

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSIE L. HINES and DEPARTMENT OF VETERANS AFFAIRS,
DAYTON VETERANS HOSPITAL, Dayton, OH

*Docket No. 98-2047; Submitted on the Record;
Issued February 25, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error; and (2) whether the refusal of the Office to reopen appellant's occupational disease claim for further consideration of the merits constituted an abuse of discretion.

This case has been before the Board previously. By decision dated August 11, 1997, the Board affirmed the Office's decisions dated April 24, 1995 and November 7, 1994 denying appellant's occupational disease claim and her request for a hearing.¹ The facts and background of the case as contained in the prior decision are incorporated herein by reference.

On March 2, 1998 appellant, through counsel, requested reconsideration and submitted additional evidence. On May 21, 1998 the Office issued two decisions. In the first, the Office denied appellant's request for reconsideration of its January 26, 1991 decision finding that it had not been filed within one year of the January 26, 1991 decision and did not establish clear evidence of error. In the second decision, in which the Office considered appellant's request for reconsideration of the Board's August 11, 1997 decision, the Office denied the request on the grounds that the evidence submitted was not relevant to the occupational disease claim. The instant appeal follows.

The Board initially finds that the Office properly denied appellant's request for reconsideration of the January 26, 1991 decision.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or

¹ Docket No. 95-2259, issued August 11, 1997.

² 5 U.S.C. § 8128(a).

terminating a benefit unless the application for review is filed within one year of the date of that decision.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴

The Board finds that, as more than one year had elapsed from the date of issuance of the Office's January 26, 1991 merit decision and appellant's request for reconsideration dated April 9, 1998, her request for reconsideration was untimely. The Board further finds that the evidence submitted does not raise a substantial question as to the correctness of the Office's January 26, 1991 merit decision.

In support of her request, appellant submitted a December 18, 1997 report from Dr. Stephen N. Buffington, an osteopathic physician, who advised that none of the factors regarding appellant's May 1990 employment injury had changed and that her condition of lumbar strain/sprain with arthritic changes was causally related to this injury.

Office procedures provide that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error. Evidence such as a well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case.⁵ In this case, while Dr. Buffington advised that appellant's condition was causally related to the May 1990 employment injury, he merely reiterated his opinion from a July 1, 1993 report that was previously submitted to the Office and considered. The Board finds that Dr. Buffington's December 18, 1997 report is thus insufficient to establish clear evidence of error on the part of the Office.⁶ Therefore, as appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's January 26, 1991 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her traumatic injury claim.

The Board further finds that the Office properly denied her request for reconsideration of the Board's August 11, 1997 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁷ 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

³ 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon., denied*, 41 ECAB 458 (1990).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *Jeanette Butler*, 47 ECAB 128 (1995).

⁶ *See Larry J. Lilton*, 44 ECAB 243 (1992).

⁷ 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).

law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁸ 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.⁹ 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.¹⁰ The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹¹

As stated above, with her request for reconsideration, appellant submitted the December 18, 1997 report from Dr. Buffington. He, however, did not discuss whether occupational exposure¹² caused appellant's condition but rather opined that it was caused by the May 1, 1990 employment injury. The Office, therefore, properly denied appellant's application for reconsideration of her occupational disease claim.

⁸ 20 C.F.R. § 10.138(b)(1) and (2).

⁹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁰ 20 C.F.R. § 10.138(b)(2).

¹¹ *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹² The Office's regulations define occupational disease or illness as a condition produced in the work environment over a period longer than a single workday or shift by such factors as systemic infection; continued or repeated stress or strain; or exposure to hazardous elements such as, but not limited to, toxins, poisons, fumes, noise, particulates, or radiation, or other continued or repeated conditions or factors of the work environment; *see Richard D. Wray*, 45 ECAB 758 (1994).

The decisions of the Office of Workers' Compensation Programs dated May 21, 1998 are hereby affirmed.

Dated, Washington, D.C.
February 25, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member