

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH A. SCUTIERI and U.S. POSTAL SERVICE,
POST OFFICE, Mt. Vernon, NY

*Docket No. 99-862; Submitted on the Record;
Issued March 29, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a merit review.

The Board has duly reviewed the case record in the present appeal and finds that the Office abused its discretion in denying appellant's request for merit review.

This case has been before the Board on a prior appeal. In a decision dated May 16, 1995, the Board found that appellant had not met his burden of proof in establishing that he sustained a recurrence of disability on or after September 3, 1991 due to his July 19, 1977 employment injury.¹ The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

Subsequent to the Board's decision, appellant's counsel requested reconsideration and submitted a report dated July 26 and October 1, 1996 from Dr. Richard Peress. Based on a physical examination and review of medical records, Dr. Peress diagnosed possible thoracic disc herniation, cervical spinal stenosis, cervical neuropathy, lumbar spine derangement with radiculitis and right lumbar radiculopathy. Dr. Peress then concluded that appellant "should never have been taken off of total disability" and that "returning to full activities of lifting caused exacerbation of his prior deteriorated spine from 1977 through 1991 and 1992 and perhaps at worse case scenario may have, in addition, caused a new condition to intervene on top of that."

By merit decision dated November 26, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification.

¹ Docket No. 93-2315 (issued May 16, 1995).

By letter dated September 27, 1997, appellant's counsel requested reconsideration and submitted a September 2, 1997 report by Dr. Peress in support of his request. Dr. Peress reiterated his opinion that appellant was totally disabled on and after September 3, 1991 due to his July 19, 1977 employment injury. He also concluded that the medical evidence and appellant's pain symptoms are sufficient "to correlate a causal relationship between the lumbosacral sprain and degenerative herniated discs noted and his claim to disability." Dr. Peress opined that the job and load duties appellant was required to perform repetitiously over three months in his limited-duty position exacerbated his back condition and caused a recurrence of disability.

In addition, the physician noted that appellant was required to work outside of his restrictions by lifting from the floor to above his shoulder as well as lifting boxes of magazines. Specifically, Dr. Peress opined that appellant's "lumbar spine was incapable of performing for a sustained period of time and therefore, he sustained recurrence in exacerbation of clinical conditions referred to as herniated disc, radiculitis and lumbar instability, secondary to the disc herniation." Dr. Peress concluded that being "required to perform tasks requiring bending and lifting above the shoulder and lifting pallets and boxes of mail" aggravated appellant's already damaged lumbar spine and caused his recurrence of total disability.

By nonmerit decision dated December 8, 1997, the Office found that appellant's request for reconsideration was insufficient to warrant review, as it "neither raised substantive legal questions nor included *new* and *relevant* evidence" (Emphasis in the original).

The only decision before the Board in this appeal is the Office's decision dated December 8, 1997 denying appellant's application for review. Since more than one year elapsed between the date of the Office's most recent merit decision dated November 26, 1996 and the filing of appellant's appeal on December 8, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.²

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advanced a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ 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.⁵ To be entitled to merit review of an Office decision denying

² 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

³ 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 his own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.138(b)(1) and (2).

⁵ *Edward C. Heinz*, 51 ECAB ___ (Docket No. 99-992, issued September 12, 2000).

or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶

The Board has duly considered appellant's evidence on reconsideration and concludes that the September 2, 1997 report by Dr. Peress is new and relevant to the issue of whether appellant's recurrence of disability on or after September 3, 1991 was due to his July 19, 1977 employment injury. Dr. Peress provided medical rationale to support that appellant had sustained a recurrence of disability due to his accepted employment injury. Dr. Peress also responded to the Office's confusion surrounding his prior reports as well as the Office's determination that appellant had not sustained a recurrence of disability.

Contrary to the Office's determination, Dr. Peress' report is relevant to issue of whether there was a change in the nature and extent of appellant's injury-related condition and whether there was a change in the nature and extent of his light-duty job requirements. Thus, the Office erred in finding that the evidence was insufficient to require merit review.

The December 8, 1997 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
March 29, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁶ *Daniel Renard*, 51 ECAB ____ (Docket No. 97-2793, issued April 20, 2000); 20 C.F.R. § 10.138(b)(2).