

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD MOORE and DEPARTMENT OF THE ARMY,
Fort Hood, Tex.

*Docket No. 97-1545; Submitted on the Record;
Issued February 11, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen the record for reconsideration of the merits of appellant's claim under section 8128 of the Federal Employees' Compensation Act constituted an abuse of discretion.

On January 11, 1991 appellant, then a 39-year-old equipment specialist, filed a notice of traumatic injury and claim, alleging that while he was on temporary duty in Dhahran, Saudi Arabia, he was injured moving equipment on December 28, 1990. Appellant stopped work on December 29, 1990. On February 19, 1991 the Office accepted appellant's claim for lumbosacral strain. On February 26, 1992 appellant filed a second notice of traumatic injury and claim, alleging that on February 14, 1992 he sustained low back pain while clearing the office for a new person. By decision dated June 12, 1992, the Office accepted appellant's claim for low back strain. Appellant received appropriate compensation for all periods of temporary total disability.

On April 19, 1994 appellant filed a claim for recurrence of disability beginning March 1994. Appellant alleged that he had a headache on February 25, 1994 and was disabled from work by the same on March 1, 1994. He also indicated that he had not been able to resume normal duties and was scheduled for possible surgery. On May 24, 1994 appellant underwent a multiple level lumbar laminectomy with foraminotomies and was diagnosed postoperatively with spinal stenosis and multiple level lumbar radiculopathies.

In a decision dated February 23, 1995, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence did not establish a causal connection between the accepted injury and the claim condition. By merit decision dated December 21, 1995 and finalized January 17, 1996, an Office hearing representative affirmed the February 23, 1995 decision of the Office. In a decision dated January 28, 1997, the Office denied appellant's request for reconsideration of the prior decisions on the grounds that the evidence submitted was immaterial in nature and insufficient to warrant review of the prior decision.

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. As appellant filed his appeal with the Board on April 2, 1997, the only decision before the Board is the Office's January 28, 1997 decision.¹

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

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.² Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.³ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁴

With his request for reconsideration, appellant submitted a letter from his counsel urging that appellant's surgery and claimed recurrence of disability were related to his accepted employment injuries as the Office had accepted herniation of the nucleus pulposus at the L5 to S1 level and the surgery was related to this condition. Counsel also asserted that Dr. Theodore G. Zaleski, a Board-certified orthopedic surgeon and appellant's treating physician and surgeon's, inability to relate the disc herniation to the accepted employment injury was not dispositive since this was resolved by the Office's acceptance of this condition. The Office hearing representative's affirmance of the denial of recurrence of disability was based on the report of Dr. Zaleski, which was written in response to the Office request for additional information by letter dated October 28, 1994. In his October 25, 1995 report, Dr. Zaleski provided a complete medical history of appellant and his back conditions, noting that appellant had sustained low back problems approximately 15 years before his accepted employment injury when he fell off a ladder and further low back pain in 1986 following heavy lifting activities at work. Dr. Zaleski indicated that the definitive treatment notes from the December 1990 injury were lacking. He found that appellant did sustain a disc herniation in either 1976 when he fell off the ladder or 1986 when he performed heavy lifting, but the exact date could not be established with certainty. Dr. Zaleski noted that the 1991 magnetic resonance imaging scan administered to appellant revealed significant degenerative changes at the L4 to L5 and L5 to S1 levels and a herniated disc at the L5 to S1 level. He concluded that based upon the concomitant degenerative changes noted at the L4 to L5 level and L5 to S1 level it would appear that the disc

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(2).

³ *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

⁴ *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

herniation existed prior to the 1990 injury and the injuries in 1990 and 1992 were aggravations of preexisting underlying conditions. In an earlier attending physician form report, Dr. Zaleski had checked a box to indicate that the surgeries and diagnosed conditions were not related to the reported history of injury.

While appellant, through counsel, has urged that the report by Dr. Zaleski is not probative on the issue of whether there was a causal relationship between the diagnosed conditions and the May 1994 surgery and the accepted employment injuries, the record is devoid of any medical evidence which would establish such a relationship or refute the well-reasoned and documented opinion of Dr. Zaleski. Thus, the arguments raised on reconsideration are immaterial and are not sufficient to warrant review of the prior merit decisions.

The decision of the Office of Workers' Compensation Programs dated January 28, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 11, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member