

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SAUNDRA J. DIMICELI and SOCIAL SECURITY ADMINISTRATION,  
Modesto, CA

*Docket No. 98-436; Submitted on the Record;  
Issued October 6, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his 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 the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated May 30, 1997 denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated April 23, 1996 and the filing of appellant's appeal on November 10, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>4</sup> To be entitled to merit review of an

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> Under section 8128 of the Act, "[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 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.138(b)(1) and (2).

<sup>4</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.<sup>5</sup>

Appellant faxed a request for reconsideration to the Office on April 22, 1997 and submitted medical evidence. By decision dated May 30, 1997, the Office denied appellant's request, finding the evidence submitted immaterial to the issue of whether appellant established a compensable employment factor.

In this case, appellant did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or fact not previously considered by the Office. The medical evidence submitted is irrelevant to the issue in question, *i.e.*, whether she established a compensable factor of employment. Consequently, as appellant did not submit relevant and pertinent evidence not previously considered by the Office, she did not meet the requirements set forth at 20 C.F.R. § 10.138.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>6</sup>

The decision of the Office of Workers' Compensation Programs dated May 30, 1997 is hereby affirmed.

Dated, Washington, D.C.  
October 6, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).