

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN F. BURNS and DEPARTMENT OF THE NAVY,
NAVSEA FECA FIELD OFFICE, Philadelphia, Pa.

*Docket No. 96-2549; Submitted on the Record;
Issued October 28, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs, in its July 10, 1996 decision to reopen appellant's claim for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion; and (2) whether the Office properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office, by its July 10, 1996 decision, properly declined to reopen appellant's case for further consideration of the merits, and that appellant's April 19, 1996 application for review was not timely filed and failed to present clear evidence of error.¹

In this case, appellant, a 54-year-old secretary filed a notice of traumatic injury and claim for compensation alleging that, on April 12, 1990 she was in the performance of duty, when she tripped and fell on a large hose on the outside pavement that blended with the cement walkway on the west side of building 83, causing her to scrape and bruise both of her knees and hurt her left hand. Appellant stopped work on April 13, 1990 and returned to work on April 23, 1990.² On May 16, 1990 the Office approved and accepted appellant's work-related claim for lumbar sprain, contusion and internal derangement of both knees.

¹ The Office's last merit decision dated March 16, 1995, was issued more than one year prior to the date the appellant filed her appeal dated August 9, 1996 and postmarked August 10, 1996. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim; *see Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² The record shows that the Office granted reports of termination of disability and/or payment (Form CA-3) approving a continuation of pay from April 13 through 17, 1990 and from April 19 through 22, 1990 on April 24, 1990. In addition, the record shows that appellant also filed a notice of recurrence of disability and continuation of pay/compensation (Form CA-2a) on April 24, 1990.

On May 26, 1993 appellant filed a claim for a schedule award for permanent partial impairment in both knees (Form CA-7). Appellant claims that the above-mentioned work-related injury of April 12, 1990, left both of her knees permanently impaired.

By decision dated January 12, 1994, the Office rejected appellant's claim for a schedule award for permanent impairment in both knees for the reason that the weight of the medical evidence established that appellant had no permanent impairment as a result of the injury of April 12, 1990. In an accompanying memorandum summarizing the evidence, the Office explained that the November 24, 1993, medical report of Dr. Noubar Didizian, a Board-certified orthopedic surgeon and second opinion medical specialist, constituted the weight of the medical evidence and established that appellant's bilateral knee condition, which he diagnosed as "mild chondromalacia patella which is of no clinical significance," and opined that "the accident or the fall of April 12, 1990 resulted in local tibial tubercle trauma rather than any evidence of internal derangement."

On December 8, 1994 appellant requested reconsideration of the Office's January 12, 1994 decision and submitted additional medical evidence. This evidence included, a one sentence medical report from Dr. Marvin N. Kallish, a Board-certified orthopedic surgeon dated February 21, 1994 and stating that "The changes that [appellant] has in her knees are permanent in nature;" and a medical report from Dr. Joseph A. Fabiani, a Board-certified orthopedic surgeon, dated November 29, 1994. Dr. Fabiani presented the history of injury as given to him by appellant and noted that appellant's past history noted no problems to her knees or joints. He noted that his examination of appellant showed quadricep measurements to be the same; that appellant had nearly full flexion and extension; that appellant had some pain with patella femoral rub and this is significant, more so on the left than on the right; and that there is no ligamentous instability and no effusion present. Dr. Fabiani noted that "x-rays were taken including the skyline view and these were normal for [the] patient's age except that the patella on the skyline view appears to be tight on the lateral side." He went on to state that:

"[Appellant] was advised that this appears to be a chondromalacia problem and may have stemmed from [appellant's] initial injury that got progressively worse. At this time [appellant] should use a band which would apply pressure on the lateral aspect and do resistive exercises for quadriceps from 30 degrees to full extension. Long term if this does not improve; a lateral release may be necessary."

After conducting a merit review of the case, the Office, by decision dated March 16, 1995, denied modification of its January 12, 1994 decision, finding that the medical opinion of Dr. Didizian continued to constitute the weight of the medical evidence as it presented a definite opinion that appellant's condition is due to the aging process. The Office noted that the report of Dr. Fabiani was insufficient to create a conflict with the report of Dr. Didizian, as it stated that appellant condition "may have stemmed from the work injury and got progressively worse," and is speculative. The Office also noted that the one sentence report submitted by Dr. Kallish clearly lacked any opinion on the causal relationship of appellant's knee condition with any work injury, and is insufficient to establish causal relationship. The Office found that the medical

evidence submitted in support of appellant's request for reconsideration was insufficient to warrant modification of the prior decision.

On April 19, 1996 appellant again requested reconsideration of her claim. Appellant stated: "I will be scheduling an appointment with a physician. I have suffered another knee injury in December 1995 which aggravated the already-injured knees, therefore, I expect to have additional evidence pertinent to the injury." However, appellant neither raised substantive legal questions regarding the issue at hand or presented new, or relevant evidence.

By decision dated July 10, 1996, the Office found appellant's second request for reconsideration to be untimely filed and that appellant presented no evidence to establish that the Office's March 16, 1995 decision was in error.

With regard to the first issue, the Board notes that, under section 10.138(b)(1) of the Office's regulations,³ a claimant may obtain review of the merits of his or her claim by written request to the Office and by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) of the same regulations provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴

Appellant did not present any new and relevant evidence not previously considered and did not raise any legal contentions not previously considered in support of her request for reconsideration. As such, the Board finds that the Office, in its July 10, 1996 decision, did not abuse its discretion in refusing to reopen the March 16, 1995 decision for further merit review.

With regard to the second issue, the Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ 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.⁷

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's March 16, 1995 merit decision to the date appellant's request for reconsideration was filed with the Office on April 19, 1996, appellant's request for reconsideration is untimely.

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ 5 U.S.C. § 8128(a).

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

⁷ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

As noted above, appellant submitted no evidence in support of her request for reconsideration, and contended: "I have suffered another knee injury in December 1995, which aggravated the already-injured knees, therefore, I expect to have additional evidence pertinent to the injury." Appellant's contention, however, is not relevant to the issue in this case, whether the medical evidence establishes that there is any permanent impairment due to the prior May 16, 1990, accepted work-related claim for lumbar sprain, contusion and internal derangement of both knees. Since appellant has submitted no evidence to support her request for reconsideration, the Board finds that she has failed to raise a substantial question as to the correctness of the Office's March 16, 1995 merit decision and has failed to establish clear evidence of error on the part of the Office. Accordingly, the Office did not abuse its discretion in denying a merit review of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated July 10, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 28, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member