

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALMETA POOLE and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Salisbury, N.C.

*Docket No. 97-2099; Submitted on the Record;
Issued June 3, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant reopening her claim under 5 U.S.C. § 8128(a).

In the present case, the Office accepted that appellant sustained a torn rotator cuff and a right shoulder strain in the performance of duty on April 25, 1990. The record indicates that appellant worked intermittently from October 1990, underwent surgery in May 1992 and eventually returned to a full-time light-duty position on September 1, 1993.

By decision dated May 1, 1995, the Office determined that the medical evidence was not sufficient to establish causal relationship between disability commencing January 20, 1995 and the accepted employment injury. In decisions dated August 10, 1995 and January 18, 1996, the Office denied modification of the prior decision.

In a letter dated January 16, 1997, appellant requested reconsideration of her claim and submitted additional medical evidence. By decision dated February 26, 1997, the Office determined that appellant's request for reconsideration was not sufficient to require reopening the claim for merit review.¹

It is noted that the Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.² Since appellant filed her appeal on May 30, 1997 the

¹ A nonmerit review 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).

² 20 C.F.R. § 501.3(d).

only decision over which the Board has jurisdiction on this appeal is the February 26, 1997 decision, denying her request for reconsideration without merit review.

The Board finds that the Office properly determined that the January 16, 1997 request for reconsideration was insufficient to require reopening the claim for merit review.

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

Appellant asserted in her request for reconsideration that she was raising two new legal arguments: (1) the medical examinations ordered by the Office were made before appellant returned to work and could not establish that she was able to perform the light-duty job; and (2) appellant had not been offered a suitable position with her physical restrictions. With respect to the first argument, the Board notes that the Office decisions did not rely on medical evidence from Office referral physicians in denying the claim. The underlying facts indicate that appellant had returned to work and then claimed total disability commencing January 20, 1995; it is appellant's burden of proof and the Office found that the evidence from her attending physicians was insufficient to establish her claim. Appellant's first argument does not raise a valid point of law or fact not previously considered.⁶ As to the second argument, appellant asserted that she had met her burden of showing inability to work at the positions made available, and, therefore, the employing establishment must find her a suitable position. The underlying Office decisions, however, had clearly found that appellant had not met her burden of proof based on the medical evidence. This argument does not raise a valid point of law or fact and does not constitute a basis for reopening the claim.

The underlying issue in the case is a medical issue, and while appellant did submit two medical reports not previously of record, neither contains new and pertinent information. In a report dated September 21, 1995, Dr. Michael Adler, a family practitioner, noted that appellant had initially been seen in August 1990, had subsequently been treated by himself and other specialists and that appellant had a chronic right shoulder condition. Dr. Adler had previously indicated that appellant had a chronic condition and he does not specifically discuss disability

³ 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").

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ Where the legal argument presented has no reasonable color of validity, the Office is not required to reopen the case for merit review; *see Norman W. Hanson*, 40 ECAB 1160 (1989).

commencing January 20, 1995 or causal relationship with the employment injury. The Board finds that his report does not constitute new and pertinent medical evidence.

In a report dated October 11, 1995, Dr. Walton W. Curl, an orthopedic surgeon, noted that appellant had been a patient since June 1993, and in her last examination on March 8, 1995 she still had positive impingement signs, but her shoulder was stable. Dr. Curl stated that the current diagnosis was chronic shoulder tendinitis and indicated that on April 17, 1995 he had changed her restrictions to prevent use of her right arm for any work at all. This report is similar to a previously submitted report from Dr. Curl dated May 30, 1995, and it does not provide any new evidence regarding an employment-related disability commencing January 20, 1995.

The Board accordingly finds that appellant has not met any of the requirements of section 10.138(b)(1). Appellant's request for reconsideration was, therefore, properly found to be insufficient to require reopening the case for merit review of the claim.

The decision of the Office of Workers' Compensation Programs dated February 26, 1997 is affirmed.

Dated, Washington, D.C.
June 3, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member