

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT EARL YOUNT and U.S. POSTAL SERVICE,  
POST OFFICE, Akron, OH

*Docket No. 01-357; Submitted on the Record;  
Issued October 5, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for compensation for the period commencing July 28, 1994.

The Office accepted appellant's claim for right shoulder and upper back strain. This case is on appeal to the Board for the third time.<sup>1</sup> In the first appeal, the Board vacated the Office's decisions dated June 28, 1994 and April 6, 1995 and remanded the case for further development of the medical evidence. The Board instructed the Office to refer appellant to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's shoulder and upper back condition after August 17, 1993 was causally related to the February 8, 1993 employment injury.<sup>2</sup> In the June 28, 1994 and April 6, 1995 decisions, the Office denied appellant's claim for continued disability.

The Office referred appellant to Dr. Charles J. Paquelet, a Board-certified orthopedic surgeon. In a report dated September 26, 1997, he considered appellant's history of injury, performed a physical examination and reviewed the diagnostic tests of record consisting of x-rays, magnetic resonance imaging (MRI) scans, a bone scan and electrodiagnostic studies. Upon reviewing the medical reports of records from Dr. Tim Newman, Kaiser Permanente Clinic dated from March through December 1993 and Dr. Ron Vargo, a chiropractor, from January through July 1994, Dr. Paquelet concluded that "those various physicians struggled to explain [appellant's] symptoms of pain involving the upper back and right shoulder." He stated:

"A variety of diagnostic possibilities were suggested and the conclusion inferred was that he suffered a sprain of the dorsal spine and right shoulder. Therefore, it may be concluded that all of the examinations and treatments from February 8,

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<sup>1</sup> The facts and history surrounding the prior appeals are set forth in the initial two decisions and are hereby incorporated by reference.

<sup>2</sup> Docket No. 95-2079 (issued August 1, 1997).

1993 until at least July 27, 1994 concern the residuals of the injury of February 8, 1993 that being a right shoulder and upper back strain. Furthermore, according to the patient, he then came in attendance with Michael Hill, M.D., who gave him regular treatments for nearly a year that culminated in a pain management program at St. Thomas Hospital in May 1995. It would thus appear that those examinations and treatments were also directly related to the allowed claim.”

In a work restriction form dated September 26, 1997, Dr. Paquelet restricted appellant from bending, twisting, reaching and lifting and working only 4 hours a day with a weight restriction of 25 pounds maximum “with 10 pounds frequent.”

In response to the Office’s request for further clarification, in a report dated November 6, 1997, Dr. Paquelet stated that appellant had residual complaints of pain in the upper back and neck directly related to the February 8, 1993 employment injury. He stated that, by physical examination, appellant had some limited motion of the cervical spine and right shoulder but no other evidence of structural or neuromuscular disease involving the spine or either upper limb. Dr. Paquelet stated that the work tolerance limitations were directly and proximately related to the February 8, 1993 employment injury.

In a report dated December 2, 1997, Dr. Paquelet stated that the current definitive diagnosis was ruptured disc at C5-6 and chronic upper back and right shoulder strain. He stated that the ruptured disc “could have been a result of the 1993 injury but that is strictly conjecture.” Dr. Paquelet stated that appellant was disabled “on the basis of the unallowed ruptured disc C5-6 and the chronic right shoulder and upper back strain.” He stated that appellant was able to work four hours a day on the “basis of the above diagnoses.”

By decision dated December 10, 1997, the Office stated that Dr. Paquelet concluded that appellant was entitled to compensation from February 8, 1993 to July 27, 1994, including chiropractic treatment and the pain management program with Dr. Hill which culminated with appellant’s participation in a pain management clinic in May 1995.

By letter dated December 19, 1997, appellant informed the Office that he believed the Office made a typographical error in the December 20, 1997 decision and the date of disability should have been extended to July 27, 1997 rather than July 27, 1994.

By decision dated March 12, 1998, the Office stated that the dates in the December 10, 1997 decision were correct.

Appellant appealed to the Board, on the second appeal,<sup>3</sup> the Board vacated the Office’s December 10, 1997 and March 12, 1998 decisions, stating that the decisions do not constitute final decisions within the meaning of the Federal Employees’ Compensation Act. The Board remanded the case for the Office to make the appropriate findings of fact on the nature of appellant’s work-related injury and the periods of disability and provide reasons for its findings, with reference to the evidence in the record, to be followed by a *de novo* decision.

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<sup>3</sup> Docket No. 98-1367 (issued December 20, 1999).

By decision dated February 25, 2000, the Office denied appellant's claim, stating that the evidence of record established that there was no longer a causal relationship between the injury and the need for loss compensation beyond July 27, 1994. In its decision, the Office considered Dr. Paquelet's September 26, 1997 report and found that his opinion established that appellant was disabled due to the right shoulder and upper back strain through July 27, 1994 and thereafter required medical treatment for those conditions. The Office found that the opinions of the chiropractors, Drs. Vargo and R.S. McMillen, supported a period of protracted disability but they thought that the accepted diagnoses should be expanded. The Office found that the orthopedists' opinions were not probative because they did not adequately explain the relationship between appellant's physical condition and his disability. The Office, therefore, found that the opinion of Dr. Paquelet, the second opinion physician, was well rationalized and constituted the weight of the evidence.

By letter dated March 8, 2000, appellant requested an oral hearing before an Office hearing representative, which was held on July 25, 2000. At the hearing, he stated that, after the February 8, 1993 employment injury, he returned to work part time with limited duty a couple of times. Appellant stated that prior to July 1995 when he left the employing establishment, he missed nine months of work. He stated that he had difficulty working at the employing establishment from February 8, 1993 through July 1995 due to pain in his back and shoulders. Appellant stated that he participated in the pain management program in May 1995. He stated that when he first returned to part-time work following the February 8, 1993 employment injury, he worked eight hours performing the job of fixing torn mail which differed from his preinjury job but even that work became too difficult for him to perform.

Appellant stated that in July 1995 he began working in "retail sales" at a sporting goods store eight hours a day where he greeted the customers, did customer service and did "stocking" of the store's products which included fishing lures. From February 1998 through October 1999 appellant sold cars and then returned to the sporting goods store where he was currently working but still having back problems. Appellant stated that he chose jobs with lots of standing instead of sitting jobs because his physician told him that sitting "was the worst thing" he could do for his back.

By decision dated October 4, 2000, the Office hearing representative affirmed the Office's February 25, 2000 decision.

The Board finds that the Office improperly denied appellant's claim for compensation for the period commencing July 28, 1994.

Since the Office was paying appellant compensation based upon the ongoing submission of documentation that he was disabled following his February 8, 1993 employment injury, appellant maintained the burden of establishing entitlement to continuing disability which was related to the employment injury.<sup>4</sup>

In this case, the evidence of record establishes that appellant continued to be disabled after July 28, 1994 due in part to the accepted condition of right shoulder and upper back strain.

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<sup>4</sup> *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992).

The Office denied appellant's claim for disability commencing July 28, 1994 based on Dr. Paquelet's September 26, 1997 report, which the Office interpreted as establishing that appellant was disabled due to his right shoulder and upper back strain through July 27, 1994 and thereafter continued to require medical treatment for those conditions. The Office, however, did not consider Dr. Paquelet's work restriction form dated September 26, 1997 which limited appellant to working 4 hours a day, lifting no more than 25 pounds and only 10 pounds frequently and no bending, twisting or reaching. Further, the Office did not consider Dr. Paquelet's November 6, 1997 report in which he stated that appellant had residual complaints of pain in the upper back and neck directly related to the February 8, 1993 employment injury and the work tolerance limitations were directly and proximately related to the February 8, 1993 employment injury. The Office also did not consider Dr. Paquelet's December 2, 1997 report in which he diagnosed a ruptured disc at C5-6 whose origin was uncertain but stated that appellant was disabled on the basis of the unallowed ruptured disc at C5-6 and the chronic right shoulder and upper back strain. Dr. Paquelet's September 26, 1997 work restriction form shows that appellant could only work part-time with restrictions. That form in combination with his November 6 and December 2, 1997 reports in which he stated that appellant's upper back and neck pain and work tolerance limitations were directly related at least, in part, to the February 8, 1993 employment injury strongly suggest that appellant continued to be disabled after July 28, 1994 due to the accepted conditions.<sup>5</sup> Dr. Paquelet's reports are sufficient to require further development of the record. Proceedings under the Act are not adversarial, and while appellant has the burden to establish entitlement to compensation, the Office shares responsibility in developing evidence.<sup>6</sup>

On remand, the Office should request clarification from Dr. Paquelet, and after such development as is deemed necessary, issue a *de novo* decision.

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<sup>5</sup> It is not necessary to prove a significant contribution of employment factors to a condition for the purpose of establishing causal relationship. See *Kathleen M. Fava (John F. Malley)*, 49 ECAB 519, 524 (1998).

<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

The October 4 and February 25, 2000 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC  
October 5, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member