

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHIRLEY L. GASKINS and U.S. POSTAL SERVICE,  
POST OFFICE, Sacramento, Calif.

*Docket No. 98-138; Submitted on the Record;  
Issued June 21, 1999*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's August 1, 1996 request for reconsideration was insufficient to warrant merit review of the claim; (2) whether the Office properly determined that appellant's December 30, 1996 request for reconsideration was insufficient to warrant merit review; and (3) whether the Office properly determined that appellant's June 5, 1997 request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, the Office, by decision dated September 13, 1995, accepted that appellant sustained major depression causally related to factors of her federal employment. The Office also determined that the accepted condition had resolved by August 3, 1995. It is evident from the memorandum accompanying the decision that the acceptance of the condition and the period of disability was based on the August 28 and September 11, 1995 reports of Dr. Irwin Lyons, a psychiatrist, serving as a second opinion referral physician.

By decision dated January 3, 1996, the Office denied modification of its prior decision. Appellant requested reconsideration by letter dated August 1, 1996 and submitted additional evidence, including a July 22, 1996 report from Dr. Janek Mehtani, a Board-certified psychiatrist. By decision dated November 7, 1996, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.<sup>1</sup> Appellant requested reconsideration by letter dated December 30, 1996, which was again found to be insufficient to warrant merit review by decision dated January 8, 1997. In a letter dated June 5,

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<sup>1</sup> 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).

1997, appellant requested reconsideration of her claim. By decision dated July 10, 1997, the Office found that the request was untimely and failed to show clear evidence of error.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year of the filing of the appeal.<sup>2</sup> Since appellant filed her appeal on October 14, 1997, the only decisions over which the Board has jurisdiction on this appeal are the July 10 and January 8, 1997, and November 7, 1996 decisions denying her requests for reconsideration.

The Board has reviewed the record and finds that the Office improperly determined that appellant's August 1, 1996 request for reconsideration was insufficient to warrant a merit review of the claim.

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

The August 1, 1996 reconsideration request included a detailed report dated July 22, 1996 from appellant's attending physician, Dr. Mehtani. The Office found this report to be cumulative in nature, but it clearly represents new and relevant evidence. The underlying medical issue in this case is whether appellant continued to have an employment-related disability after August 3, 1995. The reports submitted by Dr. Mehtani prior to the January 3, 1996 merit decision had only provided brief statements regarding a continuing disability. For example, an August 1, 1995 prescription note had stated that appellant would not be able to return to work until November 15, 1995, and in an October 4, 1995 report Dr. Mehtani stated that appellant had a relapse of her depressive disorder and he anticipated her return to work within the next three to six months.

In his July 21, 1996 report, Dr. Mehtani provided a new and detailed discussion of Dr. Lyons' findings, as well as providing additional detail and explanation as to his own opinion regarding appellant's continuing employment-related disability after August 3, 1995. This directly relates to the underlying issue and the July 22, 1996 report therefore constitutes new and relevant evidence under section 10.138(b)(1)(iii). Accordingly, the Office should have reopened the case for merit review. The case will be remanded to the Office for an appropriate decision on the merits of the claim.

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<sup>2</sup> 20 C.F.R. § 501.3(d).

<sup>3</sup> 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").

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

In view of the Board's finding that appellant is entitled to a merit review, the remaining issues will not be considered.

The decisions of the Office of Workers' Compensation Programs dated July 10 and January 8, 1997 and November 7, 1996 are set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
June 21, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member