

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANA L. HASAN and U.S. POSTAL SERVICE,
POST OFFICE, East Cleveland, OH

*Docket No. 01-119; Submitted on the Record;
Issued September 21, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further consideration of the merits on the basis that her request was untimely and failed to present clear evidence of error.

The Board has duly reviewed the case record and finds that the Office properly denied appellant's request for reconsideration.

The only decision before the Board in this appeal is the Office's decision dated November 1, 1999 denying appellant's application for review. As more than one year has elapsed between the date of the Office's most recent merit decision, issued on September 10, 1998, and the date of appellant's appeal, October 10, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that an application for reconsideration must set forth arguments 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.³ 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.⁴ To be entitled to merit review of an Office

¹ 20 C.F.R. § 501.3(d).

² 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).

³ 20 C.F.R. § 10.606(b).

⁴ *Carol Cherry*, 47 ECAB 658 (1996).

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.⁵

In this case, the Office accepted that appellant sustained an acceleration of degenerative arthritis of the left knee.

By letter dated September 23, 1997, appellant alleged that her right knee condition was causally related to her accepted injury. Based on a conflict of medical opinion between Dr. R. Denison Stewart, appellant's treating physician, and Dr. Sheldon Kaffen, a second opinion physician, the Office, on August 6, 1998, referred the case to Dr. Bernard N. Stulberg, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated August 17, 1998, Dr. Stulberg determined that appellant's right knee condition was not causally related to her accepted injury.

By decision dated September 10, 1998, the Office denied appellant's claim for consequential injury. By letter dated September 27, 1999, appellant requested reconsideration. In support, appellant submitted a report dated November 3, 1998 from Dr. Stewart. By decision dated November 1, 1999, the Office denied appellant's request for review of the September 10, 1998 decision. As appellant did not seek reconsideration of the September 10, 1998 decision until September 27, 1999, her request for reconsideration was untimely.

In this case, the evidence submitted by appellant does not establish clear evidence of error because it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The additional report of Dr. Stewart is repetitious of his prior opinion in that he attributed appellant's right knee condition to her accepted injury. This opinion was considered by the Office prior to finding a conflict in medical opinion. As such the medical evidence submitted fails to substantiate clear evidence of error in the Office's September 10, 1998 decision.⁶

The evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.606, noted above. For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

⁵ 20 C.F.R. § 10.607(a).

⁶ Dr. Stewart stated that appellant's right knee condition was caused by the additional stress she put on that knee which was caused by her left knee osteoarthritis. Dr. Stulberg, on the other hand, in his August 17, 1998 report, noted x-rays from 1992 and 1994 revealed mild joint space narrowing in the right knee before symptomology of the claimed injury. He also noted that appellant's obesity contributed to her condition.

The November 1, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 21, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member