

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELEANOR BOZZACCO and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, East Orange, NJ

*Docket No. 01-1028; Submitted on the Record;  
Issued January 4, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

This case is before the Board for the third time. Previously, the Board found that the Office improperly determined that appellant's application for review was untimely filed and improperly evaluated appellant's request for reconsideration under the clear evidence of error standard. The Board remanded the case to the Office for consideration of appellant's timely request for reconsideration under the proper standard.<sup>1</sup>

In a December 18, 2000 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted was repetitious, cumulative or irrelevant in nature.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed this appeal on March 2, 2001, the only decision properly before the Board is the Office's December 18, 2000 decision denying appellant's request for reconsideration.

The Board finds that the Office improperly denied merit review of appellant's request for reconsideration.

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<sup>1</sup> Docket No. 99-1745 (issued September 11, 2000). Docket No. 98-1781 (issued December 28, 1998) (order of dismissal).

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

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation: "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>3</sup>

In this case, relevant and pertinent new medical evidence did accompany appellant's request for reconsideration, specifically an undated report from Dr. Richard Boiardo, a Board-certified orthopedic surgeon and appellant's treating physician. Dr. Boiardo stated that appellant was in pain as a direct result of injuries sustained in her fall on November 17, 1994 and that the pain was getting worse. He noted Dr. Carl Mercurio's<sup>4</sup> May 1, 1996 report, in which Dr. Mercurio stated that appellant's osteoporosis did not present a problem until she sustained the fractures on November 17, 1994.

Additionally, Dr. Boiardo reviewed Dr. Robert Morrison's<sup>5</sup> November 4, 1996 report, in which he stated that he believed that appellant still suffered from "hot spots" at the site of the injury and confirmed a herniated disc. Dr. Boiardo explained that the herniated disc did not exist before the employment injury. He also observed that Dr. Morrison noted that appellant would need special consideration such as a "special chair, periods for stretching, etc." Dr. Boiardo stated that appellant was still suffering from pain from the herniated disc and that her symptoms were work related and permanent.

The Board finds that this information is new and relevant. Previously, Dr. Boiardo had requested surgery, stating that it was the only thing left to do, and he had not rendered an opinion or diagnosis regarding the permanency of appellant's injury. This report is relevant because it supports that appellant continues to be disabled due to her accepted employment injury.

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<sup>3</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>4</sup> Dr. Mercurio, a Board-certified orthopedic surgeon, was selected by the Office as the second opinion physician.

<sup>5</sup> The Office used Dr. Morrison, a Board-certified orthopedic surgeon, to resolve the conflict.

Consequently, the case must be returned to the Office for appropriate further development, including reopening appellant's case for a merit review. Following such further development, the Office shall issue an appropriate decision in appellant's case.

The December 18, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for a review on the merits.

Dated, Washington, DC  
January 4, 2002

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member