

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT J. KRAL and DEPARTMENT OF THE NAVY,  
NAVAL AVIATION DEPOT, Jacksonville, FL

*Docket No. 03-1839; Submitted on the Record;  
Issued March 29, 2004*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

The Office accepted appellant's claim for asthma. On September 29, 1998 he filed a claim for a schedule award. In a report dated December 5, 1998, Dr. Robert J. Soffler, a Board-certified internist with a specialty in pulmonary diseases, to whom appellant was referred by his attending physician, considered appellant's history of injury, although he noted that he did not have records of appellant's past medical evaluations, performed a physical examination and reviewed a chest x-ray dated December 4, 1998, which showed no active infiltrates or effusions. He found that appellant's lungs demonstrated forced expiratory wheezes, which appeared voluntary due to vocal cord adduction, but during quiet breathing no wheezes were heard. Dr. Soffler found that the spirometry was normal. He concluded that appellant had no evidence of acute asthma. Dr. Soffler stated that, although normal spirometry does not rule out asthma, appellant's forced expiratory wheezing suggested that he might have a significant component of laryngeal dyskinesia, which was not true asthma. He noted that appellant was a cigarette smoker and stated that he needed to avoid exposure to known asthma causing agents, including cigarette smoking. Dr. Soffler concluded that there was no permanent impairment.

In a report dated August 23, 1999, Dr. Stuart Z. Millstone, a Board-certified internist with a specialty in pulmonary diseases, examined appellant at the request of the Office. He reviewed appellant's history of injury, performed a physical examination and reviewed a pulmonary function study. Dr. Millstone stated that appellant's spirometry showed forced vital capacity (FVC) of 4.10 liters, which was 89 percent of predicted and a forced expiratory volume (FEV<sub>1</sub>) of 3.10 liters, which was 93 percent of predicted. He stated that the normal ratio was 75 percent. Dr. Millstone stated that appellant's adult onset of asthma was not ideally controlled and that he was not on any standard medications used to treat asthma. He stated that it was not unusual for an asthmatic to present with normal spirometry but appellant clearly had ongoing airway inflammation by clinical examination. Dr. Millstone concluded that appellant had a post-

infectious adult onset of asthma and chronic airway inflammation without benefit of up to date therapy.

A pulmonary function study dated February 9, 2000 showed that the predrug, actual FVC of 1.81 liters was 39 percent of predicted and the predrug, actual FEV<sub>1</sub> of 1.15 liters was 35 percent of predicted. The test showed a severe restrictive ventilatory defect.

In a report dated March 14, 2000, an Office medical adviser reviewed the pulmonary function study of August 23, 1999. He agreed with Dr. Millstone that the pulmonary function study showed an FVC of 4.10 liters, which was 89 percent of predicted and an FEV<sub>1</sub> of 3.10 liters which was 93 percent of predicted. The Office medical adviser stated that both of these tests were normal with no pulmonary impairment. He stated that, in order to calculate an impairment rating, the condition must be permanent and, since asthma was not permanent, an impairment rating could not be provided.

By decision dated April 10, 2000, the Office denied appellant's schedule award claim, finding that the evidence of record established that he did not have any pulmonary.

By letter dated April 28, 2000, appellant requested an oral hearing before an Office hearing representative, which was held on February 13, 2001. At the hearing, he described the history of his medical treatment and asserted that one could have a normal spirometry reading and still have asthma. Appellant stated that Dr. Soffler did not have his complete records and that he had used his inhalers an hour before the examination. Therefore, he did not believe Dr. Soffler could be objective. He also described his work environment and the factors he believed contributed to his asthma condition.

By decision dated June 27, 2001, the Office hearing representative affirmed the Office's April 10, 2000 schedule award denial.

By letter dated June 27, 2002, appellant requested reconsideration of the Office's June 27, 2001 decision. He submitted additional evidence consisting of the results of the February 9, 2000 pulmonary function test and a letter from John F. Balling of the Florida State Department of Veterans Affairs, dated February 8, 2001. Mr. Balling indicated that, under the Department of Veterans Affairs standards, appellant would have a severe lung disability. Appellant also submitted a February 27, 2002 report from Dr. Maria H. Rexach, an internist, who performed a physical examination and reviewed a blood test and pulmonary function study. She diagnosed occupational asthma, by history, chronic obstructive pulmonary disease with a severe restrictive ventilatory defect and anxiety and depression. Appellant contended that the district medical adviser and the Office did not consider the results of the Department of Veterans Affairs pulmonary function test.

By decision dated July 8, 2002, the Office denied appellant's request for reconsideration, finding that he presented no new relevant medical evidence or legal argument.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final

decision.<sup>1</sup> As appellant filed his appeal on July 8, 2003, the only decision over which the Board has jurisdiction on this appeal is the July 8, 2002 decision, denying his request for reconsideration.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulation 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.<sup>2</sup> 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).<sup>3</sup>

The February 9, 2000 pulmonary function study and Mr. Balling's February 8, 2001 letter were already submitted to the record. Appellant contended that the district medical adviser and the Office did not review the results of the February 8, 2001 pulmonary function study. The Board notes that the study contains only predrug findings which were made prior to having the bronchodilators administered. Under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition (2001), for purposes of determining a respiratory impairment, repeat spirometry is to be conducted after bronchodilators are administered and the best effort is used.<sup>4</sup> As the study was already of record, it does not constitute pertinent new evidence or constitute a basis for further merit review.

Mr. Balling's February 8, 2001 letter is also repetitious as it was already of record. Moreover, the Board notes it is not pertinent because the findings of other administrative agencies are not determinative with regard to proceedings under the Federal Employees' Compensation Act, which is administered by the Office and the Board.<sup>5</sup> Dr. Rexach's February 27, 2002 report noted that appellant had a severe restrictive ventilatory defect which was information already in the record. Her diagnosis of occupational asthma, by history, is irrelevant to the underlying issue of whether appellant's asthma caused permanent impairment warranting a rating pursuant to the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

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<sup>1</sup> Section 10.606(b)(2)(i-iii).

<sup>2</sup> Section 10.606(b)(2)(i-iii).

<sup>3</sup> Section 10.608(a).

<sup>4</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001), Chapter 5, the Respiratory System, Section 5.4d, page 93, and section 5.5 (Asthma), pages 102 and 103.

<sup>5</sup> See *Sandra A. Stuphen*, 49 ECAB 174, 175 n. 5 (1997).

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law and has not advanced a relevant legal argument or presented relevant and pertinent new evidence not previously considered by the Office, he has failed to establish his claim.<sup>6</sup> The Office, therefore, properly denied appellant's request for reconsideration.

The July 8, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
March 29, 2004

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

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<sup>6</sup> Section 10.606(b)(2)(i-iii).