

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAMARAH D. MARTINEZ and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Fort Lyon, CO

*Docket No. 00-2721; Submitted on the Record;
Issued March 14, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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

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

The Office accepted appellant's May 2, 1986 back strain and herniated disc at L4-5 and subsequent recurrences of disability dated November 4, 1987, June 30, 1988 and April 19, 1989.

In a report dated August 11, 1998, Dr. Jeffery M. Hrutkay, a second opinion physician and a Board-certified orthopedic surgeon, determined that appellant was capable of returning to regular duty as a clerk typist without restrictions.

On October 14, 1998 the Office issued a notice of proposed decision terminating appellant's compensation benefits on the grounds that the medical evidence failed to establish that she was disabled from work as a result of a continuing medical condition causally related to her May 2, 1986 work-related injury. By decision dated November 19, 1998, the Office terminated appellant's compensation benefits. By letter dated December 15, 1998, appellant requested a review of the written record. By decision dated April 15, 1999, the hearing representative affirmed the Office's November 19, 1998 decision.

By letter dated April 14, 2000, appellant requested reconsideration. By decision dated May 25, 2000, the Office denied appellant's request for merit review.

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.¹

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. § 501.3(d)(2).

Because more than one year has elapsed between the issuance of the Office's April 15, 1999 merit decision and August 28, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the April 15, 1999 decision and any preceding decisions. Therefore, the only decision before the Board is the Office's May 25, 2000 nonmerit decision denying appellant's application for a review of its April 15, 1999 decision.

Section 8128(a) of the Federal Employees' Compensation Act² does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation. Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. The Office through regulations has placed limitations on the exercise of that discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ 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.⁶

In support of her April 14, 2000 request for reconsideration, appellant submitted a December 2, 1999 magnetic resonance imaging scan report of her lumbar spine that revealed "moderate changes of degenerative joint and disc disease, L4-5, with mild posterior broad-based herniation," and "mild posterior herniation of L1-2 disc." However, the report was not accompanied by a rationalized medical opinion attributing the conditions to her work-related injuries and thus the report failed to establish that the Office erred in its prior decision.

Appellant has not established that the Office abused its discretion in its May 25, 2000 decision by denying her request for a review on the merits of its April 15, 1999 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

² See generally 5 U.S.C. § 8128; 20 C.F.R. § 10.600.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.608.

The May 25, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.⁷

Dated, Washington, DC
March 14, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Board notes that, on appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the April 15, 1999 final decision. *See James C. Campbell*, 5 ECAB 35 36 n. 2 (1952).