

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANCES M. JAMES and DEPARTMENT OF THE ARMY,  
HEALTH SERVICES COMMAND, Fort Stewart, GA

*Docket No. 00-1976; Submitted on the Record;  
Issued June 12, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs denial of appellant's request for reconsideration under 5 U.S.C. § 8128(a) was an abuse of discretion.

The Board has duly reviewed the case record on the present appeal and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed the appeal with the Board on May 16, 2000, the only decision before the Board is the September 30, 1999 decision denying reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>2</sup> A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section

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<sup>1</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>2</sup> Section 10.606(b)(2)(i-iii).

10.606(b)(2).<sup>3</sup> If reconsideration is granted, the case is reopened and the case is reviewed on the merits.<sup>4</sup>

On December 4, 1990 appellant, then a 53-year-old nurse, filed an occupational claim alleging that, among other problems, she sustained respiratory infection and bronchitis from exposure to nitrous oxide.

By decision dated April 24, 1991, the Office denied appellant's claim, stating that the evidence of record failed to establish that an injury was sustained, as alleged. Appellant requested an oral hearing before an Office hearing representative, which was held on November 10, 1992. By decision dated January 19, 1993, the Office hearing representative affirmed the Office's April 24, 1991 decision.

In an undated letter received by the Office on January 19, 1994, appellant requested reconsideration of the Office's decision and submitted additional evidence including medical reports from her treating physicians, Dr. John M. Fillingim, a Board-certified family practitioner, dated November 21, 1991 and Dr. Howard Frumkin, a Board-certified internist and preventive medical specialist, dated September 27, 1993. In his November 21, 1991 report, Dr. Fillingim stated that appellant's exposure to nitrous oxide in 1987 did not cause her respiratory problems but might have contributed to them. In his September 27, 1993 report, Dr. Frumkin opined that appellant's symptoms of acute intoxication, headache and nausea could be attributed to chronic exposure to nitrous oxide at her work site. He stated, however, that the respiratory symptoms appellant experienced for one to two years following her initial illness "are not as easily explained." Dr. Frumkin stated that, according to medical literature, nitrous oxide is not known to be a respiratory tract irritant and while other forms of nitrogen oxides, such as nitric acid and nitrogen dioxide, are known to be airway irritants, nitrous oxide "has not been described to transform into other forms such as these." He stated that appellant's respiratory symptoms "could have been a byproduct of poor ventilation and accumulation of other unrecognized offgases present in the cryosurgery room."

By decision dated February 23, 1994, the Office modified the prior decisions, in part and accepted appellant's claim for acute nitrous oxide intoxication, with headache and nausea. The Office stated that there was insufficient evidence to accept any respiratory or emotional condition as being related to appellant's employment.

On April 19, 1995 the Office authorized compensation for various dates from April 10, 1984 through March 7, 1991 and stated that compensation was not authorized for the dates from February 18, 1986 through November 21, 1991. On May 31, 1995 the Office reiterated authorization of compensation payment to appellant for the appropriate dates from April 1984 through March 1991. On March 21, 1997 the Office reiterated that the dates from February 18, 1986 through November 21, 1991 were not compensable.

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<sup>3</sup> Section 10.608(a).

<sup>4</sup> *Id.*

By letter dated December 7, 1998, appellant requested reconsideration of the Office's decision. By decision dated February 23, 1999, the Office vacated its April 19, 1995 and March 21, 1997 decisions because no appeal rights were issued in those decisions. The Office found that appellant was last exposed to nitrous oxide on November 22, 1991, that she stopped working on April 18, 1995 and was approved for disability retirement on October 11, 1995. The Office found that appellant failed to establish that her respiratory impairment resulted from her exposure to nitrous oxide and, therefore, her disability related to her exposure to nitrous oxide ceased on November 22, 1991.

By letter dated September 9, 1999, appellant requested reconsideration of the Office's decision and submitted additional evidence consisting of her statement dated November 22, 1994 a copy of her compensation check for the period March 11 to April 21, 1991, wage-loss benefits statements dated June 2, 1995 and October 11, 1996, a memorandum from "DCP" on the Family and Medical Leave Act of 1993 and a letter from appellant's then-attorney, Linnie L. Darden, dated January 31, 1995 to the employing establishment strongly objecting to the establishment's negative attitude toward appellant's unscheduled absences and illness.

By decision dated September 30, 1999, the Office denied appellant's request for reconsideration.

Some of the evidence appellant submitted in support of request for reconsideration such as her attorney's January 31, 1995 letter and her November 22, 1994 statement were either previously submitted or is duplicative of previously submitted evidence. None of the evidence appellant submitted, however, addresses the relevant issue in this case as to whether her medical condition after November 22, 1991 is causally related to her nitrous oxide exposure.<sup>5</sup> Appellant has, therefore, not presented new and relevant evidence. She also has not shown that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by the Office. The Office properly denied her request for reconsideration.

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<sup>5</sup> See *Earl David Seal*, 49 ECAB 152, 153 (1997).

The decision of the Office of Workers' Compensation Programs dated September 30, 1999 is hereby affirmed.

Dated, Washington, DC  
June 12, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member