U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE RAY BLUFORD and DEPARTMENT OF THE NAVY, NAVAL SUPPLY SYSTEMS COMMAND, Oakland, CA

Docket No. 99-841; Submitted on the Record;
Issued February 1, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on or after October 23, 1996.

In the present case, the Office accepted that appellant, then a 37-year-old supply systems analyst, sustained a lumbar contusion and strain on December 13, 1988. The Office paid appropriate compensation until appellant returned to work in a light-duty capacity. Appellant was subsequently reassigned to another office and his position title changed from that of a supply systems analyst to a budget analyst. Appellant worked as a budget analyst until October 14, 1994, when he was terminated from employment for failure to comply with leave requesting procedures and excessive unauthorized absences. Appellant filed multiple recurrence of disability claims. The record reflects that the Office reinstated appellant's entitlement to compensation on August 11, 1995.

In a November 29, 1995 report, Dr. Fred Blackwell, a Board-certified orthopedic surgeon and appellant's treating physician, opined that appellant had a chronic musculoligamentous strain and sprain of the lumbosacral spine. He stated that appellant's problem was mainly that of treatment management. In a July 23, 1996 progress report, Dr. Blackwell reported that appellant was permanent and stationary. Restrictions on repetitive bending, lifting and twisting in excess of 15 to 20 pounds were imposed.

In a July 31, 1996 report, Dr. Allan Halden, a Board-certified orthopedic surgeon and Office referral physician, reviewed appellant's history of injury and his course of medical treatment subsequent to his termination of employment on October 14, 1994. Dr. Halden provided the results of his physical examination, tests of record and diagnosed a chronic lumbosacral sprain/strain. He opined that appellant's condition was causally related to the injury of December 13, 1988 and he stated that appellant continued to suffer residuals therefrom. Dr. Halden stated that, following appellant's October 1994 termination from work, appellant had one documentable episode of temporary flare-up of his symptoms from about August 8 through

September 15, 1995. Dr. Halden found appellant was capable of performing the duties of a budget analyst. He noted that maximum medical improvement from the work injury occurred on or about April 26, 1995. Appellant was permanently restricted to lifting no more than 20 pounds. Bending, stooping, kneeling and twisting were permanently limited in aggregate to no more than one hour of an eight-hour day.

On September 23, 1996 the Office issued a notice of proposed termination on the grounds that the weight of the medical evidence of record, as represented by Drs. Blackwell and Halden, established that appellant had no ongoing disability to perform his date-of-injury job or the job held on the date of his termination from federal employment. Therefore, appellant has no entitlement to continuing monetary compensation. As appellant has continuing residuals, the Office noted that he remained entitled to medical benefits.

In a September 20, 1995 report, Dr. Blackwell stated that there was nothing new to report clinically and opined that a new trial of physical therapy was not warranted. He, however, recommended a retraining program if appellant was to get back into the work force.

By decision dated October 23, 1996, the Office terminated appellant's entitlement to wage-loss compensation.

In an October 10, 1996 letter, which the Office received on October 25, 1996, appellant disagreed with the Office's proposed termination. Appellant stated that at the time of the injury he worked as a supply system analyst in the Physical Inventory Branch Quality Assurance Section, not as a budget analyst. Appellant further stated that, when he was reassigned in 1990, he did not perform the duties of a budget analyst in the comptroller's department, but was primarily assigned supply-related functions. Appellant agreed that he was capable of performing most duties of a budget analyst based on the job description with some training. However, he reiterated that he was not performing budget analyst duties at the time of injury or at the time of his discharge from federal duties. Appellant also stated that his termination on October 14, 1994 was directly related to his injury. He related that on October 12, 1994 he was ordered by the department director to pack his belongings. Appellant stated that he, not the department director, packed and carried six boxes of his belongings down two flights of stairs to his car. Appellant related that he has not worked since October 12, 1994. Appellant enclosed a copy of his Form 50 and a job description of a supply system analyst.

Dr. Blackwell continued to submit progress reports documenting that, although appellant has persistent complaints, there was nothing to address from an orthopedic standpoint.

Appellant thereafter requested a hearing which was conducted on June 25, 1997. Appellant submitted witness statements from seven coworkers, which stated that they worked with appellant in the comptroller's department during the period of 1992 to 1994 when he was the minor property custodian/plant manager. They related that appellant's primary services included but was not limited to assigning, tagging, monitoring, storing and relocating the office's printers and monitors and all other office equipment.

In an August 5, 1997 declaration statement, Ray Valderrama stated that he was appellant's supervisor from February 1991 until the date appellant was removed.

Mr. Valderrama stated that appellant was a budge analyst and, in that position, he was never required to do any lifting, moving or carrying of any equipment, boxes or objects. He further related that on October 12, 1994 when appellant was informed of the decision to remove him from federal service, he had helped appellant gather his belongings and place them in boxes. Mr. Valderrama stated that he personally carried three boxes containing appellant's personal belongings to appellant's his vehicle and loaded them into the trunk of his vehicle. Mr. Valderrama stated that, at no time throughout the entire period, either inside or outside of the building, did appellant lift anything heavier than a file folder. He stated that appellant did not carry or lift a box anywhere.

A copy of the Equal Employment Opportunity (EEO) counselor's report of January 5, 1995 was also submitted.

By decision dated August 22, 1997, an Office hearing representative affirmed the October 23, 1996 decision terminating wage-loss compensation. The hearing representative found that appellant was not asked to do anything outside the duties listed on the position description of a budget analyst. Specifically, the hearing representative found that the duties described by appellant's former coworkers directly coincided with what appellant's supervisor and the EEO counselor reported. The hearing representative further found that as appellant worked as a budget analyst and performed the duties of that position from 1990 through the date of his separation in 1994, appellant had demonstrated the ability to work without a loss of wage-earning capacity for over three years. The hearing representative further found that appellant was terminated due to his own misconduct and the medical evidence establishes that appellant is capable of performing the duties he was performing at the time of his termination.

In a September 8, 1997 report, Dr. Blackwell noted that appellant was reporting increasing pain without a history of a new injury. He stated that the magnetic resonance imaging examination in July 1996 showed no evidence of significant pathology. An electromyogram (EMG) study was recommended to exclude the possibility of nerve root compromise. A September 11, 1997 EMG and nerve conduction study were noted as essentially normal. In a September 15, 1997 report, Dr. Blackwell reported that no substantial medical matter has changed. He related that, although appellant's complaints were impressive, his clinical findings were not. Dr. Blackwell reported that he was only seeing appellant on an as needed basis. In a report of December 24, 1997, Dr. Blackwell stated that there had been no overall change in appellant's condition. He recommended that appellant start again on a work conditioning program.

In a letter dated February 17, 1998, appellant, through his attorney, requested reconsideration. Appellant's attorney submitted copies of the materials which comprised appellant's EEO claim with regard to his termination. He stated that much of this material indicated that appellant was terminated from his position as a result of issues involving sick leave usage and failure to notify the job of times he was going to be off of work. Appellant's attorney argued that the reason for the termination was very much in line with appellant's claim that although he was described as a budget analyst, his work entailed physical activities which caused him to lose a substantial period of time from work. Appellant's attorney asserted that

appellant lost time from work because his lower back injury was aggravated by the work he was doing on the job.

Appellant's attorney also submitted two statements from appellant's coworkers for the proposition that, even though appellant was described as a budget analyst, he was instead doing the work of a property custodian/plant manager. Appellant's attorney asserted that the additional evidence indicates that appellant was being asked to do work that was outside the description of a budget analyst and aggravated appellant's condition so that he was incapacitated from working.

In a January 11, 1998 statement, Charles Coates indicated that he worked with appellant during the period of 1992 to 1994, when he was a minor property custodian/plant manager. Mr. Coates related that, on occasion, he saw appellant moving typewriters, printers, modems and CPUs, as part of his job of accounting for the office equipment located in the office where he worked, which was in a separate building. Mr. Coates stated that the above-mentioned units which each weighed approximately 15 to 20 pounds. He stated that appellant would bring a cart, lift the office equipment off of the desk and place it on the cart and take the equipment either to different offices in the building or to storage. Mr. Coates stated that appellant not only placed the equipment on the cart, but would also have to take it off the cart. He also stated that as far as he knew appellant worked on his own.

In a February 8, 1998 statement, John Celmer also related that he was a coworker of appellant from 1992 to 1994. Mr. Celmer stated that, even though appellant was technically assigned the job of budget analyst, it was his observation that appellant had a far more physical job to do. Mr. Celmer related that he observed appellant doing many different tasks, many of which required physical activity including lifting, bending, stooping, walking and carrying. For example, Mr. Celmer stated that he observed appellant move office equipment, including computers and computer monitors on either a rack or using office chairs to move the equipment around. Mr. Celmer estimated that a computer CPU weighed approximately 20 to 30 pounds. He also related that he observed appellant often being sent on errands and that it was his impression that appellant was up and on the go a lot.

In a decision dated May 21, 1998, the Office denied modification of the August 22, 1997 Office hearing representative's decision.

In a letter dated June 16, 1998, appellant, through his attorney, again requested reconsideration. A June 7, 1998 statement from Tim Hunt was submitted. Mr. Hunt related that he was working for the employer in 1994 and that appellant brought excess equipment to his office as that was the job he was required to do. He stated that he remembered seeing appellant at least once a week for approximately two months during which time appellant would bring him, along with other items, typewriters and computers. The typewriters he brought weighed at least 50 pounds and the computers weighed approximately 60 pounds. He related that it was his understanding that the work appellant had to do in order to get him the above items was that "he had to carry the equipment from the second floor down to load on a vehicle at his building and then drive them over to me. When they arrived at my building, [appellant] and I would take the materials out of the vehicle and load them onto a cart. This required appellant to lift heavy equipment, and he was also required to repetitively bend, lift and twist in order to perform these services. [Appellant] and I would then bring the equipment to my office where it would remain

on the cart until I dealt with it. While [appellant] and I both unloaded the vehicle when it reached me, my understanding is that [appellant] had to load this material by himself in order to get it to me."

Dr. Blackwell continued to submit progress reports indicating that appellant was showing improvement.

By decision dated September 15, 1998, the Office denied modification of the Office's prior decisions.[1]

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on or after October 23, 1996.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.[2]

In this case, the Office accepted that appellant sustained a lumbar contusion and strain. The Office paid appropriate compensation and medical benefits even after appellant was terminated from his federal employment on October 14, 1994 for misconduct. By decision dated October 23, 1996, the Office terminated appellant's wage-loss compensation but continued appellant's entitlement to medical benefits. In order to terminate appellant's compensation benefits, the Office must establish that the employment-related disability has ceased or that it is no longer related to employment. With respect to the opinions of Drs. Blackwell and Halden, whose opinions formed the basis of the Office's initial October 23, 1996 termination, both physicians had an accurate history of the work injury and opined that appellant still had residuals from the work injury maximum medical improvement had been reached. Dr. Blackwell, appellant's treating physician, reported that appellant was permanent and stationary on July 23, 1996. Dr. Halden, the Office referral physician, reported that maximum medical improvement occurred on or about April 26, 1995. Each physician imposed permanent restrictions on lifting, bending, stooping, kneeling and twisting. Dr. Halden specifically opined that, from the job description and the statement of accepted facts, appellant was capable of performing the duties of a budget analyst. Accordingly, although both Drs. Blackwell and Halden, found that appellant had residuals from his employment-related condition, which required further medical treatment, they both opined that appellant was capable of working within the given restrictions. Inasmuch as appellant's medical restrictions were within the duties of appellant's light-duty position as a budget analyst,[3] the opinions of Drs. Blackwell and Halden are sufficient to discharge the Office's burden of proof to justify the termination of appellant's compensation benefits.

[1] The Office subsequently issued a decision dated November 3, 1998, in which appellant's attorney fees were granted in full. Inasmuch as this decision is not being appealed, the Board will not address this decision.

[2] *Patricia A. Keller*, 45 ECAB 278 (1993).

[3] The physical demands of the budget analyst position are stated as follows: Work is sedentary and no special

The Board notes that the record reveals that appellant was terminated from his employment due to misconduct. The evidence of record would have to establish that the termination of appellant's employment was due to his physical inability to perform his assigned duties, rather than misconduct. At the time of the Office's initial October 23, 1996 termination, the record is devoid of any evidence that appellant was not and could not perform his assigned duties as a budget analyst. The Board has held that an employing establishment's termination of employment for unacceptable conduct by the employee does not establish "disability" for work within the meaning of the Federal Employees' Compensation Act.[4]

Inasmuch as the Office's October 23, 1996 termination was supported by the weight of medical opinion, the burden of proof shifted to appellant to establish that his disability subsequent to October 23, 1996 continued to be causally related to his employment injury.[5]

In the present case, the Office hearing representative accepted as factual that part of appellant's duties as a budget analyst from 1992 through 1994 included being responsible for some special projects and for turning in excess equipment. In the January 5, 1995 report of the EEO counselor, it was noted that appellant was assigned responsibilities for minor property and systems problems that required him to move monitors and printers when the department had to meet deadlines and no one else was available. It was further noted that Mr. Valderrama, who was appellant's supervisor for two to three years, was aware of appellant's chronic back problem and had specifically directed appellant not to lift things that could cause injury. Appellant was supposed to use laborers to move and turn in excess equipment. The most recent medical evidence of record reflects that, on December 24, 1997, Dr. Blackwell found appellant capable of lifting up to 20 pounds and to avoid repetitive bending, lifting and twisting. The July 31, 1996 report from Dr. Halden indicated permanent restrictions of lifting no more than 20 pounds and bending, stooping, kneeling and twisting were limited in the aggregate to no more than one hour in an eight-hour day.

The Board finds that, although appellant alleges that he was the minor property custodian from 1992 to 1994 and this is supported by witness statements, he has not shown that there was a change in the nature and extent of his light-duty job requirements. The statements submitted by appellant's coworkers all support the fact that appellant was responsible for turning in excess equipment in the performance of special projects during 1992 to 1994. The statements from Mr. Celmer, Mr. Coates and Mr. Hunt further indicate that appellant occasionally lifted and moved pieces of office equipment. These statements, however, do not establish that appellant performed these tasks on a regular or daily basis. Instead it indicates that the equipment was being relocated during a limited period of time due to downsizing. Furthermore, although the witnesses provided estimates pertaining to the weight of the typewriters, printers, modems and CPUs were provided, these are general estimates as neither of the witnesses explained how the weight of the equipment was assessed. Because the weight of the equipment cited by the

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effort is required. Some walking and standing is required in going to and from departments.

[4] *John W. Normand*, 39 ECAB 1378 (1988).

[5] *See Talmadge Miller*, 47 ECAB 673 (1996).

witnesses are not credible, it cannot be established that appellant lifted and moved equipment in excess of the 20-pound lifting restriction provided by Drs. Blackwell and Halden. In his June 7, 1998 statement, Mr. Hunt related that, in lifting the equipment, appellant was required to "repetitively bend, lift and twist." However, this statement is unsupported as there is no indication as to the amount of the equipment being relocated at a given time or how long it took to unload the equipment. Moreover, although he also stated that appellant had to carry and load the equipment prior to bringing it to him, this statement is insufficient to support that appellant performed independent lifting. Mr. Hunt could only observe and testify as to the work he performed with appellant; the manner and/or methodology with which appellant acquired and transported the equipment was not directly observed by Mr. Hunt and, thus, is considered hearsay. Furthermore, it has been accepted as factual that appellant was specifically directed by his supervisor not to lift things that could cause injury and that laborers were available to move and turn in excess equipment. Accordingly, the witness statements do not provide credible evidence that appellant was required to lift and move the equipment himself. Moreover, there is no indication from the witness statements that appellant encountered any difficulty in the performance of his duties of relocating the excess equipment from 1992 to his termination in 1994.

The Board also finds there is no medical evidence of file to indicate that appellant was unable to perform the duties required of him after his reassignment to the budget analyst position, which included the special projects. The medical evidence establishes that appellant is unable to perform the duties as a supply systems analyst, his date-of-injury position, but supports his ability to perform the duties of a budget analyst, including the special projects which were assigned. The medical evidence of file establishes no increased disability and the May 28, June 18 and August 13, 1998 medical reports from Dr. Blackwell indicate improvement due to work conditioning therapy. Accordingly, the medical evidence fails to establish that appellant was required to perform duties beyond his medical restrictions.

It is, as noted above, appellant's burden to establish his claim. In the absence of medical opinion evidence that appellant remained totally disabled due to the effects of the December 13, 1988 employment injury, the Board finds that appellant has not met his burden of proof in this case.

The decisions of the Office of Workers' Compensation Programs dated September 15 and May 21, 1998 are hereby affirmed.

Dated, Washington, DC
February 1, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member