

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN W. SATCHER and DEPARTMENT OF THE INTERIOR,
FISH & WILDLIFE SERVICE, Albuquerque, NM

*Docket No. 02-72; Submitted on the Record;
Issued August 5, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant established a recurrence of disability on intermittent dates from October 4, 1996 to June 7, 1997; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration of a schedule award decision.

The record indicates that appellant has four traumatic injury claims that have been administratively combined. The Office has accepted that appellant sustained a herniated nucleus pulposus at L3-4 and L4-5 on March 21, 1989; a lumbar radiculopathy on April 17, 1996 and lumbar strains on June 5, 1997 and June 30, 1998.

In a decision dated April 10, 1995, the Office issued a schedule award for an eight percent permanent impairment to the left leg and a five percent permanent impairment to the right leg. In a decision dated June 12, 1998, the Office determined that appellant had not established intermittent dates of disability from October 4, 1996 to June 7, 1997. In a decision dated July 12, 1999, the Office denied modification of its June 12, 1998 decision. Appellant filed an appeal with the Board requesting review of the July 12, 1999 Office decision; the Board issued an order dated June 26, 2001 indicating that the case record was incomplete and the Office was directed to properly assemble the case record and issue an appropriate decision.¹ In a decision dated August 9, 2001, the Office denied modification of its June 12, 1998 decision.

In a decision dated August 10, 1999, the Office issued a schedule award for an additional four percent for the right leg and one percent for the left leg. Appellant filed a request for reconsideration on October 3, 1999. By decision dated September 22, 2000, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the schedule award issue.

¹ Docket No. 00-270.

The Board finds that appellant has not established a recurrence of disability for intermittent dates from October 4, 1996 to June 7, 1997.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.²

In the present case, appellant did not allege a change in a light-duty job or provide sufficient medical evidence with respect to specific dates of disability claimed from October 1996 to June 1997. The record indicates that appellant received treatment from Dr. William Abeyeta, an internist, during this period, but Dr. Abeyeta does not provide an opinion relating disability to an employment injury. In a report dated January 30, 1998, Dr. Richard McKenzie, stated that appellant had exacerbations of back pain that caused him to miss work on specific intermittent dates from October 4, 1996 to April 11, 1997. Dr. McKenzie does not appear to have treated appellant during this period and he does not provide a reasoned medical opinion on causal relationship with the employment injuries. He noted that appellant had disc degeneration and spinal stenosis, without clearly explaining how these conditions were causally related to the employment injuries. To the extent Dr. McKenzie believed the employment injuries aggravated an underlying condition, he does not discuss the nature and extent of an employment-related aggravation. He states that “it is likely his type of problem would have flare-ups without a specific injury being related to it,” but Dr. McKenzie does not explain how these flare-ups were causally related to appellant’s federal employment.

The Board finds no medical evidence containing a complete background and a reasoned medical opinion with respect to the claimed dates of disability and the employment injuries. Accordingly, the Board finds that appellant did not meet his burden of proof in this case.

The Board further finds that the Office abused its discretion in denying merit review of the schedule award decisions.

With respect to the Board’s jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office’s final decision.³ As appellant filed his appeal on September 19, 2001, the only decision over which the Board has jurisdiction on this appeal, with respect to a schedule award, is the September 22, 2000 decision denying his request for reconsideration.

In a letter dated July 11, 2000, to the Office’s Branch of Hearings and Review, appellant indicated that he had previously requested reconsideration of the August 10, 1999 schedule award decision. He submitted a copy of a letter dated October 3, 1999 requesting reconsideration of the August 10, 1999 decision; he also submitted a receipt for certified mail

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *See* 20 C.F.R. § 501.3(d).

sent to the appropriate district office on October 4, 1999, with receipt by the Office on October 7, 1999.

The Board finds that the evidence is sufficient to establish that a reconsideration request dated October 3, 1999 was mailed to the Office on October 4, 1999.⁴ The Office, however, did not issue its decision until September 22, 2000, nearly a year later. It is well established that when the delay in issuing a reconsideration decision jeopardizes a claimant's right to have a merit review of the case by the Board, the Office should conduct a merit review.⁵ The delay in this case precluded appellant from either filing a second timely reconsideration request or securing a merit review by the Board. Accordingly, the Board finds that the Office should conduct a merit review of the issues presented in the August 10, 1999 decision.

The decision of the Office of Workers' Compensation Programs dated September 22, 2000 is set aside and remanded for a merit decision; the decision dated August 9, 2001 is affirmed.

Dated, Washington, DC
August 5, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ See *Douglas McLean*, 42 ECAB 759 (1991) (certified mail receipt established timeliness of reconsideration request).

⁵ *Geoma R. Munn*, 50 ECAB 242 (1999); *Carlos Tola*, 42 ECAB 337 (1991).