

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JESUS PEREZ and DEPARTMENT OF THE ARMY, WHITE SANDS  
MISSILE RANGE, White Sands, NM

*Docket No. 01-852; Submitted on the Record;  
Issued October 18, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On October 27, 1998 appellant, then a 42-year-old electronics technician, filed a traumatic injury claim alleging that on September 29, 1998 he injured his back, right heel and face when he slipped down steps while carrying equipment.

The Office accepted appellant's claim for a right heel and thoracic contusions and facial abrasion.

On July 8, 1999 appellant filed a claim alleging that he sustained a recurrence of disability on April 7, 1999.

By decision dated October 14, 1999, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on April 7, 1999 causally related to his September 29, 1998 employment injury. In a December 7, 1999 letter, appellant appealed the Office's decision to the Board.

In an order dated October 11, 2000, the Board dismissed appellant's appeal because he wished to seek reconsideration before the Office.

By decision dated November 9, 2000, the Office denied appellant's request for a merit review of his claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>1</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>2</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>3</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>4</sup>

In support of his request for reconsideration, appellant submitted reports dated April 28, May 19, July 9 and September 15, 1999 from Dr. James W. Bean, a Board-certified orthopedic surgeon. The Board finds that Dr. Bean's reports constitute duplicative evidence because they were already of record and considered by the Office. Therefore, they are insufficient to warrant a basis for reopening appellant's claim.<sup>5</sup>

Appellant also submitted treatment notes from his physical therapist dated April 22, 27 and 29, 1999, and May 3 through 4, 6, 12 through 13 and 17, 1999. The Board finds that the treatment notes of appellant's physical therapist are of no probative value inasmuch as a physical therapist is not a physician under the Act, and therefore, is not competent to give a medical opinion.<sup>6</sup>

Dr. Bean's April 28, 1999 prescription for heel caps failed to address the relevant issue in this case, whether appellant sustained a recurrence of disability on April 7, 1999 causally related to his September 29, 1998 employment injury. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>7</sup> Dr. Bean's prescription, therefore, is insufficient to warrant a basis for reopening appellant's claim.

Because appellant has failed to submit any new relevant and pertinent evidence not previously reviewed by the Office and further failed to raise any substantive legal questions, 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> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>3</sup> *Id.* at § 10.607(a).

<sup>4</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>5</sup> *Philip J. Deroo*, 39 ECAB 1294 (1988).

<sup>6</sup> 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

<sup>7</sup> *See Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The November 9, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
October 18, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member