

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA C. SRACK and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Temecula, CA

*Docket No. 03-512; Submitted on the Record;
Issued April 9, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

The Office accepted that appellant sustained a lumbosacral strain as a result of a fall on December 24, 1997 while appellant, then 46 years old, was working as a rural carrier.

By letter dated November 5, 1998, the Office referred appellant to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, along with medical records, a statement of accepted facts and a list of specific questions for a second opinion medical examination. In a December 1, 1998 report, he diagnosed lumbar musculoligamentous sprain/strain resolved based on physical and objective findings. He opined that appellant did not have any medical condition caused by her work factors and that she did not require any medical treatment. In an accompanying work capacity evaluation dated December 5, 1998, Dr. Dorsey indicated that appellant could work eight hours a day with no restrictions.

The Office issued a notice of proposed termination of compensation on February 18, 1999 based on Dr. Dorsey's report.

By decision dated March 22, 1999, the Office terminated appellant's compensation on the grounds that she no longer suffered from any residuals of her employment-related lumbosacral strain. In a September 24, 1999 decision, the Office denied appellant's September 2, 1999 request for modification based on merit review of the claim.

On July 26, 2000 Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, examined appellant. He submitted a September 5, 2000 report revealing a history of appellant's December 24, 1997 employment injury, a review of medical records and his findings on physical examination. Dr. Tauber diagnosed chronic lumbosacral sprain with aggravation of degenerative disc disease and degenerative facets/chronic discogenic pain. He disagreed with Dr. Dorsey's report and stated that objective findings and her history supported appellant's condition.

Dr. Tauber further stated that appellant required additional medical treatment including a discography to determine her concordant pain. He opined that appellant was unable to continue with her prior activity and work levels due to continuing pain resulting from her employment-related lumbosacral strain.

By decision dated December 27, 2000, the Office again denied appellant's September 15, 2000 request for modification based on merit review of the claim. In a January 30, 2001 letter, appellant requested reconsideration.

By decision dated July 6, 2001, the Office denied appellant's request for merit review of her claim on the grounds that the evidence submitted was repetitious in nature and thus, insufficient to warrant modification of its prior decision.

In a March 18, 2002 decision, the Office denied appellant's December 17, 2001 request for merit review on the same grounds as its previous decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her request for an appeal on December 26, 2002 the only decision before the Board is the March 18, 2002 decision, denying her request for merit review.

The Board finds that the Office abused its discretion in refusing to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,² 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.³ 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.⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

In support of her December 17, 2001 request for reconsideration, appellant submitted medical evidence from a new physician in support of her contention that she still suffered from employment-related residuals of her accepted lumbosacral strain. Dr. Vert Mooney, a Board-certified orthopedic surgeon, provided a history of appellant's December 24, 1997 employment injury, medical treatment and employment in his December 11, 2001 report. He noted a review

¹ 20 C.F.R. §§ 501.2(c) 501.3(d)(2).

² 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).

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

of medical records and provided his findings on physical examination. Dr. Mooney concurred with Dr. Tauber's diagnosis of symptomatic chronic lumbar strain superimposed upon degenerative lumbar disc disease. He stated that the results of a computerized tomography and magnetic resonance imaging scan provided objective findings of appellant's continuing symptoms contrary to Dr. Dorsey's findings. He further stated that the validity of appellant's complaints with resultant functional deficits was confirmed by the extensive functional capacity report of Terry Lawson, a physical therapist. Dr. Mooney stated:

“In my professional opinion, [appellant] does have objective medical findings which are valid and have been noted previously by other physicians. In summary, there is no question, based on her history, that she continues to suffer symptoms of the medical conditions sustained by her as a result of the injury o[n] December 24, 1997. There is a direct causation between the injury sustained on that date and the condition suffered by [appellant] at this time. There is no other causation for this represented in her the total [sic] of her medical records.”

The Board finds that Dr. Mooney's report constitutes relevant and pertinent new evidence not previously considered by the Office, such that review of the evidence and the case on its merits is warranted as to whether appellant has any residuals causally related to her December 24, 1997 employment injury. Therefore, the Board finds that the Office abused its discretion by denying appellant's request for a review of the merits of her claim under section 8128(a) of the Act.

The March 18, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration on its merits.

Dated, Washington, DC
April 9, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member