

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CORNELIUS C. LEWIS and DEPARTMENT OF THE ARMY,  
AUDIT AGENCY, SOUTHWEST REGION, San Antonio, TX

*Docket No. 99-547; Submitted on the Record;  
Issued June 23, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

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 consideration of the merits.

This case has previously been on appeal before the Board. In its most recent decision dated September 26, 1997, the Board found that appellant had not established that he was incompetent for the period June 5, 1982, the date he became aware of his condition, through August 20, 1987, the date appellant filed his claim, and that, therefore, the Office properly denied his claim as not timely filed.<sup>1</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are adopted herein by reference.

Following the Board's September 26, 1997 merit decision denying his claim, appellant requested reconsideration on June 30, 1998. By decision dated July 14, 1998, the Office declined 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 review of the merits of the claim.<sup>3</sup>

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<sup>1</sup> Docket No. 95-1864 (issued September 26, 1997), *reaff'd on recon.* Docket No. 95-1864 (issued February 6, 1998).

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

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

In this case, appellant did not submit additional new medical evidence in support of his request for reconsideration. Appellant instead submitted legal arguments. Appellant argued that he was an incompetent employee and that his incompetence tolled the time limitation statute. As appellant has previously made this assertion before the Office and the Board and as the Board found in its September 26, 1997 decision that appellant had not submitted the necessary medical evidence to support this argument, this statement does not constitute a point of law not previously considered.

Appellant also alleged that the Board erred in basing its September 26, 1997 decision on one medical report. This statement does not show that the Office erroneously applied or interpreted a point of law nor does it advance a point of law or a fact not previously considered by the Office. Furthermore, the Board notes that the Office does not have jurisdiction to review decisions of the Board.<sup>4</sup> Therefore, the argument that the Board improperly weighed a medical report is not sufficient to require the Office to reopen appellant's claim for review of the merits.

Finally, appellant alleged that the same Office senior claims examiner denied appellant's claim on April 13, 1995 and June 23, 1994. This procedural anomaly in appellant's claim does not show that the Office erroneously applied or interpreted a point of law nor does it advance a point of law or a fact not previously considered by the Office. In addition any perception of prejudice in such a situation is no longer valid as the Board reviewed appellant's claim on the merits following these decisions and affirmed the Office's decisions.

The July 14, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
June 23, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>4</sup> 20 C.F.R. § 501.6(c).