

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD H. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

*Docket No. 96-2224; Submitted on the Record;
Issued August 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof in establishing periods of recurrences of disability after January 6, 1995 that were causally related to his accepted employment injury of traumatic lumbar myofibrositis and myofascitis.

This is the third appeal before the Board in this case. In the first appeal, by decision dated October 21, 1988, the Board found that appellant was at fault in the creation of a \$4,146.64 overpayment in compensation and further found that the Office of Workers' Compensation Programs acted properly in withholding 25 percent of appellant's continuing compensation checks after he failed to respond to the Office's request for financial information.¹ In the second appeal, by decision dated March 15, 1990, the Board found that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.² The facts and circumstances of the case are completely set out in the October 21, 1988 and March 15, 1990 decisions and are hereby incorporated by reference.

Appellant continued to receive compensation for temporary total disability until December 1, 1992 when he returned to work. On December 29, 1992 appellant filed a claim for recurrence of disability beginning December 2, 1992, asserting that he stopped work on December 11, 1992 as performing his regular duties was painful. On January 6, 1993 appellant was offered a limited-duty position as a modified laborer custodian. On February 8, 1993

¹ Docket No. 88-489 (issued October 21, 1988).

² Docket No. 90-4 (issued March 15, 1990).

appellant accepted this position, which the Office had found was suitable work, returning to work for four hours a day as indicated. Appellant received appropriate wage-loss compensation.³ By decision dated April 6, 1993, the Office denied appellant's claim for recurrence of disability between May 9 and September 10, 1987 on the grounds that the medical evidence did not establish that the claimed recurrence was causally related to the accepted employment injury. On March 30, 1993 appellant filed a claim for recurrence of disability beginning March 18, 1993. Appellant returned to limited-duty work March 29, 1993. On July 8, 1993 the Office granted appellant a schedule award for an 18 percent permanent impairment to his left leg. Appellant filed intermittent claims for recurrence of disability between July 1993 and March 1994 and worked between periods of claimed temporary total disability. On April 19, 1994 appellant filed a claim for recurrence of disability beginning April 14, 1994. After appellant returned to work with additional medical limitations, he filed a subsequent claim for recurrence of disability beginning May 3, 1994. In a decision dated July 8, 1994, the Office found that the work stoppages in April and May 1994 were not causally related to his accepted employment injury and denied appellant's claims for compensation. On January 6, 1995 an Office hearing representative affirmed the Office's July 8, 1994 decision. In May 1995 appellant filed claims for recurrence of disability beginning January 6, April 3 and May 19, 1995. By decision dated October 16, 1995, the Office denied appellant's claim for a recurrence of disability beginning January 6, 1995 and further found that the work stoppages in April and May 1995 were not causally related to his accepted July 17, 1978 employment injury. In a decision dated June 17, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant merit review.

The Board has carefully reviewed the entire case record on appeal and finds that this case is not in posture for decision.⁴

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 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.⁵

In the present case, the Office denied appellant's claims for recurrence of disability, relying on the August 29, 1995 opinion of Dr. Edwin A. Hissa, a Board-certified orthopedic surgeon and appellant's treating physician. The Office found that appellant was capable of

³ Appellant also received compensation for previous periods of temporary total disability from June 4 to July 5, 1985.

⁴ The Board's jurisdiction to consider and decide appeals from final decision 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 July 9, 1996, the only decisions before the Board are the Office's October 16, 1995 and June 17, 1996 decisions. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁵ *Jackie B. Wilson*, 39 ECAB 915 (1988); *Terry R. Hedman*, 38 ECAB 22 (1986).

performing his limited-duty work based on Dr. Hissa's opinion that there was no recurrent or lingering condition related to appellant's knee injury of the patellofemoral joint.⁶ A review of this report indicates that Dr. Hissa reported that he was treating appellant primarily for his knee condition which was not the accepted July 17, 1978 injury of lumbar myofibrositis and myofasciitis from which appellant claimed recurrence of disability. He also indicated that he had little information on appellant's back and noted that appellant was undergoing epidural steroid injections for his back condition. Dr. Hissa noted that there was no evidence of significant herniated disc or aggravation of the claimed problem without further discussion. In a letter dated September 15, 1995, the Office request additional information from Dr. Hissa, including a opinion addressing whether appellant was totally disabled from work in his modified position as of April 18, 1995 and whether his current condition was related to his accepted back and knee injuries. Dr. Hissa did not respond to this inquiry. However, appellant did submit several work restriction forms by Dr. Hissa which noted that appellant had muscle spasms, back and knee pain and a prior torn meniscus and indicated that appellant became medically unable to work beginning April 3, 1995 as he could not walk, sit or stand for extended period.

The Office may undertake to develop either factual or medical evidence for determination of the claim.⁷ It is well established that proceedings under the Federal Employees Compensation Act are not adversarial in nature,⁸ and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.⁹ The Office has the obligation to see that justice is done.¹⁰

In the present case, in view of the conflicting evidence by Dr. Hissa, as well as his admission that he was not focusing on the accepted injury from which appellant claimed recurrence of disability beginning April 1995 and had little information on this condition, the Office should further develop the evidence by providing Dr. Hissa with a statement of accepted facts, together with appellant's, medical record and requesting that he submit a rationalized medical opinion directly responding to the questions posed in the September 15, 1995 request for additional information. After such development as the Office deems necessary, a *de novo* decision shall be issued.

The decisions of the Office of Workers' Compensation Programs date June 17, 1996 and October 21, 1995 are hereby set aside, and this case is remanded for further proceedings consistent with this decision.¹¹

⁶ In August 1983 the Office accepted that appellant sustained chondromalacia of the left patellofemoral and a tear of the meniscus that was causally related to factors of his federal employment.

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

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

⁹ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹⁰ *William J. Cantrell*, 34 ECAB 1233 (1983).

¹¹ In view of the disposition in this case, any issues with respect to the Office's denial of merit review in response to appellant's request for reconsideration is moot.

Dated, Washington, D.C.
August 24, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member