

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT J. GAPS and U.S. POSTAL SERVICE,  
POST OFFICE, Albuquerque, N.M.

*Docket No. 95-2971; Submitted on the Record;  
Issued April 21, 1998*

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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 abused its discretion by denying appellant's application for review on August 8, 1995.

The Board finds that the Office did not abuse its discretion by denying merit review on August 8, 1995.

In the present case, the Office has accepted that appellant, a mailhandler, sustained employment injuries on May 22, 1985, May 10, 1987 and April 18, 1989 which caused cervical and back strains, right inguinal strain, post-traumatic headaches, contusion of the right ankle and epicondylitis. Appellant worked intermittently until September 27, 1989. Appellant received wage-loss benefits for appropriate periods of disability. On October 19, 1992 the Office determined that appellant had the wage-earning capacity of a collection clerk and reduced his compensation benefits accordingly.<sup>1</sup>

On March 11, 1993 appellant filed a notice of recurrence of disability alleging that he had been continuously totally disabled. The Office denied appellant's notice of recurrence of disability by decision dated July 7, 1993. An Office hearing representative affirmed the July 7, 1993 decision on June 21, 1994.<sup>2</sup> On June 20, 1995 appellant requested reconsideration of his claim. The Office denied appellant's application for review on August 8, 1995.

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<sup>1</sup> In a letter to the Office dated May 20, 1993, appellant disagreed with the Office's wage-earning capacity determination.

<sup>2</sup> On January 19, 1995 appellant filed a new claim for traumatic injury with an injury date of November 20, 1994. The Office has not adjudicated this claim. On April 26, 1995 the Office did write appellant an advisory letter wherein it noted appellant's January 19, 1995 claim and noted that appellant's recurrence of disability claim had been previously denied.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. 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>

To obtain a merit review of his claim, appellant was required to submit new and relevant evidence or advance a legal argument not previously considered by the Office regarding the denial of his recurrence of disability. As the Office had determined by its October 19, 1992 decision that appellant had the physical ability to perform the duties of a collection clerk, to establish a recurrence of disability appellant had to establish a change in the nature and extent of the injury-related condition.<sup>4</sup> While appellant continued to claim that he was totally disabled, the Office properly determined that appellant had not submitted new and relevant evidence to establish a change in the nature and extent of the injury-related condition resulting in total disability.

In support of his request for reconsideration, appellant submitted many medical reports and documents previously of record. Appellant argued that medical evidence previously of record showed that the wage-earning capacity determination was issued in error. The Board's jurisdiction is limited to review of decisions of the Office issued within one year of the filing of the appeal. As the Office's October 19, 1992 decision was not issued within one year of the docketing of appellant's appeal on August 29, 1995, the Board lacks jurisdiction to review that decision.

The only new medical evidence appellant submitted with his request for reconsideration of the denial of his recurrence claim were reports from his psychologist Janice Penn dated June 12, 1995, a May 22, 1995 progress note from Dr. Rounsaville, a May 15, 1995 report from Dr. Rene Gonzalez, a August 4, 1994 report from Dr. Robert S. Turner, a Board-certified orthopedic surgeon and May 2, 1995 nurses notes from the St. Joseph Healthcare System and an October 28, 1994 Form CA-17 completed by Dr. Charles D. Milligan.

While psychologist Penn and Dr. Gonzalez opined that appellant had depression and therefore required low stress work, the Office has not accepted depression as caused by the accepted injuries. These reports which address depression therefore do not address the relevant issue, that is whether appellant sustained a change in the accepted condition such that he was totally disabled. Likewise while the other new medical reports of record from Dr. Rounsaville,

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<sup>3</sup> 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>4</sup> When an employee, who is disabled from the job he held when injured on account of employment-related residuals, return to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition. *Mary A. Howard*, 45 ECAB 646 (1994).

Dr. Turner, the St. Joseph Healthcare System and Dr. Milligan provided diagnoses of appellant's back condition as chronic lumbosacral strain and indicated that appellant was disabled from work, these reports also did not address the relevant issue. These medical reports did not provide any evidence that appellant's accepted condition had changed, such that appellant was now totally disabled from work. These reports merely reiterated findings and opinions provided previously of record.

As appellant did not submit the necessary new and relevant evidence and did not advance a new point of law not previously considered, the Office did not abuse its discretion by denying merit review.

The decision of the Office of Workers' Compensation Program dated August 8, 1995 is hereby affirmed.

Dated, Washington, D.C.  
April 21, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member