

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SALVATORE BOLOGNA and DEPARTMENT OF DEFENSE,  
DEFENSE DEPOT, Mechanicsburg, Pa.

*Docket No. 96-2666; Submitted on the Record;  
Issued December 14, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing a recurrence of disability after July 3, 1995 that is causally related to his accepted July 13, 1972 employment injuries of lumbosacral strain, L5 radiculopathy and depression

On July 13, 1972 appellant, then a 28-year-old packer, sustained an injury to his back. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain, L5 radiculopathy and depression. Appellant returned initially to light-duty work and resumed regular-duty work on December 6, 1972.

Appellant sustained recurrences of disability on December 31, 1975, October 7, 1976 and November 8, 1991 which were accepted by the Office. On November 10, 1976 appellant underwent lumbar laminectomy surgery. Appellant received appropriate compensation for all periods of temporary total disability.

On January 19, 1995 the Office requested that appellant participate in a vocational rehabilitation program. On May 10, 1995 a rehabilitation counselor provided appellant with a position description for part-time work as a packer/labeler/taper. By letter dated June 2, 1995, the Office notified appellant that the offered position was suitable, was within his physical capabilities and advised appellant that the penalty provision set forth at 5 U.S.C. § 8106(c) would be applied if he refused an offer of suitable work. Appellant was instructed to report for work on June 12, 1995. He did report to work but was sent home on June 22, 1995 due to illness. Appellant requested sick leave on June 29, July 3 and July 6, 1995. In a letter dated August 4, 1995, the Office advised appellant that, if he did not intend to return to work, he needed to submit medical evidence to substantiate continuing disability. By letter dated August 30, 1995, the Office notified appellant that the medical evidence submitted was not sufficient to establish a recurrence of disability and advised him that he had 20 days to return to work or he would be in violation of section 8106 of the Federal Employees' Compensation Act.

In a decision dated September 22, 1995, the Office terminated appellant's benefits effective that date on the grounds that he abandoned suitable employment.

However, by decision dated March 26, 1996 and finalized March 27, 1996, an Office hearing representative found that the Office improperly terminated appellant's compensation effective September 22, 1995 on the grounds that he had abandoned suitable employment as appellant had returned to work when he was advised the position was suitable and the Office did not follow established procedures in terminating appellant under section 8106(c). The Office hearing representative further found that appellant failed to establish that he sustained a recurrence of disability after July 3, 1995 that was causally related to his accepted July 1972 employment injuries. Consequently, the September 22, 1995 decision of the Office was reversed with respect to application of section 8106(c) and affirmed with respect to denial of the claim for recurrence of disability. In a decision dated July 23, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision.<sup>1</sup>

The Board finds that appellant has not established that he sustained a recurrence of disability after July 3, 1995 which was causally related to his accepted July 1972 employment injuries.<sup>2</sup>

Where appellant claims recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.<sup>3</sup> This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>4</sup> In addition, 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 medical evidence of record establishes that he can perform the work of a 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

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<sup>1</sup> A review of the record indicates that the Office denied a request by appellant for a hearing in a letter decision dated September 13, 1996. Appellant's appeal with the Board was docketed on August 27, 1996 and the record does not contain a copy of appellant's apparent request below for a hearing. As the Office and the Board cannot have simultaneous jurisdiction over the same issue in the same case and since appellant had already requested reconsideration of his claim prior to any request for an oral hearing being received by the Office, the Board will retain jurisdiction over this matter and consider the merits of appellant's claim and the decision of the Office dated September 13, 1996 is null and void; *see generally Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>2</sup> 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. As appellant filed his appeal with the Board on August 27, 1996, the decisions before the Board are the Office's September 22, 1995 and March 27 and July 26, 1996 decisions. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> *John E. Blount*, 30 ECAB 1374 (1979).

<sup>4</sup> *Frances B. Evans*, 32 ECAB 60 (1980).

duty. As part of the burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>5</sup>

In the present case, appellant returned to work in a part-time limited-duty position that had been approved by his treating physician George P. Roth, a Board-certified neurosurgeon. In a report dated May 22, 1995, Dr. Roth noted that appellant had concerns that he might miss work from time to time due to his symptoms. After appellant returned to work and performed his duties for several weeks, he was sent home on June 22, 1995 due to illness. Thereafter, he called in sick on several occasions and claimed a recurrence of disability beginning July 3, 1995 when appellant completely ceased work. Initially, appellant submitted a form report dated August 7, 1995 from Dr. Roth who diagnosed degenerative lumbar disc disease, post laminectomy with continued symptoms that were related to his accepted employment injuries as indicated by checking the appropriate box on the form. He indicated that appellant was totally and permanently disabled and that all attempts to return appellant to productive work had failed. These findings were reiterated in form reports dated August 25 and September 8, 1995. Appellant also submitted a report dated August 29, 1995 by Louise Costello, M.S. and Michael J. Asken, Ph.D., who were treating appellant for his depression and reported that appellant continued to be seen on a weekly basis, his mood seemed to be improved for the past several weeks although he was easily stressed and agitated by communications from the employing establishment and that he seemed to be physically improving while he was not working. As the Office found, this medical evidence was not sufficient to establish that appellant had a recurrence of disability after July 3, 1995. The form reports by Dr. Roth, in which he checked a box to indicate that the claimed condition was related to the provided history of injury are insufficient to sustain appellant's burden of proof as these reports are not rationalized. Dr. Roth did not provide any explanation or rationale for his opinion that the diagnosed medical condition was causally related to the July 1972 incident. Therefore, these reports are insufficient to meet appellant's burden of proof.<sup>6</sup> The report by Dr. Asken and Ms. Costello does not address the issue of whether appellant sustained a recurrence of disability with respect to his depression.

However, appellant submitted several medical reports, which did address his medical condition and claimed disability in light of his limited-duty position. In a report dated August 14, 1995, Dr. Michael F. Lupinacci, a Board-certified physiatrist, provided a history of injury and physical examination findings and diagnosed work-related chronic back and right leg pain by history and significant degenerative disease of both ankles, hips and appellant's cervical area. Dr. Lupinacci indicated that appellant would benefit from continued physical therapy and reported that returning to even a sedentary position would be futile despite his motivation. He concluded that appellant should pursue permanent total disability. In a letter dated August 25, 1995, Dr. Roth concurred with Dr. Lupinacci's assessment. In a report dated October 31, 1995, Dr. Thomas J. Yucha, a Board-certified orthopedic surgeon, noted that he had treated appellant for his back, neck and feet problems for years. He reported that appellant had surgery at the L4-5 level of his spine and had a disc removed and that due to scarring in the area of the previous

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<sup>5</sup> Jackie B. Wilson, 39 ECAB 915 (1988); Terry R. Hedman, 38 ECAB 22 (1986).

<sup>6</sup> Debra S. King, 44 ECAB 203 (1992); Salvatore Dante Roscello, 31 ECAB 247 (1979).

surgery he was in chronic pain with positive nerve involvement in the right lower extremity as demonstrated by electromyography. Dr. Yucha found that appellant's significant orthopedic problems in his neck, low back and feet would prevent him from doing any meaningful work as he could not stand for long periods of time or sit for long periods of time due to chronic pain. In a report dated October 26, 1995, Dr. Roth provided a complete history of injury and treatment for appellant and diagnosed chronic low back pain and right lower extremity pain due to lumbar radiculitis, which was related to a combination of intrinsic and extrinsic scar tissue formation involving his L5 nerve root. He noted that appellant had returned to "entirely sedentary" work but had problems performing even this type of work and that he had encouraged appellant to seek disability retirement. Dr. Roth also noted that appellant had problems with his feet and emotional problems related to pain adjustment over the years. In a duty status form by Dr. Roth dated July 11, 1995, he indicated that appellant could lift less than 10 pounds intermittently for 1 hour, could sit, climb stairs, kneel, bend, stoop and reach above the shoulder intermittently for less than 1 hour, could stand and walk continuously for less than 1 hour and intermittently for 2 hours and could perform simple grasping and fine manipulation continuously for 2 hours and intermittently for 4 hours. Dr. Roth indicated that appellant was totally disabled from July 11, 1995 and reiterated his diagnoses of degenerative lumbar disc disease and post laminectomy. The limitations set forth in this report are substantially more significant than those contained in the duty status report by Dr. Roth dated March 21, 1995, which allowed appellant to sit and walk for two hours intermittently over a four-hour period, to lift and stand for one hour intermittently and occasional bending, squatting and kneeling. In a report dated October 30, 1995, Dr. Asken and Ms. Costello provided a summary of their treatment of appellant since October 1991 and noted that appellant attempted to return to work part-time, however, that attempt was unsuccessful. They reported that appellant's psychological state had been erratic since that time with periods of improvement and regression and that appellant was currently reporting increased pain. Appellant's psychotherapeutic counseling was ongoing. In a report dated October 2, 1995, Dr. Douglas A. Bream, a podiatrist, indicated that appellant had been treated on numerous occasions for bilateral foot pain, arthritic foot pain and pain of his ankle and subtalar joints. Dr. Bream reported that some of appellant's foot pain could be related to his severe neuropathy from his back. In an office note dated October 18, 1995, in which a nerve conduction study was reviewed, Dr. Lee J. Sanders, a chief of podiatry, noted that the clinical findings remained the same with chronic pain in the feet, ankles and low back and tarsal tunnel syndrome with contribution from the lumbosacral spine. In a note dated October 31, 1995, Dr. Bream noted that he had reviewed the nerve conduction study and that appellant's neuropathy appeared to be related to his more proximal radiculopathy. In letters dated February 2 and April 17, 1996, Dr. Asken and Ms. Costello reiterated their conclusions concerning appellant's erratic psychological state and continued depression. In a report dated April 2, 1996, Dr. Bream noted that he had read appellant's limited-duty job description, which required standing and indicated that appellant could not perform this work or any work, which required standing due to arthritis and peripheral neuropathy in both feet. In a report dated April 15, 1996, Dr. Roth indicated that appellant had returned to work in a sedentary part-time position but was worse when he returned to his office in July 1995. However, Dr. Roth also reported that his medical records did not contain specific descriptions of things at work that aggravated appellant's situation or the specific physical findings representing definite deterioration over the previous examinations. Nonetheless, Dr. Roth concluded that further employment efforts were futile and that appellant was permanently and totally disabled.

While the reports by Drs. Roth, Asken, Lupinacci and Yucha are not sufficient to establish that appellant's claimed recurrence of disability is causally related to his accepted July 1972 employment injuries of lumbosacral strain, radiculopathy and depression, the Board finds that these reports, given the absence of evidence to the contrary, are sufficient to require further development of the evidence. The Board notes that Drs. Roth, Lupinacci and Yucha have all considered that appellant's light-duty position required sedentary work and have concluded that he was incapable of doing the same. The report by Dr. Asken and Ms. Costello indicated that appellant's psychological condition had regressed to some degree as well. The Board notes that when an employee initially submits supportive factual and/or medical evidence, which is not sufficient to carry the burden of proof, the Office must inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof. The Office may undertake to develop either factual or medical evidence for determination of the claim.<sup>7</sup> It is well established that proceedings under the Act are not adversarial in nature,<sup>8</sup> and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.<sup>9</sup> The Office has the obligation to see that justice is done.<sup>10</sup>

In the present case, as there were uncontroverted inferences of causal relationship and that appellant was no longer capable of performing his light-duty position, the Office was obligated to request further information from appellant's treating physicians. On remand, the Office should further develop the evidence by providing Drs. Roth, Asken, Lupinacci and Yucha with statements of accepted facts and requesting that they submit rationalized medical opinions on whether appellant's claimed recurrence is causally related to his accepted employment injuries and whether he was unable to perform his light-duty position. After such development as the Office deems necessary, a *de novo* decision shall be issued.

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<sup>7</sup> 20 C.F.R. § 10.11(b); *see also John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

<sup>9</sup> *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

<sup>10</sup> *William J. Cantrell*, 34 ECAB 1233 (1983).

The decisions of the Office of Workers' Compensation Programs dated July 23 and March 27, 1996 and September 22, 1995 are set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.  
December 14, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member