

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT R. DIBERNARDO and DEPARTMENT OF AGRICULTURE,
PACKERS & STOCKADES ADMINISTRATION, Lancaster, Pa.

*Docket No. 97-1350; Submitted on the Record;
Issued April 2, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant had any disability after April 1, 1994 that was causally related to his April 26, 1993 employment injury.

On April 26, 1993 appellant, then a 64-year-old supervisory industrial specialist, was lifting several 50-pound test standards to help test a scale for accuracy when he developed severe pain in his right lower back. The Office of Workers' Compensation Programs accepted appellant's claim for a lumbosacral strain. Appellant retired on April 1, 1994. On May 26, 1995 he filed a claim for recurrence of disability effective April 1, 1994. In a July 31, 1995 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate a causal relationship between the employment injury and his current condition. In merit decisions dated November 8, 1995, May 17, 1996 and January 21, 1997, the Office denied appellant's requests for modification of the Office's July 31, 1995 decision.

The Board finds that the case is not in posture for decision.

Appellant indicated that he had a prior back condition, for which he underwent surgery on April 3, 1992 for removal of a deteriorated disc and fusion of the L4-5 vertebrae. In a September 10, 1993 report Dr. I. Stanley Porter stated that appellant's myelogram and computerized tomography (CT) scan showed no evidence of impingement. He reported that an electromyogram (EMG) demonstrated no evidence of denervation but did show evidence of peripheral axonal and demyelination neuropathy in both legs.

In his claim for recurrence of disability appellant indicated that his surgical recovery had proceeded well until his April 26, 1993 employment injury. He indicated that all prior recovery was affected and renewed therapy and functional rehabilitation was ordered. Appellant commented that when management insisted on and received his travel restrictions the pressure on his performance increased and intensified. He stated that he was unable to sit or stand for extended periods without extreme pain and stiffness. Appellant noted that travel and driving

restrictions imposed during his rehabilitation period resulted in a generally sedentary duty level. He claimed that he was subjected to unusually stressful work conditions by his supervisor due to his medical restrictions. Appellant commented that he developed cervical psoriasis, was hospitalized for chest pain and was evaluated with a diagnosis of rheumatoid arthritis during the period after the employment injury. He stated that these conditions continued in the stressful climate causing his decision to retire to avoid further consequences.

In May 25, 1995 report, Dr. John Palumbo, a Board-certified family practitioner, indicated that appellant injured his back in 1992 while shoveling snow and underwent surgery in April 1992. He noted that after appellant returned to full-time work in June 1992 his employer continued to put stress on him. Dr. Palumbo commented that as for appellant's traveling and driving capacity, it was felt that the driving and constant traveling was putting undue stress on his back. He indicated that appellant began to get severe back pain. When appellant reinjured his back in April 1993 he could barely tolerate the back pain from his traveling and mileage he was putting on his car. In August 1993 he developed cervical psoriasis and was diagnosed with rheumatoid arthritis. Dr. Palumbo indicated that since appellant had stopped working, he was much improved because he did not have to cope with his severe working environment. He stated that appellant would continue to need treatment for his rheumatoid arthritis and psoriasis which were chronic conditions.

In a February 10, 1994, memorandum appellant's supervisor recommended that appellant be removed from employment due to his inability to perform his duties due to his health. The supervisor noted that appellant had been restricted to driving only for 30 minutes at a time with 20-minute rest breaks if he had to drive for multiple 30-minute periods. He indicated that appellant's duties in checking scales necessitated that he drive to any site within the employing establishment's nine-state region to conduct on-site work. The supervisor stated that appellant was required to travel approximately 35 percent of his time with the duration of the trips ranging from 1 day to 2 weeks, averaging 5 days at a time. He noted that it was not uncommon for appellant to travel 900 to 1,200 miles in one trip. He indicated that in conducting weighing investigations, it was sometimes necessary to sit in a car for extended periods of time after arrival at a site to avoid divulging the investigation or compromising the result. The supervisor stated that because of appellant's travel restrictions he was unable to carry out his duties and the duration of the restrictions was indefinite.

In an October 8, 1996 deposition, Dr. Palumbo indicated that in July 1993 he restricted appellant to just driving back and forth to work. He noted that appellant was showing a neurological deficit for the first time at that point with weakness while walking on his toes on the left side and positive straight leg raising. Dr. Palumbo stated that the driving restriction was not the result of the 1992 back injury but solely due to the 1993 work injury to the back. He indicated that appellant had recovered from the 1992 injury and subsequent surgery by the time of the 1993 back injury.

The medical evidence submitted by Dr. Palumbo, therefore, shows that appellant was placed on driving restrictions due to the effects of the April 26, 1993 employment injury and that, because of those driving restrictions, appellant was unable to carry out the duties of his position and was forced to retire, which could be considered the beginning of an employment-

related disability. Dr. Palumbo's uncontradicted reports, while insufficient to establish appellant's claim, are sufficient to require further development of the record.¹ Therefore, on remand, the Office should refer appellant, together with the statement of accepted facts and the case record, to an appropriate physician for an examination. The physician should provide a diagnosis of appellant's condition and state whether his condition was caused or aggravated by the April 26, 1993 employment injury and whether he sustained disability due to the employment injury or had some period of disability after April 1, 1994 causally related to his employment injury. After such further development as it may find necessary the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated January 21, 1997, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
April 2, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹ *John J. Carlone*, 41 ECAB 354 (1989).