

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS J. DRABIK and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Des Plaines, IL

*Docket No. 98-1885; Submitted on the Record;  
Issued March 1, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
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.

Appellant, a systems specialist, filed a claim on February 27, 1985 alleging that he sustained a right knee injury on October 19, 1968. By decision dated August 1, 1985, the Office subsequently denied compensation benefits on the grounds that his claim was not timely filed. Appellant requested reconsideration and by decision dated December 22, 1986, the Office denied modification of its prior decision.

Appellant filed a claim on April 30, 1984 alleging that he injured his right knee in the performance of duty on April 18, 1984. The Office accepted appellant's claim for temporary aggravation of his right knee condition. Appellant requested a schedule award and the Office denied this request by decision dated January 29, 1986. The Office determined that appellant's 1984 employment injury did not result in permanent residuals. Appellant requested an oral hearing and by decision dated October 14, 1986 and finalized October 15, 1986, the hearing representative affirmed the Office's January 29, 1986 decision.

Appellant filed a claim on March 11, 1991 alleging that he injured his right knee in the performance of duty. The Office accepted appellant's claim for strain right knee medial collateral ligament tear of the right knee, and chondromalacia of the right patella. Appellant filed a claim for recurrence of disability on April 29, 1994, alleging that he sustained consequential injuries to his left leg and both arms on April 13, 1991 when he fell at home. By decision dated January 10, 1995, the Office denied appellant's claimed recurrence of disability. Appellant requested an oral hearing and by decision dated August 21, 1995, the hearing representative affirmed the Office's January 10, 1995 decision. Appellant requested review by

the Board. By decision dated November 7, 1997, the Board adopted the August 21, 1995 decision of the Office hearing representative.<sup>1</sup>

In a letter dated March 2, 1998, appellant, through his representative, requested reconsideration of “prior denials of this claim.” He stated that his request was based on issues of law. By decision dated April 3, 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 reviewing the merits of the claim.<sup>3</sup>

In this case, appellant requested reconsideration on the basis that his supervisor denied him the right to file a claim in 1968. He further argued that his 1968 injury constituted a latent condition as appellant had no way of knowing the extent of his injury until magnetic resonance imaging (MRI) scans became available and that as appellant was unaware of his ligament injury until MRI scans became available the 1968 claim should be recognized as one permitting lost time payment and schedule award.

The Federal Employees’ Compensation Act requires in cases of injury prior to September 7, 1974 that a claim be filed within one year of the date that the claimant is aware, or reasonably should have been aware, that his condition may have been caused by factors of his federal employment. The requirement may be waived if the claim is filed within five years and: (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure. The filing provision is a maximum, mandatory requirement which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time.<sup>4</sup>

Appellant’s attorney made substantially similar arguments in a December 1, 1986 request for reconsideration. As the Office noted in its December 22, 1986 decision, the five-year filing provision is a maximum, mandatory requirement which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed

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<sup>1</sup> Docket No. 95-3001.

<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> *Carlos Tola*, 42 ECAB 337, 341-42 (1991).

time. Therefore, appellant's legal argument is not new and does not advance a point of law not previously considered by the Office in regard to the December 22, 1986 decision.

Appellant did not submit new evidence or argument regarding the Board's November 7, 1997 decision which addressed the causal relationship between his April 29, 1994 recurrence of disability and his accepted employment injury on March 11, 1991. Therefore, the Office properly refused to reopen appellant's claim for review of the merits of this claim.

The April 3, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
March 1, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member