

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDRICK J. MOSCHIANO and DEPARTMENT OF VETERANS AFFAIRS,
SAN DIEGO VETERANS HOSPITAL, San Diego, CA

*Docket No. 99-2067; Submitted on the Record;
Issued September 12, 2000*

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 consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The only decision before the Board on this appeal is the Office's February 24, 1999 nonmerit decision denying appellant's application for a review on the merits under 5 U.S.C. § 8128(a) of its April 24, 1998 decision.¹ Because more than one year has elapsed between the issuance of the Office's April 24, 1998 merit decision and May 17, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the April 24, 1998 merit decision.²

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim on February 24, 1999, 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,³ the Office's regulations provide that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.⁴

¹ By decision dated April 24, 1998, the Office determined that appellant had failed to implicate any compensable factor of his employment in the development of his emotional condition.

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.606(b)(1),(2).

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 The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶ 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 Act.⁷ However, the Office, through its implementing regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.⁸ Evidence that does not address the particular issue involved is irrelevant and also constitutes no basis for reopening a case.⁹

Section 10.608(a) of the Office's implementing regulations states that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2). Section 10.608(b) states, however, that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.

In its February 24, 1999 decision, the Office properly determined that appellant failed to meet any one of the standards articulated in section 10.606(b)(2).

By letter dated January 13, 1999, appellant requested reconsideration of the Office's April 24, 1998 decision. In support of the request appellant reiterated his argument that his receipt of an unacceptable performance evaluation without warning was cruel and damaged him emotionally. He also claimed that the threat of being demoted or separated from his position caused him considerable workplace anxiety, stress and depression. Appellant submitted in support medical treatment records dating from March 24 through December 31, 1998 reporting the health care provided appellant.

As these arguments and evidence did not implicate or support any further compensable factors of appellant's employment in the development of his condition, they are irrelevant, such that they do not constitute the submission of evidence of Office error regarding a point of law, evidence of a relevant legal argument not previously considered by the Office, or relevant and pertinent evidence not previously considered, as the Office properly ascertained. Consequently,

⁵ 20 C.F.R. § 10.607(a).

⁶ *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *See Mohamed Yunis*, *supra* note 6; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁸ *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

⁹ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

the Board now finds that such evidence does not constitute grounds for reopening appellant's case for a merit review.

Therefore, the Office did not abuse its discretion by denying appellant's request for a further review of her case on its merits on February 24, 1999.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of appellant's request to ascertain whether evidence as required by section 10.606(b)(2) had been submitted, correctly determined that it had not and denied appellant's request for a merit reconsideration on that basis.

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review did not contain any evidence as required by section 10.606(b)(2) for reopening his claim for a further review of the case on its merits.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁰ Appellant has made no such showing here.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 24, 1999 is hereby affirmed.

Dated, Washington, D.C.
September 12, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *Daniel J. Perea*, 42 ECAB 214 (1990).