

U. S. DEPARTMENT OF LABOR  
Employees' Compensation Appeals Board

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In the Matter of JOHN J. McGONAGLE and U.S. POSTAL SERVICE,  
POST OFFICE, Boston, Mass.

*Docket No. 97-311; Submitted on the Record;  
Issued September 23, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for review of the merits on July 11, 1996.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

On November 27, 1993 appellant filed a claim alleging that on November 26, 1993 he injured his back. The Office denied his claim by decision dated January 29, 1994 finding that he failed to establish fact of injury. Appellant requested an oral hearing and by decision dated June 17, 1995 and finalized June 19, 1995 the hearing representative affirmed the Office's decision. Appellant requested reconsideration on May 6, 1996 and by decision dated July 11, 1996, the Office declined to reopen appellant's claim for review of the merits.

The only decision before the Board on this appeal is that of the Office dated July 11, 1996 in which it declined to reopen appellant's case on the merits. Since more than one year elapsed from the date of issuance of the Office's June 19, 1995 merit decision to the date of the filing of appellant's appeal, on October 9, 1996, the Board lacks jurisdiction to review that decision.<sup>1</sup>

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>2</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a

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<sup>1</sup> See 20 C.F.R § 501.3(d).

<sup>2</sup> 20 C.F.R. § 10.138(b)(1).

claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>3</sup>

In this case, the Office denied appellant's claim finding that there were discrepancies in the description of his employment incident on different occasions and to different physicians. The Office, therefore, found that appellant had not established that the employment incident occurred as alleged.

Appellant's representative submitted legal argument in support of his request for reconsideration. He alleged that appellant's factual statements were consistent both internally and with the history provided by appellant's physicians. Appellant's representative alleged that the Office improperly declined to accept appellant's history of injury as factual.

The Board finds that the representative's brief does not constitute a point of law not previously considered by the Office. Appellant's representative made the same argument, that appellant's statements were consistent within themselves, before the hearing representative. As this argument was presented previously, it had been considered by the Office and is not sufficient to require the Office to reopen appellant's claim for review of the merits.

The decision of the Office of Workers' Compensation Programs dated July 11, 1996 is hereby affirmed.

Dated, Washington, D.C.  
September 23, 1998

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>3</sup> 20 C.F.R. § 10.138(b)(2).