

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROSEMARY EARNEST-ELLISON and U. S. POSTAL SERVICE,  
POST OFFICE, Columbus, Ohio

*Docket No. 96-645; Submitted on the Record;  
Issued February 24, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing a recurrence of disability between October 1991 and October 1993 causally related to her July 1990 accepted employment injury; and (2) whether the Office of Workers' Compensation Programs has met its burden of proof in terminating appellant's compensation benefits effective November 19, 1995.

On October 19, 1990 appellant, then a 36-year-old distribution clerk, filed an occupational disease claim, alleging that on July 2, 1990 she first became aware that she had right shoulder bursitis and tendinitis and that she became aware that it was employment-related on July 24, 1990. Appellant stopped work on August 5, 1990. In a supplemental statement, appellant indicated that she had experienced burning in her shoulder and difficulty breathing after heavy lifting and repetitive movements for approximately two months prior to filing her claim. The Office accepted appellant's claim for tendinitis of the right shoulder. Appellant returned to work on September 17, 1990. On October 19, 1990 appellant alleged injury to her back while working in the newspaper section of the employing establishment. Her claim was accepted for dorsal and lumbosacral sprain. Appellant began limited-duty work for five hours per day on March 28, 1991. On November 8, 1991 appellant filed a claim for recurrence of disability beginning April 20, 1991. Appellant stopped work on October 27, 1991. By decision dated May 12, 1993, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence did not establish a causal relationship between her claimed condition and her accepted employment injury. In a decision dated November 9, 1993, an Office hearing representative remanded the case for further development of the evidence. The Office hearing representative found that while the claim was originally accepted for right shoulder tendinitis, the medical evidence of record indicated that appellant had sustained fibrositis related to her home and work activities. By decision dated February 24, 1994, the Office accepted the claim for right shoulder impingement syndrome, but denied appellant's claim for disability on the grounds that disability was not established after October 27, 1991. In a decision dated October 19, 1994, an Office hearing representative vacated the Office's February 24, 1994

decision and remanded the case for resolution of a conflict in the medical evidence “regarding all conditions proximately caused, aggravated, precipitated or accelerated by factors of appellant’s federal employment” to be based upon a revised comprehensive statement of accepted facts. By decision dated March 28, 1995, the Office denied appellant’s claim for disability on the grounds that the evidence did not establish total disability after October 27, 1991. In a decision dated July 31, 1995, an Office hearing representative found that appellant had established total disability beginning October 29, 1993 based on the submission of documentation that she was separated from the employing establishment due to her inability to meet the physical demands of the position for which she was hired. The Office hearing representative also set aside the March 28, 1995 decision of the Office and remanded the case for further development of the evidence in the form of an additional report from the impartial medical examiner regarding whether appellant was capable of performing limited-duty work between October 27, 1991 through October 28, 1993. In a decision dated September 22, 1995, the Office denied appellant’s claim for compensation for the period of October 27, 1991 through October 28, 1993 on the grounds that the medical evidence did not establish that she was incapable of performing limited-duty work. In a letter dated September 28, 1995, the Office notified appellant that it proposed termination of her compensation on the grounds that there were no actual findings of disability to demonstrate that she could not perform her job. By decision dated October 28, 1995, the Office terminated appellant’s benefits effective November 11, 1995.

The Board has duly reviewed the case record in the present appeal and finds that appellant has not established a recurrence of disability between October 27, 1991 and October 28, 1993 causally related to her accepted employment injury.<sup>1</sup>

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.<sup>2</sup>

In the present case, the Office properly determined that there was a conflict in the medical opinion evidence between the medical reports of Drs. Arnold A. Allenius, an osteopath and appellant’s treating physician and Reinhard Westphal, a Board-certified orthopedic surgeon and the Office referral physician. In a report dated January 25, 1994, Dr. Westphal diagnosed right shoulder impingement syndrome which at times might have given the appearance of fibromyalgia. He indicated that the condition was work related but further found that appellant was capable of performing her previous limited-duty assignment as it did not involve any lifting. On the other hand in reports dated July 24 and August 12, 1994, Dr. Allenius diagnosed

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<sup>1</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 her appeal with the Board on January 11, 1996, the only decisions before the Board are the Office’s September 22 and October 28, 1995 decisions; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>2</sup> *Jackie B. Wilson*, 39 ECAB 915 (1988); *Terry R. Hedman*, 38 ECAB 22 (1986).

fibromyalgia that was aggravated by her limited-duty work in which she was required to repeatedly use her right hand, shoulder and arm and to do overhead lifting. Dr. Allenius stated that appellant had been totally disabled from at least October 29, 1991 through May 17, 1993 and would continue to be disabled until she could obtain proper treatment.

In order to resolve the conflict, the Office referred appellant to Dr. Ralph G. Rohner, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter in accordance with section 8123 of the Federal Employees' Compensation Act<sup>3</sup> which provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.<sup>4</sup> In a report dated February 20, 1995, Dr. Rohner diagnosed fibromyalgia, noting that this condition was frequently called by different names but he preferred "overuse syndrome of the right upper extremity, manifested as fibromyalgia." Dr. Rohner indicated that appellant's condition was permanent. In the accompanying work-capacity evaluation form, Dr. Rohner indicated that appellant could work 4 hours a day and should limit repetitive motion, overhead hand use and not lift over 10 pounds or lift above the shoulder more than 2 hours a day. After the case was remanded for an opinion addressing directly whether appellant was capable of performing her limited-duty position from October 1991 through October 28, 1993, Dr. Rohner provided a report dated September 7, 1995. In the revised statement of accepted facts, the Office had indicated that appellant's limited-duty position involved working 5 hours a day with restrictions of writing labels for the OCR machine, lifting up to 10 to 15 pounds of mail, stamping return to sender mail and postage due mail, working in the office using the telephone to record absences, make announcements and writing. In his September 1995 report, Dr. Rohner reported that the position described could have been carried on by appellant after October 27, 1991 from an organic point of view. He stated that there was nothing "anatomically wrong with her that prevented her from performing said duty. [Appellant] has symptoms due to her fibromyalgia, but nevertheless, she could anatomically do her job." He concluded that appellant could work eight hours a day from an anatomical standpoint. In *James P. Roberts*,<sup>5</sup> the Board held that the opinion of an impartial medical specialist resolving a conflict of medical opinion would be given special weight, but that the conflict must be between "medical reports of virtually equal weight and rationale." As Dr. Rohner's combined reports are rationalized and based upon a proper factual background, his reports represent the weight of the medical evidence and establish that appellant was not disabled from performing her limited-duty position after October 27, 1991.

The Board further finds, however, that the Office improperly terminated benefits effective November 11, 1995.

Under the Act,<sup>6</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>7</sup> After the Office determines that an

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<sup>3</sup> 5 U.S.C. § 8123(a).

<sup>4</sup> *Shirley L. Steib*, 46 ECAB 309 (1994).

<sup>5</sup> 31 ECAB 1010 (1980).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.<sup>8</sup>

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.<sup>9</sup> Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after November 11, 1995 and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>10</sup>

In the instant case, the Office proposed termination of benefits based on the September 7, 1995 report of Dr. Rohner. In this report, Dr. Rohner indicated that appellant was not disabled from an anatomical standpoint and was capable of performing the limited-duty position after October 27, 1991. He also indicated that appellant was experiencing discomfort presumably due to symptoms of her fibromyalgia and that she had emotional difficulty dealing with that discomfort. While the report by Dr. Rohner was sufficient to establish that appellant was not disabled from performing her limited-duty position, it does not specifically address whether appellant has any residuals of her employment injuries as the physician has not indicated that appellant may work without any restriction in the position she held at the time of injury. Thus, the Office has not discharged its burden.

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<sup>7</sup> *William Kandel*, 43 ECAB 1011 (1992).

<sup>8</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

<sup>9</sup> *Dawn Sweazey*, 44 ECAB 824 (1993).

<sup>10</sup> *Mary Lou Barragy*, 46 ECAB 781 (1995).

The decision of Office of Workers' Compensation Programs dated September 22, 1995 is affirmed and the decision of the Office dated October 28, 1995 is hereby reversed.

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

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member