

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GERALD FERRETTI and DEPARTMENT OF DEFENSE,  
DEFENSE CONTRACT AUDIT AGENCY, Lexington, MA

*Docket No. 98-2555; Submitted on the Record;  
Issued April 25, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's December 18, 1997 request for reconsideration.

In a decision dated January 6, 1997, which is the most recent decision on the merits of appellant's claim, the Office found that there remained a dearth of probative medical evidence to establish a period of disability resulting from appellant's February 9, 1996 employment injury, which the Office accepted for aggravation of lumbar radiculitis.

Appellant had submitted medical opinion evidence supporting disability for work as a result of the February 9, 1996 employment injury. On August 17, 1996 Dr. Michael P. Carroll, appellant's orthopedic surgeon, reported:

"[Appellant] has been disabled since February 9, 1996 because of the February 9[, 1996] injury. Although he had a preexisting condition, the patient's symptoms have definitely worsened as a result of the accident and aggravated and exacerbated his previous existing problem. I believe that this injury was the proximate cause of the disabling condition.

"[Appellant's] pain is further aggravated by sitting, standing, and bending down and decreased by lying down, all of which make him unable to perform his duties of employment. As far as permanency, it is too early at this time to tell whether this will result in a permanent disability, but in the meantime he is disabled for work at this point."

In its January 6, 1997 decision, the Office found that Dr. Carroll's August 17, 1996 report did not give medical rationale to establish that the February 9, 1996 injury was the proximate cause of a disabling condition. The Office found that the evidence submitted was not sufficiently convincing to override the Office's prior determination.

The Office received an August 8, 1997 report from Dr. Steven M. Bernardini, a chiropractor, who noted that subluxations were demonstrated by x-ray and who supported that appellant was totally disabled for his normal job-related duties from June 28 through July 22, 1996. The Office also received a couple of treatment notes that did not address whether appellant's February 9, 1996 injury caused disability for work.

On December 18, 1997 appellant requested reconsideration. In support thereof he submitted evidence previously of record but also submitted evidence not previously of record supporting that he was disabled for work in 1996. In addition to several form reports indicating with a mark that appellant was disabled, appellant submitted an August 14, 1997 report from Dr. Bernardini, who stated:

"Let this be an addendum to the previously submitted letter dated August 8, 1997. As previously stated, [appellant] has been under my care for injuries sustained in a work-related accident on February 9, 1996.

"On his initial visit, a full consultation including history was taken. Considering all factors and the extent of his condition, it appears with all medical certainty, that [appellant's] current injuries are causally related to the accident in question. The patient had a marked acute exacerbation of his preexisting condition with symptoms, and a substantial increase of objective testing, as a result of the accident of February 9, 1996. This new injury of February 9, 1996 has rendered him disabled of performing his normal duties as a[n] [a]uditor."

Appellant also submitted additional evidence from Dr. Jean-Jacques Abitbol, an orthopedic surgeon, who previously reported on August 22, 1996 that appellant remained temporarily totally disabled. In his November 19, 1997 report, Dr. Abitbol related appellant's history, medical treatment and findings on examination. He reported with a reasonable degree of medical certainty that appellant's February 9, 1996 injury exacerbated his symptoms. Further, Dr. Abitbol reported that appellant's work injury was severe enough to prevent him from working as an auditor through October 17, 1996. He added: "As a result of lifting the boxes at his place of employment on February 9, 1996 [appellant] was exacerbated by lifting the boxes and rendered totally disabled from working as an auditor from February 9 through October 17, 1996."

In a decision dated June 1, 1998, the Office denied appellant's December 18, 1997 request for reconsideration. The Office reported that the basis for its decision was that the material appellant submitted with his request was both cumulative and repetitious.<sup>1</sup>

The Board finds that the Office abused its discretion in denying appellant's December 18, 1997 request for reconsideration.

The requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof. The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.<sup>2</sup> A claimant has a right to secure a review of the merits of his case when he presents new evidence relevant to his contention that the decision of the Office is erroneous. The presentation of such new and relevant evidence creates a necessity for review of the full case record, that is, of all of the evidence, in order to properly determine whether the newly supplied evidence, considered with that previously in the record, shifts the weight of the evidence in such a manner as to require modification of the earlier decision. If the Office determines that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on its merits.<sup>3</sup>

The Board finds that Dr. Bernardini's August 14, 1997 report is new and relevant to the issue of whether appellant's February 9, 1996 employment injury caused disability for work. Although he previously reported that appellant was totally disabled for his normal job-related duties from June 28 through July 22, 1996, he did not previously relate this disability to appellant's employment injury. Dr. Bernardini did so in his August 14, 1997 report and reasoned that appellant had a marked, acute exacerbation of his preexisting condition with symptoms and a substantial increase of objective testing as a result of the accident of February 9, 1996. Without assessing the probative value of this opinion, the Board finds that this evidence requires the Office to conduct a full review of the merits of appellant's claim.

The Board also finds that Dr. Abitbol's November 19, 1997 report is new and relevant. Although he previously reported on August 22, 1996 that appellant remained temporarily totally disabled, he did not previously relate this disability to appellant's employment injury. Dr. Abitbol made this connection in his November 19, 1997 report, stating that lifting boxes at the employing establishment on February 9, 1996 exacerbated appellant's symptoms and that the injury was severe enough to prevent him from working as an auditor from February 9 through

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<sup>1</sup> The Office added that Dr. Abitbol's November 19, 1997 report was of diminished probative value for several reasons. While the Office is encouraged to advise claimants of the evidence necessary to establish their claims, the Office should avoid assessing the probative value of evidence in any decision purporting to deny a merit review. It is clear from the Office's June 1, 1998 decision that, notwithstanding the probative value of Dr. Abitbol's November 19, 1997 report, the Office considered this report to be repetitious as it simply summarized previous examinations and provided no new insight. The Office found that such a "new" report was insufficient to reopen appellant's claim as it did not meet the requirements for a merit review.

<sup>2</sup> *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

<sup>3</sup> *Joseph R. Alsing*, 39 ECAB 1012 (1988).

October 17, 1996. Again, without assessing the probative value of this opinion, the Board finds that this evidence requires the Office to conduct a full review of the merits of appellant's claim.

Because appellant supported his December 18, 1997 request for reconsideration with new and relevant evidence, the Board finds that the Office abused its discretion in denying appellant's request. The Board will reverse the Office's June 1, 1998 decision and remand the case for a full review of the merits of appellant's claim and an appropriate final decision on whether his February 9, 1996 employment injury caused disability for work.<sup>4</sup>

The June 1, 1998 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.  
April 25, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>4</sup> *Earl F. Smith*, 36 ECAB 261 (1984); *Joseph W. Baxter*, 36 ECAB 228 (1984); *Ethel D. Curry*, 35 ECAB 737 (1984) (where the Office twice refused to reopen a case for merit review because the additional evidence submitted on reconsideration lacked substantial probative value, the Board found that the additional evidence was new and relevant, reversed the Office's decisions and remanded the case to the Office for a merit review).