

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN S. PEKLO and DEPARTMENT OF THE AIR FORCE,  
AIR NATIONAL GUARD, SELFRIDGE ANG BASE, Mich.

*Docket No. 95-2222; Submitted on the Record;  
Issued January 5, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in declining to reopen appellant's claim for merit review.

The Board has reviewed the case record and finds that the Office properly declined to reopen appellant's claim.<sup>1</sup>

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> provides for review of an award for or against payment of compensation. Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed.<sup>3</sup>

With the written request, the claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Section 10.138(b)(2) of the implementing regulations provides that any application for review which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of

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<sup>1</sup> The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed his notice of appeal on May 30, 1995, the Board has jurisdiction only of the Office's nonmerit decisions dated January 24 and March 10, 1995.

<sup>2</sup> 5 U.S.C. §§ 8101-8193. (1974); 5 U.S.C. § 8128(a).

<sup>3</sup> *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

this section will be denied by the Office without review of the merits of the claim.<sup>5</sup> Abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions that are contrary to both logic and probable deductions from established facts.<sup>6</sup>

In this case, the Office accepted appellant's claim, filed on July 19, 1985, for a lumbosacral strain and paid appropriate compensation. Appellant, a warehouse worker, returned to light duty on September 30, 1985, but was subsequently referred to vocational rehabilitation and took a position in the private sector.<sup>7</sup> The Office paid compensation for loss of wage-earning capacity.

In August 1988 appellant filed a notice of recurrence of disability and stopped work on November 10, 1988 claiming that the pain in his back had become much worse. The Office requested that appellant provide medical evidence showing the causal relationship between the July 1985 injury and the recurrence of disability.

On May 5, 1990 the Office denied the claim on the grounds that the medical evidence was insufficient to establish that the claimed recurrence of disability was causally related to the initial injury. The Office noted that a report from Dr. David F. Kaufman, an osteopathic practitioner and appellant's treating physician, indicated that the diagnosed condition of possible herniated lumbar disc was a new injury.

Appellant timely requested an oral hearing, which was held on January 24, 1991. The hearing representative denied the claim on March 27, 1991 on the grounds that appellant had failed to provide "any substantive medical evidence to support" a causal relationship. Appellant requested reconsideration, which was denied after a merit review on January 29, 1992. Twice more appellant requested reconsideration and the Office denied his requests on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

On January 9, 1995 appellant again requested reconsideration. The Office denied this request because appellant had neither raised a new argument nor submitted new evidence. On February 17, 1995 appellant's attorney requested reconsideration on the basis that he had submitted new and relevant evidence. On March 10, 1995 the Office denied his request on the grounds that the evidence submitted was repetitious and therefore insufficient to warrant review of the prior decision.

The Board finds that the medical reports from Dr. Mary L. Morden concerning appellant's operation on September 2, 1992 and follow-up care are copies of evidence considered by the Office in its January 10, 1994 decision. The Office notes dated December 19

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<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>7</sup> The record indicates that appellant worked as a security guard for a private hospital while receiving continuation of pay. The employing establishment terminated appellant effective April 26, 1986, but he was reinstated on July 25, 1986. Subsequently, the employing establishment was unable to find light-duty work for appellant.

and 20, 1994, as well as the billing records, do not address the relevant issue of causal relationship. Therefore, appellant has failed to submit relevant and pertinent evidence not previously considered by the Office. Further, appellant has not shown that the Office erroneously applied or interpreted a point of law, or advanced a point of law or fact not previously considered by the Office. Accordingly, the Board finds that the Office properly declined to review appellant's request for reconsideration.<sup>8</sup>

The January 24 and March 10, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
January 5, 1998

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> See *Norman W. Hanson*, 45 ECAB 430, 435 (1994) (finding that the Office properly declined to reopen a claim because appellant presented no new and relevant evidence).