

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LYNDELL FRANCISCO and TENNESSEE VALLEY AUTHORITY,  
BELLEFONTE NUCLEAR PLANT, Hollywood, AL

*Docket No. 99-330; Submitted on the Record;  
Issued November 2, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for wage-loss compensation for the period October 1 to 31, 1996; and (2) whether the Office properly terminated appellant's compensation benefits effective February 4, 1997.

On June 9, 1980 appellant, then a 35-year-old electrician welder, filed a notice of traumatic injury and claim, alleging that on June 5, 1980, he injured his left knee and shin while in the performance of duty. The Office accepted appellant's claim for contusion of the left leg and left knee sprain. On May 18, 1981 appellant filed a second notice of traumatic injury and claim, alleging that he sustained an injury to his back on that date. The Office accepted his claim for low back strain. Appellant filed claims for recurrences of disability related to his May 18, 1981 employment injury for recurrences beginning May 29 and July 24, 1981, April 27, 1983 and April 25, 1984. Appellant returned to work with restrictions between the periods he sustained recurrences of disability and received appropriate compensation for all periods of temporary total disability. In a decision dated October 24, 1985, appellant received a schedule award for a 19 percent permanent impairment of his left leg for 54.72 weeks of compensation for the period April 2, 1985 to a fraction of the day April 20, 1986.

Appellant participated in a rehabilitation program, and on May 24, 1991, he returned to work with the employing establishment as an assistant instructor. In a decision dated July 19, 1991, the Office determined that appellant had returned to work effective May 24, 1991 as an assistant instructor and this position fairly and reasonably represented his wage-earning capacity. Accordingly, the Office reduced appellant's compensation. By letter dated July 24, 1996, the employing establishment advised appellant that his position would be eliminated in a reduction-in-forces effective September 30, 1996. On October 22, 1996 appellant filed a claim for recurrence of disability beginning September 30, 1996. On November 18, 1996 appellant filed a claim for wage loss beginning October 1, 1996. In a decision dated May 15, 1997, the Office accepted appellant's claim for recurrence of disability of his June 1980 employment injury for

the period November 1, 1996 to February 4, 1997, denied appellant's claim for loss of wage-earning capacity for the period October 1 to 31, 1996 and disallowed compensation for the period February 5 to March 15, 1997. In a merit decision dated January 14, 1998 and finalized January 15, 1998, an Office hearing representative affirmed the Office's May 15, 1997 decision finding that appellant did not establish total disability for the period October 1 to 31, 1996 and that the Office properly terminated compensation benefits effective February 5, 1997 on the grounds that appellant's disability ceased by February 4, 1997. By decision dated April 17, 1998, 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 duly reviewed the entire case record on appeal and finds that the Office properly denied appellant's claim for wage-loss compensation for the period October 1 to 31, 1996.

The term "disability" as used under the Federal Employees' Compensation Act means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of injury.<sup>1</sup> The general test for determining loss of wage-earning capacity is whether an injury-related impairment prevents the employee from performing the kind of work he was doing when injured.<sup>2</sup> As appellant claimed a recurrence of disability after he had been reemployed as an assistant instructor, he is required to demonstrate that he is unable to earn wages as an assistant instructor.<sup>3</sup>

Appellant has not submitted any evidence to substantiate his claim for wage-loss compensation for the period October 1 to 31, 1996. Although appellant was terminated from his position effective September 30, 1996, this termination was based on a reduction-in-force and not appellant's inability to perform his position as an assistant instructor. Appellant submitted office notes dated February 4, 1997 and a report dated January 17, 1997 by Dr. W. Carl Dyer, Jr., a Board-certified orthopedic surgeon. He indicated that appellant was temporarily totally disabled by knee surgery on November 1, 1996 which was causally related to his original June 1980 employment injury. Thus, appellant has not establish temporary total disability by medical evidence until November 1, 1996. As the record is devoid of any other medical evidence concerning a recurrence of disability prior to this date, appellant did not establish any loss of wage-earning capacity for the period October 1 to 31, 1996 that was causally related his accepted employment injury.

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<sup>1</sup> See *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

<sup>2</sup> See *Gary L. Loser*, 38 ECAB 673 (1987).

<sup>3</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 the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish 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 requirement. *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

However, the Board also finds that the Office improperly terminated appellant's compensation effective February 4, 1997.

Under the Act,<sup>4</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>5</sup> After the Office determines that an 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>6</sup>

In the present case, the Office did not establish that appellant's disability had ceased and therefore it improperly terminated appellant's compensation effective February 4, 1997. The Office based its determination that appellant's disability had ceased on the February 4, 1997 office notes by Dr. Dyer and a report by Dr. Bennett W. Caughran, a Board-certified orthopedic surgeon and Office referral physician. In his January 17, 1997 report, Dr. Dyer noted that appellant's November 1996 surgery was causally related to his work injury of June 1980 but also indicated that appellant was not able to return to work at that time. In his February 4, 1997 notes, Dr. Dyer reported that appellant was in less pain, but walked with a limp and had synovitis and effusion. He indicated appellant was unable to do prolonged standing, lifting, bending, stooping, pulling, tugging, pivoting or twisting. He found appellant's knee problems were directly related to his original work injury and that appellant would not be able to be employed full time. Dr. Dyer concluded appellant had a 50 percent permanent physical impairment from a whole body standpoint. This report does not indicate appellant's disability ceased and is silent with respect to the issue of whether appellant was capable of performing his prior work as an assistant instructor. Moreover, in his report, Dr. Caughran diagnosed traumatic arthritis of the lateral compartment of the left knee and found that the November 1996 surgery was connected to the 1980 injury although appellant's prior injury and overweight condition might have also been aggravating factors. He indicated appellant was not totally incapacitated for all sedentary work, however, he was subject to recurrent pain in the left knee and low back pain. Dr. Caughran reported that appellant was able to do light work which did not involve stooping, bending, lifting, climbing or prolonged walking. Although the Office requested that Dr. Caughran render an opinion concerning whether appellant was capable of returning to his work as an assistant instructor, the physician did not address this issue definitively. Consequently, as the record does not contain any evidence which clearly establishes that appellant was capable of returning to his position as an assistant instructor, the Office has not met its burden of establishing that appellant's benefits should be terminated effective February 4, 1997.

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *William Kandel*, 43 ECAB 1011 (1992).

<sup>6</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

The decision of the Office of Workers' Compensation Programs dated January 15, 1998 is affirmed with respect to the recurrence determination for the period October 1 to 31, 1996 and reversed with respect to the Office's termination of appellant's compensation. The decision dated April 17, 1998 is hereby set aside.<sup>7</sup>

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

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> In light of the Board disposition concerning the Office's termination finding, any issue with respect to appellant's request for reconsideration is moot.