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

The December 26, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
January 12, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ 20 C.F.R. § 10.304 (d).