

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ODESSA C. MOORE and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 97-1112; Submitted on the Record;
Issued March 10, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

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

In a decision dated May 20, 1981, the Office adjusted appellant's compensation benefits based on her capacity to earn wages as an electronics assembler. On January 25, 1996 appellant, through her attorney, requested reconsideration of this decision. Appellant alleged that the Office should have modified her wage-earning capacity determination based on a report dated March 16, 1982 from appellant's attending physician, Dr. Clarence L. Shields, Jr., a Board-certified orthopedic surgeon. By decision dated October 28, 1996, the Office declined to reopen appellant's claim for review of the merits finding that she failed to submit relevant new evidence.

The October 28, 1996 decision is the only decision before the Board on appeal. There are no other decisions within the one-year time period prior to appellant's appeal to the Board on January 8, 1997.¹

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

¹ 20 C.F.R. § 501.2(c). Appellant filed a notice of recurrence of disability on August 6, 1996. The Office issued a final decision on this issue on January 30, 1997. As this issue was not before the Board, the Office appropriately issued its decision. *Arlonia B. Taylor*, 44 ECAB 591 (1993).

Office.² 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.³

In this case, appellant requests that the Office reopen her 1981 wage-earning capacity determination, based on Dr. Shields' March 16, 1982 report, which was received by the Office on March 24, 1982. As this report was already in the record and had been considered by the Office and Board⁴ in reaching subsequent decisions.

Furthermore, the Office based its May 20, 1981 decision to reduce appellant's wage-earning capacity in part on a report dated December 9, 1980 from Dr. Shields finding that appellant was capable of light duty. Dr. Shields recommended that appellant undergo treatment at a pain center on June 8, 1981.

Appellant requested reconsideration of the Office's May 20, 1981 decision on June 23, 1981 and did not submit additional evidence. The Office informed appellant that her reconsideration request was inadequate and allowed an additional 30 days for relevant new evidence.

Appellant then took part in a pain clinic during which period the Office paid compensation for total disability. Following the completion of the pain clinic, the Office requested that Dr. Shields opine whether appellant could perform the duties of the constructed position. In his March 16, 1982 report, Dr. Shields stated that appellant did not make significant improvement at the pain center and that she was not capable of being gainfully employed. However, he also stated that appellant's subjective complaints and physical findings were the same as when last rated and included a copy of his December 9, 1980 report.

As Dr. Shields' report indicates that appellant's physical findings and subjective complaints were the same as the December 8, 1980 report, his report is cumulative and not relevant to the issue of whether appellant has sustained a material change in the nature and extent of her condition such that she could no longer perform the duties of the constructed position.

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

⁴ This case has previously been before the Board on appeal. Docket No. 94-1672 (issued April 4, 1995).

The October 28, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
March 10, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member