

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSANETTE MUELLER and DEPARTMENT OF THE ARMY,
Fort Huachuca, AZ

*Docket No. 98-734; Submitted on the Record;
Issued December 13, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for review of the merits under 5 U.S.C. § 8128(a).

In the present case, the Office accepted that appellant sustained a conversion disorder causally related to her federal employment. Appellant returned to work on a part-time basis in September 1991 and claimed a recurrence of total disability as of August 1, 1993. In a decision dated January 20, 1994, the Office denied appellant's claim for total disability commencing August 1, 1993. The Office also determined that appellant was entitled to compensation based on her wage-earning capacity in the part-time position.¹

By decision dated April 28, 1995, an Office hearing representative affirmed the recurrence and wage-earning capacity determinations. In decisions dated September 27, 1995 and October 22, 1996, the Office denied modification of the prior decisions.

In a letter dated July 11, 1997, appellant requested reconsideration of her claim. By decision dated September 23, 1997, the Office determined that appellant's request was insufficient to warrant merit review of the case.²

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.³ Since appellant filed her appeal on December 23, 1997, the only

¹ The actual wage-earning capacity decision was issued on January 25, 1994.

² A nonmerit review on a request for reconsideration is a limited review to determine if the evidence is sufficient under 20 C.F.R. § 10.138(b)(1) to reopen the case for merit review and the only right of appeal is to the Board. A merit review is a determination, pursuant to the discretionary authority granted by 5 U.S.C. § 8128(a), of whether the evidence is sufficient to modify the prior decision and appeal rights include a one-year period to request reconsideration or appeal to the Board; *see* 20 C.F.R § 10.138; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7-8. (June 1997).

decision over which the Board has jurisdiction on this appeal is the September 23, 1997 decision denying her request for reconsideration.

The Board has reviewed the record and finds that the Office properly denied appellant's request for reconsideration without merit review of the case.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provides that a claimant may obtain review of the merits of the claim 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.⁵ Section 10.138(b)(2) states that any application for review that 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.⁶

In this case, appellant submitted a July 11, 1997 request for reconsideration, without submitting additional evidence. Appellant argued that the medical evidence was sufficient to establish a recurrence of disability, but she did not provide new and relevant medical evidence on the issue. The Board finds no indication that appellant met any of the requirements of section 10.138(b)(1). Accordingly, the Office properly denied the request for reconsideration without merit review of the claim.

The Board notes that appellant also submitted a letter dated October 21, 1997, requesting reconsideration of the October 22, 1996 merit decision. The record contains a letter dated December 11, 1997 from the Office advising appellant that the most recent Office decision permitted only an appeal to the Board, not a request for reconsideration. Although it is correct that the September 23, 1997 Office decision does not provide a right to request reconsideration, appellant's letter is clearly a request for reconsideration of the October 22, 1996 merit decision. Furthermore, the date of the request for reconsideration would render it timely filed.⁷ It is unclear what the December 11, 1997 Office letter was intended to represent, since it briefly refers to a "limited review" and "no evidence of error," and yet does not provide appeal rights.

On return of the case record, the Office should issue an appropriate decision with respect to a timely request for reconsideration of the October 22, 1996 Office decision.

³ 20 C.F.R. § 501.3(d).

⁴ 5 U.S.C. § 8128(a) (providing that "[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 20 C.F.R. § 10.138(b)(1).

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

⁷ The record does not contain an envelope with a postmark date. If the postmark is not available, the date of the letter is the date of filing; *see Willie H. Walker, Jr.*, 45 ECAB 126 (1993).

The decision of the Office of Workers' Compensation Programs dated September 23, 1997 is affirmed.

Dated, Washington, D.C.
December 13, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member