

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROGER E. GIORDANO and U.S. POSTAL SERVICE,  
POST OFFICE, Hicksville, NY

*Docket No. 98-1053; Submitted on the Record;  
Issued May 16, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of partial disability on or about August 12, 1994 that was causally related to his June 4, 1989 employment injury.

On June 4, 1989 appellant, a motor vehicle operator, sustained an injury while in the performance of his duties when his vehicle struck a pothole or an object in the road. The Office of Workers' Compensation Programs accepted his claim for the conditions of herniated disc at the L3-5 and L5-S1 levels and consequential cervical sprain.<sup>1</sup> Appellant received compensation for temporary total disability on the periodic rolls. He returned to full-time limited duty on January 10, 1992.

In August 1994 appellant filed a claim asserting that he sustained a recurrence of disability (four hours a day) beginning August 12, 1994 as a result of his June 4, 1989 employment injury. He described the circumstances of the recurrence as follows:

“My condition was not cured. It was made worse because of the lack of therapy that I needed but was unable to get. I have gone as far as I can go. The pain has increased to the point of not being able to stand it. The job that I do requires standing and sitting and the getting up and down is very painful. The prolonged standing has been very hard on my back. Prolonged use of anti-inflammatories and pain medication was stopped by Dr. Lehman because blood tests revealed possible damage to my liver and kidneys. I am now unable to take the medication that kept me going. Without the medication I am unable to get rid of the pain.”

In a decision dated December 29, 1995, the Office denied appellant's claim of recurrence on the grounds that the evidence of record failed to demonstrate a causal relationship between

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<sup>1</sup> The Office's Form CA-800, Federal Employees' Compensation Act nonfatal summary, appears to indicate that the Office also accepted the condition of cervical degenerative changes.

the accepted employment injury and the claimed recurrence of disability. The Office found that appellant's physician had provided no evidence to indicate a worsening of appellant's condition or to indicate that appellant's limited-duty job was changed in such a way as to not comply with earlier restrictions.

Appellant requested reconsideration. In support thereof he submitted a November 21, 1994 report from Dr. Jacob M. Lehman, his attending orthopedic surgeon. Dr. Lehman reported that he had seen appellant on a regular basis due to the injury sustained at work on June 4, 1989. Noting that appellant was status post long periods of treatment, Dr. Lehman reported:

"On June 14, 1994 the patient was working light duty. He still had back pain, shoulder pain, leg pain, but could tolerate the pain. No authorization was ever forthcoming for the program of physical therapy that was requested on that date. When seen on August 4, 1994, the patient's pain had increased markedly. The patient has trouble even sleeping. The patient had limited abduction of both shoulders. Reflexes were all hypoactive. Motions of the lumbar spine were markedly restricted by pain. There was marked muscle spasm over the patient's neck and back. The patient had an exacerbation of his condition due to the fact that he was working eight hours a day at this time, mainly standing.

"On October 4, 1994 the patient was still working light duty, but now four hours a day and was able to tolerate the pain, which is still present and is permanent."

Dr. Lehman diagnosed right L5-S1 nerve damage in the lower back. Diagnostic studies showed a bulging disc at L5-S1 compressing the dural sac and compressing the S1 nerve roots. Dr. Lehman reported that appellant had a chronic pain syndrome with chronic muscle spasm over the neck and back, nerve damage in the lower back at L5-S1 and a bulging desiccated disc at L5-S1 compressing the nerve root. He added: "These are all causally related to the injury of 1989, which is compensable."

Treatment notes show that in December 1989 appellant was given Vicodin for pain. This continued through December 1991, when Nortriptyline and Ibuprofen were substituted. In April 1992 Dr. Lehman switched appellant to tylenol and codeine, which he thought might be a little stronger. In June 1992 appellant was given anti-inflammatories and tylox for his severe radiating neck pain. In July 1992 he was advised to take elavil at bedtime to help his pain and insomnia. He continued on elavil, naprosin as needed and tylox only as needed. In April 1993 he was given tylenol, codeine and naprosyn.

In a treatment note dated December 20, 1993, Dr. Lehman stated: "We [wi]ll give him tylenol and codeine for the pain, so long as he does n[o]t abuse it, he should n[o]t run into any problems from that. The naprosyn over a long period of time, you can get kidney or liver damage. Recheck March or February." On February 18, 1994 Dr. Lehman advised appellant not to take anti-inflammatories because his blood urea nitrogen-creatinine ratio was abnormal. On March 14, 1994 he reported that appellant should stay off both anti-inflammatories and painkillers for the time being. On June 14, 1994 appellant was allowed tylenol and codeine for pain, but on June 28, 1994 Dr. Lehman advised appellant that his tests were not back to normal and that he should not go back on medication. The treatment note for August 4, 1994 states:

“Patient is having more pain with the eight[-]hour days, he wants to try working four hours a day and see if he can function a little bit better. Patient still has neck pain, back pain and restricted motions of the shoulders. We have requested authorization for physical therapy and have heard nothing. Patient states he has trouble sleeping during the day. Patient has 100 degrees of abduction of the left shoulder. 100 degrees abduction of the right shoulder. Considerable muscle spasm neck and back, REQUEST AUTHORIZATION FOR A PAIN CONTROL CENTER. Patient can not take pain medication because of his liver problems. Reflexes are all hypoactive. 30 degrees hyperextension, 30 degrees forward flexion lumbar spine. 15 degrees of lateral bending of the lumbar spine. 30 degrees of rotation of the lumbar spine. 30 degrees hyperextension cervical spine, forward flexion is about 40 degrees. 20 degrees right lateral bending, 15 degrees left lateral bending cervical spine. Patient remains with a marked disability. REQUEST AUTHORIZATION FOR PHYSICAL THERAPY AND PAIN CONTROL CENTER. Disability is marked partial. Patient can only work a four[-]hour day. If the patient goes to days, his sleeping patterns may improve. Lifting restricted to 10 to 15 pounds.”

Dr. Lehman completed a work restriction evaluation dated August 5, 1994. He limited appellant to four hours of restricted duty effective immediately.<sup>2</sup>

On February 13, 1996 further development of the evidence revealed that the employing establishment had changed appellant’s work schedule to four hours a day on a temporary basis because the treating physician had authorized only four hours of work at that time. Appellant was currently working six hours a day because the employing establishment again provided work to appellant within the restrictions given by the treating physician.

In a decision dated March 18, 1996, the Office reviewed the merits of appellant’s claim and denied modification of its prior decision.

On August 26, 1996 appellant again requested reconsideration. He indicated that Dr. Lehman was very ill and was fighting for his life and that another doctor had refused to write a report on the issue of recurrence because he was not treating appellant at the time of the recurrence.

In a decision dated September 19, 1996, the Office reviewed the merits of appellant’s claim and denied modification of its prior decision.

On February 18, 1997 appellant requested an oral hearing before an Office hearing representative. He stated that this was his second request.

In a decision dated April 7, 1997, the Office found that appellant was not entitled to a hearing as a matter of right because he had previously requested reconsideration. The Office

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<sup>2</sup> In a treatment note dated March 6, 1995, Dr. Lehman stated that appellant would continue light work and would go back to six hours a day.

denied appellant's request for a hearing on the grounds that he could address the issue in his case equally well through the reconsideration process.<sup>3</sup>

Appellant again requested reconsideration.

In a decision dated June 13, 1997, the Office found that appellant's application was irrelevant or repetitious and, therefore, not sufficient to warrant review of the Office's prior decision.

Appellant again requested reconsideration.

The Office referred the medical record and a statement of accepted facts to an Office medical adviser. On November 17, 1997 the medical adviser reported that there was no evidence that appellant's condition worsened. Diagnostic tests done in 1994 were about the same as a test in August 1997: L5-S1 herniated nucleus pulposus. The medical adviser reported that physical therapy was, in his experience, of little value in longstanding chronic cases and should not be authorized.

In a decision dated November 26, 1997, the Office vacated its decision of December 29, 1995 because the wording of the order indicated that the claim was rejected for failure to establish a causal relationship between the injury and the claimed disability. In the current decision, the Office denied appellant's claim of recurrence because he failed to provide medical evidence sufficient to establish that his employment-related condition had worsened so that he could no longer perform the modified-duty work he was doing and because appellant did not provide factual evidence establishing that the modified-duty job requirements had changed so that he could no longer perform them.

The Board finds that the medical evidence of record is sufficient to establish that appellant sustained a recurrence of disability on or about August 12, 1994 that was causally related to his June 4, 1989 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 total 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.<sup>4</sup>

The evidence in this case shows a change in the nature and extent of appellant's injury-related condition. When appellant filed his claim of recurrence, he explained his attending orthopedic surgeon, Dr. Lehman, had stopped appellant's prolonged use of anti-inflammatories and pain medication, that without this medication he was unable to get rid of the pain and that he

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<sup>3</sup> Appellant does not ask the Board to review the Office's April 7, 1997 decision.

<sup>4</sup> See *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

had gone as far as he could go. He stated that his pain had increased to the point that he was unable to stand it.

The medical evidence supports appellant's claim. Treatment notes show prolonged use of pain killers and anti-inflammatories. Because of the risk of liver damage, however, Dr. Lehman took appellant off pain killers and anti-inflammatories for good by June 28, 1994. Not long thereafter, on August 4, 1994 Dr. Lehman reported that appellant was experiencing increased pain, was unable to take pain medication because of his liver problems and had considerable muscle spasm in his neck and back. Dr. Lehman described appellant's disability as marked partial and restricted appellant's work to four hours a day. In his narrative report of November 21, 1994, Dr. Lehman supported a change in the nature and extent of appellant's injury-related condition when he explained that appellant's pain had "increased markedly" when he examined appellant on August 4, 1994. Dr. Lehman reported that appellant had an "exacerbation" of his condition due to the fact that he was working eight hours a day, mainly standing. In addition to right L5-S1 nerve damage and a bulging disc at L5-S1, Dr. Lehman reported that appellant had a chronic pain syndrome with chronic muscle spasm over the neck and back, nerve damage in the lower back at L5-S1 and a bulging desiccated disc at L5-S1 compressing the nerve root, all of which were causally related to the employment injury of 1989. Dr. Lehman limited appellant to four hours a day and the employing establishment provided work within this restriction.

The only medical evidence negating appellant's claim is the November 17, 1997 note of the Office medical adviser, who reported that there was no evidence that appellant's condition had worsened. This brief notation, three sentences in length, is of little if any probative value. Appellant claims that his pain had become intolerable without the medications that had allowed him to work eight hours a day. The Office medical adviser did not address this issue. He did not review Dr. Lehman's treatment notes or his report of August 4, 1994. He did not address appellant's use of pain killers and anti-inflammatory medication or Dr. Lehman's advice more than a month prior to the date of the claimed recurrence that appellant discontinue his use of such medications.

Because the weight of the medical evidence shows a marked increase in appellant's pain following the discontinuance of medications for his injury-related condition and because Dr. Lehman, thereafter, restricted appellant's work to four hours a day, the Board finds that appellant has met his burden of proof to establish a recurrence of disability on or about August 12, 1994.

The November 26, 1997 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.  
May 16, 2000

Willie T.C. Thomas

Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member