

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMY S.C. COLEMAN and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, NE

*Docket No. 97-2453; Submitted on the Record;
Issued November 26, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained recurrences of disability on or about October 14, 1992 and February 8, 1996 that were casually related to his July 20, 1983 employment injury.

On July 20, 1983 appellant, a mailhandler, sustained an injury in the performance of his duties while reaching for and repairing mail. The Office of Workers' Compensation Programs accepted his claim for thoracic strain and a herniated disc at the C5-6 level. Appellant underwent surgery on February 11, 1986. He received compensation on the periodic rolls beginning August 10, 1991.

On August 6, 1991 Dr. James P. O'Hara, an orthopedic surgeon and Office referral physician, reported that appellant was able to work in a light, sedentary capacity with restrictions for four hours a day. The Office asked appellant's attending orthopedic surgeon, Dr. Oscar M. Jardon, to comment on Dr. O'Hara's restrictions. Dr. Jardon completed a work restriction evaluation on January 28, 1992 indicating that appellant could work four hours a day with restrictions. On June 23, 1992 Dr. Jardon reported that appellant presented with chronic neck pain secondary to his injury in 1983. He explained that appellant would continue to be disabled as a result of his injury and that appellant had reached a static level and would not improve. In a narrative report dated June 24, 1992, he clarified that appellant could do some work under the guidelines he set forth on January 28, 1992. "He might not be able to function everyday," Dr. Jardon reported, "but I do believe that he could function a good deal of the time under these guidelines without any physical injury and to his benefit by being employed. These guidelines would seem to be perfectly okay."

With Dr. Jardon's approval on July 23, 1992, appellant returned to limited duty on August 10, 1992 in a letter patch and repair position for four hours a day.

Appellant stopped work on October 14, 1992 and filed a claim asserting that he sustained a recurrence of total disability that date as a result of his July 20, 1983 employment injury.

In a report dated October 22, 1992, appellant's attending neurosurgeon, Dr. Douglas J. Long, reported that appellant was seen the previous day continuing to complain of severe incapacitating neck and upper extremity pain. Dr. Long continued as follows:

"His past history is well known to us, having undergone an anterior cervical dis[c]ectomy with fusion at 5/6 in February 1986. Since his fusion, he [has] had intermittent neck pain and in fact had been deemed disabled and unable to return to work in the [employing establishment]. However, recently he returned to a lighter type duty by the release of his other physicians and he [has] noted progressive pain in his neck and arms. He states that he [is] reasonably comfortable with respect to his neck pain when he [is] relatively inactive.

"It is my opinion that [appellant] cannot return to any useful employment activity due to his disabling neck and arm pain. He has a significant past medical history of diabetes mellitus, hypertension, and previous myocardial infarctions. We have deemed him a nonsurgical candidate on previous occasions, and I believe [appellant] represents a chronic pain state for which he has reached a static level and I do not feel further improvement will occur, therefore, I believe he would be deemed permanently disabled."

The Office found a conflict in medical opinion between Dr. Jardon and Dr. O'Hara. The Office referred appellant, together with copies of the medical records, and a statement of accepted facts, to Dr. John G. Yost, a Board-certified orthopedic surgeon, for a referee medical opinion on whether appellant was able to work eight hours per day in the position of letter patch and repair.

In a report on or about December 1, 1993, Dr. Yost related appellant's history and complaints and his findings on examination. He concluded as follows:

"As far as his neck and arm symptoms are concerned, I can see no reason why he should not be able to sit at a table and repair mail. On an active exercise program to stretch out his trapezius muscles and his shoulders, he should be able to reach and move with relatively [sic] comfort. He no doubt will have some aching each day, but I do not look for this aching to limit his participation in such activities."

The Office requested a supplemental report from Dr. Yost addressing whether appellant could perform the duties of the patch and repair position for eight hours a day. In a report dated October 19, 1994, Dr. Yost stated that when he saw appellant on December 1, 1993 he felt that appellant could return to the performance of work, as outlined in his report, repairing mail at a mail table. Appellant's only restriction, Dr. Yost explained, was that he would maybe start four hours a day and gradually work up to an eight-hour shift as appellant had not worked in quite some time. "With this activity," he stated, "[appellant] is going to get some aching, but with exercises, this can be controlled."

On July 31, 1995 Dr. Yost approved an offer of employment as a modified full-time mailhandler with restrictions.¹

In a progress note dated August 16, 1995, Dr. Long reported that appellant was deemed cardiac disabled and also disabled due to his neck pain. He stated: "I believe he should be deemed disabled as a result of his neck and cardiac problems, as it was previously related to in a letter dated October 22, 1992. His situation has not changed. In fact it has gotten worse since the date of that last letter."

Appellant initially rejected the offer of employment but eventually returned to work in the position on December 30, 1995. Appellant returned to work for four hours a day and was scheduled to increase his hours to six effective January 13, 1996 and to eight effective January 27, 1996. On January 24, 1996 the employing establishment telephoned the Office to advise that appellant brought a note from his attending physician and started working only four hours a day.

On February 7, 1996 appellant filed a claim asserting that he sustained a recurrence of disability on or about February 8, 1996 as a result of his July 20, 1983 employment injury. Appellant explained that he never completely recovered from his original injury, that returning to work for eight hours a day had aggravated his injury and that he began working only four hours a day. He claimed a recurrence of partial disability.

On a work release form dated January 24, 1996, Dr. Long restricted appellant to four hours of work per day, five days a week, as previously outlined in the job description. In a form report dated February 28, 1996, he noted chronic neck pain, diagnosed cervical spondylosis, related the condition to appellant's July 20, 1983 employment injury and indicated that appellant was partially disabled and capable of working four hours a day. In a narrative report dated April 10, 1996, Dr. Long reported as follows:

"[Appellant] has been seen by the orthopaedic, neurosurgery service, and pain clinic service on multiple occasions over many years. He is a gentleman who has chronic neck pain and left arm and shoulder symptoms which date all the way back to his original injury in 1983 when he underwent surgical intervention without significant change in his symptoms. I believe, within a reasonable degree of medical certainty, this is a continuation of his original work-related injury. I believe he should remain in his current disability status, that being four hours a day for work with the previously outlined restrictions as it pertains to the U.S. Department of Labor, U.S. Postal Service position.

"[Appellant] has continued to have problems as it relates to his neck, and that has limited his job performance in a modified full-time mailhandler. I am uncertain as to whether he returned to an eight-hour per day limited duty and my recommendation has always been four hours per day. We attempted a trial of increasing eight hours per day but he was unable to do that. His subject of

¹ The position was substantially similar to the letter patch and repair position appellant previously performed.

complaints continue to remain neck pain, shoulder pain, intermittent left upper extremity pain.

“Please find enclosed copies of all formal dictations for which I have seen [appellant]. I have no additional comments. If there are further questions or concerns, please do not hesitate to contact me in writing.”

In a decision dated August 29, 1996, the Office denied appellant’s claims of a recurrence of disability on or about October 14, 1992 and February 8, 1996 on the grounds that the weight of the medical evidence failed to establish that the claimed recurrences were causally related to the employment injury of July 20, 1983.

Appellant requested reconsideration and submitted a February 26, 1997 report from Dr. Long. Indicating that he had reviewed the Office’s August 29, 1996 decision, Dr. Long reported as follows:

“As I previously stated, it [has] been my recommendation that we continue to allow you to work as pain allows, with a minimum of four hours per day. You may increase your work load as tolerated.

“It is my opinion, that the majority of your shoulder pain is secondary to cervical spondylosis, which has been documented objectively, by serial MRI [magnetic resonance imaging] [s]cans, the last being December 23, 1996. This demonstrates status post anterior cervical dis[c]ectomy at C5-6, and cervical spondylosis at C3-4, and C4-5, with some now [sic] evidence of progression of cervical disc degeneration at C6-7.

“I have made numerous documentations as to the reasons why I believe you are partially disabled, have reviewed the memorandum provided to me by you, and unfortunately, I can make no further suggestions than what has been previously made.”

In a decision dated May 1, 1997, the Office reviewed the merits of appellant’s claim and denied modification of its prior decision. The Office found that appellant failed to establish that his condition worsened to the extent that he was not capable of performing light duty for the periods beginning October 14, 1992 and February 8, 1996.

Appellant filed an appeal with the Board on July 23, 1997.

The Board finds that this case is not in posture for a determination of whether appellant’s disability beginning on or about October 14, 1992 was causally related to his July 20, 1983 employment injury.

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of disability and to show that he cannot perform such limited-duty work. As part of this 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 limited-duty job requirements.²

Appellant returned to limited duty on August 10, 1992 with the approval of both his attending orthopedic surgeon, Dr. Jardon, and the Office referral physician, Dr. O'Hara. Both reported that he could work four hours a day with restrictions, and Dr. Jardon specifically approved the position of letter patch and repair.³ Appellant worked in this position for approximately two months before stopping work on October 14, 1992. To support his claim of recurrence, he submitted an October 22, 1992 report from his attending neurosurgeon, Dr. Long. Dr. Long did not note any change in the nature or extent of the limited-duty job requirements, but he did report that appellant complained of severe incapacitating neck and upper extremity pain, that appellant had progressive pain in his neck and arms after returning to limited duty, and that appellant was permanently disabled and could not return to any useful employment activity because of his disabling neck and arm pain. There is no medical opinion evidence to the contrary. The Board finds that this report is sufficiently supportive of a change in the nature and extent of appellant's injury-related condition that further development is warranted.⁴ After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim of a recurrence of total disability on or about October 14, 1992.

The Board also finds that appellant has met his burden of proof to establish that he sustained a recurrence of partial disability on or about February 8, 1996 that was causally related to his July 20, 1983 employment injury.

The Board notes that the weight of the medical evidence did not clearly establish that appellant could perform the limited-duty position for more than four hours a day. On October 19, 1994 Dr. Yost, the Office referral physician, recommended that appellant start work at four hours a day and gradually work up to an eight-hour shift, as he had not worked in quite some time. Even with a gradual increase in hours, Dr. Yost recognized that appellant was "going to get some aching."⁵ Only two weeks after this report, however, appellant's attending neurosurgeon, Dr. Long, reported that appellant was disabled due to his neck condition, as he previously related on October 22, 1992. He reported that appellant's condition had not changed and had, in fact, become worse since his previous report. A conflict in medical opinion thus existed as to the extent of appellant's disability. Dr. Long would later clarify on April 10, 1996 that his recommendation had always been that appellant work four hours a day. The medical evidence thus established that appellant could perform the limited duty but not whether he could increase his work hours to six effective January 13, 1996.

² See *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

³ Because there was no conflict between Dr. Jardon and Dr. O'Hara on whether appellant could return to limited duty for four hours a day, Dr. Yost is not considered a referee medical specialist, and his opinion does not carry special weight. *Helga Risor (Windell A. Risor)*, 41 ECAB 939 (1990).

⁴ See *John J. Carlone*, 41 ECAB 345, 358 (1989) (finding that the medical evidence was not sufficient to discharge appellant's burden of proof but remanding the case for further development of the medical evidence given the uncontroverted inference of causal relationship raised).

⁵ Dr. Yost believed that the expected aching could be controlled by exercises, but there is no evidence that appellant was instructed in or used any such exercises.

Appellant returned to limited duty on December 30, 1995 for four hours a day. As scheduled, his hours increased to six effective January 13, 1996. The record therefore shows a change in the nature and extent of his limited-duty job requirements. Appellant stopped work on January 24, 1996 and supported his claim of a recurrence with reports from Dr. Long. A work release form dated January 24, 1996 showed that Dr. Long restricted appellant to four hours of work per day. A form report dated February 28, 1996 noted chronic neck pain and a diagnosis of cervical spondylosis. In a narrative report dated April 10, 1996, Dr. Long supported that appellant's condition was a continuation of his original work-related injury. He noted that appellant attempted a trial of increasing his hours but was unable to do this. Dr. Long reported that appellant should remain in his current disability status of working four hours a day, which he explained had always been his recommendation.

As the record shows a change in the nature and extent of appellant's limited-duty job requirements on or about January 13, 1996, and as the medical opinion evidence supports that appellant was unable to continue working more than four hours a day, the Board finds that appellant has met his burden of proof to establish a recurrence of partial disability on or about February 8, 1996 that was causally related to his July 20, 1983 employment injury.

The May 1, 1997 and August 29, 1996 decisions of the Office of Workers' Compensation Programs are set aside on the issue of appellant's claimed recurrence of disability on or about October 14, 1992 and are reversed on the issue of appellant's recurrence of disability on or about February 8, 1996. The case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.
November 26, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member