

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNETTE E. MURPHY and DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION, Syracuse, NY

*Docket No. 98-521; Submitted on the Record;
Issued August 11, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her request for appeal on November 17, 1997, the only decision before the Board is the October 22, 1997 decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the July 29, 1996 decision of the hearing representative affirming the Office's decision dated May 22, 1995, which denied appellant's claim for benefits.

By letter dated July 23, 1997, appellant, through counsel, filed a request for reconsideration. Appellant subsequently submitted a medical report dated July 27, 1997 from Dr. Jalal Sadrieh, Board-certified in orthopedic surgery, who stated that appellant's injury to her neck and lower back was caused by her fall at work in March 1994. However, Dr. Sadrieh failed to provide a rationalized medical opinion in support of his opinion that appellant's medical condition was causally related to the March 1994 incident. Appellant also submitted a July 8, 1997 report from Dr. Edward J. Galvin, a chiropractor. This report is of no probative medical value because Dr. Galvin did not diagnose a subluxation as revealed by x-rays and thus he is not recognized as a physician in this case.²

Appellant also submitted treatment notes from April 1989 to October 1993, none of which contained a rationalized medical opinion from a physician establishing a causal relationship between the work-related incident and her condition. The September 22, 1993 magnetic resonance imaging scan had been reviewed previously. None of these reports establish

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8101(2).

a causal relationship between appellant's alleged injury and her current condition. Finally, appellant submitted a March 22, 1995 report from Dr. Sadrieh, however, that report had been reviewed previously.

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) did not constitute an abuse of discretion.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.³ Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),⁴ the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁵

Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁶

³ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ *See Charles E. White*, 24 ECAB 85 (1972).

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

Evidence, which does not address the particular issue involved⁷ or evidence, which is repetitive or cumulative of that already in the record,⁸ does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence, which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁹ However, such evidence was not submitted here, as none of the submitted medical evidence, chiropractic notes or treatment notes addresses the issue of the causal relationship between appellant's medical condition and the March 11, 1994 incident.

The evidence appellant submitted in support of her request for reconsideration neither advanced substantive legal arguments nor included any new and relevant evidence pertinent to the issue of whether appellant's medical condition is causally related to the March 11, 1994 work-related incident. Therefore, the Office properly found that there was no basis to reopen the case for further merit review.

The decision of the Office of Workers' Compensation Programs dated October 22, 1997 is hereby affirmed.¹⁰

Dated, Washington, D.C.
August 11, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁸ *Eugene F. Butler*, 36 ECAB 393 (1984).

⁹ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ The Board notes that subsequent to the Office's October 22, 1997 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).