

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNEMARIE L. SKOMINA and DEPARTMENT OF THE TREASURY,
OFFICE OF THRIFT SUPERVISION, Jersey City, NJ

*Docket No. 98-1816; Submitted on the Record;
Issued August 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

In this case, the Office accepted the condition of a right knee contusion for a May 19, 1992 incident where appellant was injured while going into the storage room. Appellant stopped work effective May 20, 1992. She was terminated from employment as a result of a reduction-in-force (RIF) in October 1992.

On November 6, 1996 the Office issued a decision rejecting appellant's claim for compensation for wage loss for the periods after October 12, 1993 for the reason that the evidence of record supported that appellant was not totally disabled and that she was able to perform her date-of-injury position, which the Office found that appellant was working in a light-duty capacity. The Office relied on the October 13, 1993 report of Dr. Herman Frank, a Board-certified orthopedic surgeon and an Office referral physician, who stated that appellant had a mild partial disability and could return to work with restrictions. Based upon a review of appellant's job duties, the fact that appellant was working in a light-duty capacity at the time of the accepted job injury and a clarification statement from Dr. Frank, the Office found that appellant's date-of-injury job was within her restrictions and that she was capable of performing her date-of-injury job effective October 13, 1993, the date of Dr. Frank's report.

In a letter dated November 4, 1997, appellant requested reconsideration. Appellant advanced some arguments pertaining to the statements made in the November 6, 1996 decision and submitted copies of evidence which were previously of record which she believed supported her arguments.

In a decision dated February 19, 1998, the Office denied appellant's request for reconsideration without reviewing the merits of the claim, on the grounds that the arguments

advanced were irrelevant, immaterial and of a repetitious nature to warrant review of its prior decision.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

The only decision before the Board on this appeal is the February 19, 1998 Office decision, which found that appellant, in her request for reconsideration, had not submitted sufficient evidence to warrant review of the Office's November 6, 1996 decision. Since more than one year has elapsed between the issuance of the November 6, 1996 decision and May 18, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the November 6, 1996 decision.¹

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”²

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.³ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Federal Employees' Compensation Act.⁴

In support of her request for reconsideration, appellant noted that the Office erred in listing the date compensation was filed for, that the Office misspelled the name of the physician who initially treated her, that Dr. Joel Bonamo and not Dr. Scifo, was her physician of record and she underwent arthroscopic surgery in 1996. She further argued that as her job was eliminated before the date of October 13, 1993 based on a RIF action, she was not capable of performing her assigned job as the job was no longer available. Appellant further argued that the

¹ See 20 C.F.R. § 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

position description of her date-of-injury job included duties that were not within the restrictions imposed by Dr. Frank, the Office referral physician. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁵ In this case, the issue is medical in nature as the Office relied upon Dr. Frank's opinion that the medical evidence established that appellant was capable of performing her date-of-injury job with restrictions. The Office found that although appellant had residuals from the job injury, the restrictions imposed by Dr. Frank would not prevent appellant from performing her assigned duties, which were being performed in a light-duty capacity. There was no medical evidence submitted with the request for reconsideration suggesting that appellant was not capable of performing her date-of-injury position or that the restrictions which he imposed would not prevent her from performing her assigned duties. Appellant's argument regarding typographical errors, who her physician of record is or the fact that she was RIF are irrelevant to the issue of whether appellant had the capacity to perform her date-of-injury job duties, if such a job was available, which the Office found appellant was working in a light-duty capacity at the time of the accepted job injury. Appellant submitted no new evidence which was not previously of record. Therefore, appellant's contentions do not have a reasonable color of validity and are insufficient to require the Office to reopen the claim for a merit review.

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 deductions from known facts.⁶ The Board finds no evidence in the case record of any such abuse of discretion.

Accordingly, appellant did not provide a sufficient evidentiary basis for reopening her claim and the Office properly employed its discretion in refusing to reopen the case for further review on the merits.⁷

⁵ *Constance G. Mills*, 40 ECAB 317 (1988); *Mary J.W. Gormary*, 15 ECAB 107 (1963); *Maria Sievers*, 13 ECAB 380 (1962).

⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁷ *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).

The Office of Workers' Compensation Programs' decision dated February 19, 1998 is affirmed.

Dated, Washington, D.C.
August 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member