

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOY L. PITTS and DEPARTMENT OF VETERANS AFFAIRS,  
GRAND JUNCTION VETERANS HOSPITAL, Grand Junction, Colo.

*Docket No. 96-1997; Submitted on the Record;  
Issued July 7, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its May 15, 1996 decision, 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 has duly reviewed the case record in the present appeal and finds that this case is not in posture for a decision.

The only decision before the Board on this appeal is the Office's May 15, 1996 decision denying appellant's request for a review on the merits of its April 21, 1995 decision. Because more than one year has elapsed between the issuance of the Office's April 21, 1995 decision and June 12, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the April 21, 1995 decision.<sup>1</sup>

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup>

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Gregory Griffin*, 41 ECAB 186 (1989).

<sup>4</sup> 5 U.S.C. § 8128(a) provides: "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>5</sup> Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>6</sup> 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 section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.<sup>7</sup>

Thus to require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions have not been presented, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128.<sup>8</sup>

In its April 21, 1994 decision, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record was insufficient to establish that her claimed emotional condition arose in the performance of duty. The Office specifically found that the incidents claimed by appellant as sources of stress, primarily involving alleged hostile treatment of appellant by her coworkers, either did not occur in the performance of duty or were not accepted as factual. Therefore, the Office declined to address the medical evidence of record.

By letter dated April 21, 1996, appellant requested reconsideration of her claim and submitted additional factual and medical evidence. This evidence included a signed statement from Mr. Ed Riddle, a staff pharmacist at the employing establishment and appellant's coworker, in which he stated that upon appellant's return to work following surgery for carpal tunnel syndrome, "it was apparent...that there was a feeling of tenseness and animosity aimed at her" and that several pharmacy coworkers, two named individuals in particular, "initiated," "perpetuated" and "participated in whisperings and snickering directed towards [appellant]." Appellant also submitted a statement from a Mr. Owen Cook, II, another employing establishment coworker, who stated that the same two individuals named by Mr. Riddle made "condescending remarks" about appellant. The Office essentially denied appellant's claim because the employment incidents upon which she based her claim had either occurred outside the performance of duty, or had not been supported by the requisite documentary evidence to establish the incidents as factual. The Board notes that appellant had not previously submitted these statements by her coworkers, and therefore the Office had not previously considered them.

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<sup>5</sup> See 20 C.F.R. § 10.138(b)(1).

<sup>6</sup> 20 C.F.R. § 10.138 (b)(1).

<sup>7</sup> 20 C.F.R. § 10.138(b)(2).

<sup>8</sup> *Karl Doern*, 32 ECAB 821 (1981).

Because appellant had not previously submitted these coworker statements, and because these statements serve to corroborate several situations previously identified by appellant but found by the Office not to be factual, the statements do constitute new and relevant evidence. Because appellant submitted relevant and pertinent evidence not previously considered by the office, the Board finds that she is entitled to a merit review of her claim under section 10.138(b)(1)(iii) of Title 20 of the Code of Federal Regulations.

The Board will remand the case to the Office for such further development as may be necessary, to be followed by an appropriate final decision on the merits of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated May 15, 1996 is set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
July 7, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member