

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLENDA S. MECCA and DEPARTMENT OF THE NAVY,
NAVCAMS, WESTPAC, U.S. NAVAL STATION, Guam

*Docket No. 97-1518; Submitted on the Record;
Issued April 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

The facts in this case indicate that on May 9, 1991 appellant, then a 37-year-old safety technician, sustained an employment-related low back strain. By decision dated February 8, 1994, the Office denied appellant's request for a hot tub, finding that the medical evidence of record failed to substantiate its need. Following appellant's request for a review of the written record, in a July 22, 1994 decision, an Office hearing representative remanded the case to the Office to refer appellant, along with a statement of accepted facts, to a specialist for an opinion regarding the medical necessity for a hot tub as treatment of her diagnosed condition. By letter dated September 7, 1994, the Office referred appellant to Dr. Hyman P. Roosth, a Board-certified orthopedic surgeon, who, in a September 30, 1994 report, advised that there was no need for treatment with a hot tub. By decision dated November 14, 1994, the Office denied appellant's request, crediting the opinion of Dr. Roosth. On September 29, 1995 appellant requested reconsideration and submitted a disability evaluation and report from Dr. Frank A. Luckay, a Board-certified orthopedic surgeon. By decision dated December 5, 1995, the Office denied appellant's request, finding the evidence submitted immaterial to the issue in the case. On May 20, 1996 appellant again requested reconsideration. In a July 3, 1996 decision, the Office denied appellant's request finding that, pursuant to 20 C.F.R. § 10.138(b)(2), it had not been filed

within one year of the November 14, 1994 decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a).¹ The instant appeal follows.

The only decision before the Board is the Office's July 3, 1996 decision denying appellant's request for reconsideration of the November 14, 1994 decision. Because more than one year had elapsed between the issuance of this decision and March 25, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the November 14, 1994 Office decision.²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ 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.⁴ 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.⁵

The Board finds that as more than one year had elapsed from the date of issuance of the Office's November 14, 1994 merit decision and appellant's request for reconsideration dated May 20, 1996, her request for reconsideration was untimely. The Board further finds that the arguments made by appellant in support of this request do not raise a substantial question as to the correctness of the Office's November 14, 1994 merit decision. She submitted no additional medical evidence in support of her claim regarding the medical necessity for a hot tub. Therefore, as she has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's November 14, 1994 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 claim.

¹ The record indicates that appellant also requested a schedule award. In a letter dated July 3, 1996, the Office informed appellant that it's July 3, 1996 decision denying reconsideration of the November 14, 1994 merit decision did not address her schedule award claim and the case was being referred to a claims examiner in that regard.

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

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

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

The decision of the Office of Workers' Compensation Programs dated July 3, 1996 is hereby affirmed.

Dated, Washington, D.C.
April 12, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member