

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOREN K. DAVIS and DEPARTMENT OF THE NAVY,
NAVAL AVIATION DEPOT, NAVAL AIR STATION, Alameda, Calif.

*Docket No. 96-680; Submitted on the Record;
Issued July 13, 1998*

DECISION and ORDER

Before DAVID S. GERSON, 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 his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

On June 5, 1991 appellant, then a 48-year-old aircraft mechanic, submitted an occupational disease claim alleging that his colon cancer was caused by employment-related exposure to asbestos. The Office developed the case, and by decision dated November 6, 1992, denied the claim on the grounds that the medical evidence failed to establish a causal relationship between employment factors and the diagnosed condition. Appellant requested reconsideration and, in a March 25, 1993 decision, an Office hearing representative remanded the case to the Office, finding that a conflict in the medical evidence existed between the opinions of Board-certified occupational physicians, Dr. Robert Harrison, appellant's physician, and Dr. J.S. Weiss who had furnished a second opinion for the Office. Following remand, the Office referred appellant, along with the medical record, a statement of accepted facts, and a set of questions, to Dr. Richard W. Martin, who is also Board-certified in occupational medicine, for an impartial medical evaluation. On August 2, 1993 the Office again denied the claim, crediting the referee opinion of Dr. Martin who advised that appellant's colon cancer was not employment-related. Following appellant's request, a hearing was held on March 31, 1994 at which time he and Dr. Harrison testified. By decision dated June 28, 1994, an Office hearing representative affirmed the prior decision. On July 28, 1995 appellant, through his Congressman, the Honorable Gary A. Condit, requested reconsideration, contending that, as his employment exposure to asbestos was not questioned and government regulations and medical literature stated that exposure to asbestos had been shown to cause colon cancer, he was entitled to compensation. He also submitted additional evidence. In a letter decision dated September 18, 1995, the Office denied appellant's request, finding the evidence submitted

cumulative and repetitious and therefore insufficient to warrant merit review. The instant appeal follows.

The only decision before the Board in this appeal is the Office's decision dated September 18, 1995 denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated June 28, 1994 and the filing of appellant's appeal to the Board on January 11, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Act,² 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.³ 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.⁴ 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.⁵

In this case, appellant did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or fact not previously considered by the Office. In support of his request appellant submitted copies of a February 9, 1993 report from Dr. Harrison that had previously been reviewed. While he contended that government regulations and medical literature indicated that asbestos exposure caused colon cancer and submitted copies of regulations, information regarding hazard data, asbestos disposal, a class action lawsuit, and a medical journal article, such evidence is of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of a general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.⁶ Causal relationship is a

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 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).

³ 20 C.F.R. § 10.138(b)(1) and (2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *See George A. Johnson*, 43 ECAB 712 (1992).

medical issue, and the medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁷ The only medical evidence appellant submitted in support of his reconsideration request had previously been reviewed by the Office. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138.

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.⁸ Such was not the case here, and the Board finds that the Office properly denied appellant's application for reconsideration of his claim.

The decision of the Office of Workers' Compensation Programs dated September 18, 1995 is hereby affirmed.

Dated, Washington, D.C.
July 13, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *See Gary L. Fowler*, 45 ECAB 365 (1994).

⁸ *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).