

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE W. KEMBRO, JR. and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, WHITING FIELD, Milton, FL

*Docket No. 02-1868; Submitted on the Record;
Issued December 31, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
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.

This claim is on appeal to the Board for the second time.¹ In the first appeal, the Board affirmed the Office's July 28 and February 4, 2000 decisions, in which the Office found that appellant did not establish that he had more than a 10 percent permanent impairment of each lung for which he received a schedule award. The Board found that the Office properly determined that the February 2, 2000 report of the referral physician, Dr. Thomas B. Williams, a Board-certified pulmonologist, accompanied by January 2000 pulmonary function tests, did not show that appellant's pulmonary condition had changed since the schedule award was issued and no other evidence of record established that appellant's 10 percent impairment to his lungs had increased.

By letter dated December 31, 2001, appellant requested reconsideration of the Office's decision and submitted a report from Dr. Weddington B. Kelley, a Board-certified internist with a specialty in pulmonary disease, dated December 18, 2001. In his report, Dr. Kelley stated that he had seen appellant since 1993, that appellant had asbestosis and that he had "a very thorough asbestos examination done elsewhere in 1992 which did show evidence of pleural and parenchymal asbestos involvement and decreased vital capacity consistent with some degree of asbestosis." He stated that he had followed appellant over the years and there had been no evidence of development of mesothelioma or bronchogenic carcinoma.

By decision dated January 23, 2002, the Office denied appellant's request for reconsideration.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ Docket No. 01-77 (issued August 17, 2001). The facts and history surrounding the prior appeal are set forth in the initial decisions and are hereby incorporated by reference.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.² A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).³

In the present case, to support his reconsideration request, appellant submitted the report of Dr. Kelley dated December 18, 2001 in which Dr. Kelley noted that appellant had asbestosis and that a 1992 examination showed evidence of pleural and parenchymal asbestos involvement and decreased vital capacity consistent with some degree of asbestosis. He stated that there had been no evidence of development of mesothelioma or bronchogenic carcinoma. Dr. Kelley's opinion does not address whether appellant's 10 percent impairment to his lungs had worsened since the schedule award or provide objective evidence that appellant's lung condition worsened. His opinion is therefore not relevant and does not constitute "relevant and pertinent new evidence" not previously considered by the Office. Appellant has also not shown that the Office erroneously applied or interpreted a specific point of law and he did not advance a relevant legal argument not previously considered by the Office. He therefore has failed to establish his claim that he has greater than a 10 percent impairment of each lung and the Office properly denied his request for reconsideration.

The January 23, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 31, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

² Section 10.606(b)(2)(i-iii).

³ Section 10.608(a).