

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHERINE J. THOMPSON and VETERANS ADMINISTRATION,  
MEDICAL CENTER, Madison, WI

*Docket No. 98-1564; Submitted on the Record;  
Issued February 17, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, 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 her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her 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 January 8, 1998 decision denying appellant's request for a review on the merits of its December 12, 1996 decision.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's December 12, 1996 decision and April 17, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the December 12, 1996 decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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.<sup>4</sup> To be entitled to a merit review of an Office

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<sup>1</sup> On June 25, 1996 appellant, then a 52-year-old registered nurse, filed a traumatic injury claim alleging that she sustained injury to her left neck, shoulder and arm on June 24, 1996 when she twisted her neck while pulling a patient up in bed. Appellant stopped work on June 25, 1996 and returned to light-duty work on July 15, 1996. By decision dated December 12, 1996, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an employment injury on June 24, 1996.

<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.<sup>5</sup> 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.<sup>6</sup>

In support of her October 1, 1997 reconsideration request, appellant submitted numerous medical documents. These documents included a June 25, 1996 medical report, which had not previously been submitted to the Office. In this report, Dr. Nancy Deaton, an attending Board-certified family practitioner, noted that appellant reported she had injured her left neck and shoulder the prior evening when she lifted a patient at work. Dr. Deaton diagnosed, "Left-sided neck pain and upper extremity pain, most likely a musculoskeletal strain." Appellant had not previously submitted a medical report, which related a diagnosed condition, *i.e.*, a musculoskeletal strain, to the June 24, 1996 employment incident. Therefore, appellant has submitted new and relevant medical evidence which requires reopening her claim for review on the merits.

For these reasons, the Office abused its discretion in its January 8, 1998 decision by denying appellant's request for a review on the merits of its December 12, 1996 decision under section 8128(a) of the Act. The case should be remanded to the Office for proper reconsideration on the merits of appellant's claim that she sustained an employment injury on June 24, 1996. After such development it deems necessary, the Office should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated January 8, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.  
February 17, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).