

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KANISSETTA BERRY and DEPARTMENT OF THE AIR FORCE,  
OKLAHOMA CITY AIR LOGISTICS CENTER, TINKER AIR FORCE BASE, Okla.

*Docket No. 97-1480; Submitted on the Record;  
Issued January 20, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

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

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.

Appellant filed a claim on September 10, 1993 alleging that on September 3, 1993, her left leg and feet became painful as a result of her duty requirements. In support of her claim, appellant submitted a September 13, 1993 medical report from Dr. Anthony L. Cruz, an osteopath, who stated that he examined appellant on that day and determined that she had lumbar radiculitis. The Office denied her claim by decision dated March 1, 1994 finding that appellant had not established fact of injury. Appellant requested reconsideration on December 12, 1994 and submitted medical reports, which noted degenerative disc at L4-5, disc protrusion at L5-S1 and increased pain in both left and right lower extremities. By merit decision dated December 20, 1994, the Office denied appellant's claim on the grounds that none of the medical reports established that appellant sustained a work-related injury. Appellant, with assistance of counsel, filed a request for reconsideration on December 9, 1995 and submitted legal argument in support of her request. On January 26, 1996 appellant submitted additional medical evidence including medical reports noting her disc disruption at L5-S1, herniated nucleus pulposus at L5-S1 and foraminal and lateral recess stenosis at L4-5. By decision dated February 7, 1996, the Office modified its December 20, 1994 decision, by finding that the September 13, 1993 medical report of Dr. Cruz established that appellant sustained a left thigh injury as alleged on September 3, 1993, but denied appellant's request for compensation benefits on the grounds that she had not established a causal relationship between the injury and her medical condition. Appellant, on February 4, 1997, filed a request for reconsideration and submitted legal argument in support of her request. By decision dated February 14, 1997, the Office declined to reopen appellant's request for reconsideration of the merits finding that appellant's legal argument was not sufficient to require merit review.

As more than one year has elapsed since the date of the last merit decision, the December 20, 1994 decision, to the date of appellant's appeal to the Board on March 21, 1997, the Board lacks jurisdiction to review that decision.<sup>1</sup> The only decision before the Board is the February 14, 1997 decision of the Office declining to reopen appellant's claim for consideration of the merits.

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 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, appellant submitted legal arguments in support of her request for reconsideration. She noted that she had established her injury and argued that she had presented medical evidence, which "strongly suggests" a causal relationship between her injury and her medical condition and that, therefore, her claim for compensation should be accepted.

The Board finds that this argument is not sufficient to require the Office to reopen appellant's claim for review of the merits. Appellant did not offer any persuasive argument for shifting the burden to the Office and she did not acknowledge and distinguish the long line of Board precedent holding that a claimant has the burden of proof in establishing a claim for compensation.<sup>4</sup> Furthermore, appellant had previously argued that the medical evidence submitted was sufficient to meet her burden of proof. Therefore, this did not constitute a new legal argument not considered by the Office. For these reasons, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

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<sup>1</sup> 20 C.F.R. § 501.3(d).

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

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

<sup>4</sup> *John M. Tornello*, 35 ECAB 234, 239 (1983).

The decision of the Office of Workers' Compensation Programs dated February 14, 1997 is hereby affirmed.

Dated, Washington, D.C.  
January 20, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member