

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVATORE BOLOGNA and DEPARTMENT OF DEFENSE,
DEFENSE DEPOT MECHANICSBURG, Mechanicsburg, PA

*Docket No. 02-431; Submitted on the Record;
Issued February 5, 2003*

DECISION and ORDER

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

The issue is whether appellant has established a recurrence of total disability on and after July 3, 1995 causally related to his accepted July 13, 1972 employment injury.

This is the third appeal in this case. In the first appeal, the Board issued a decision on December 14, 1998 in which it set aside the Office of Workers' Compensation Programs' decisions and remanded the case for further consideration.¹ The Board determined that since there were uncontroverted inferences of causal relationship and that appellant was no longer capable of performing his light-duty position, the Office should develop the medical evidence on whether appellant's claimed recurrence was causally related to his accepted employment injuries and whether he was unable to perform his light-duty position. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.²

In a letter dated February 18, 1999, the Office requested a detailed narrative report from appellant's attending physicians together with a copy of an updated statement of accepted facts. A response was requested within 25 days. By copy of each letter sent to the physicians, both appellant and his authorized representative were advised that although the Office was attempting to obtain this information, the final responsibility for ensuring the information was received remained with appellant.

¹ Docket No. 96-2666.

² The Office had accepted that appellant, then a 28-year-old packer, had sustained a lumbosacral strain, L5 radiculopathy and depression as a result of his July 13, 1972 injury. He eventually returned to regular-duty work on December 6, 1972. After sustaining several recurrences of disability, which the Office accepted, he underwent lumbar laminectomy surgery on November 10, 1976. Appellant returned to work in a part-time limited-duty position which his treating physician, Dr. George P. Roth, a Board-certified neurosurgeon, had approved and worked for several weeks before claiming a recurrence of disability beginning July 3, 1995 when he stopped working.

In a March 8, 1999 report, Dr. George P. Roth, a Board-certified neurosurgeon, stated that he considered appellant to be totally and permanently disabled. He related that he attempted to return appellant to a sedentary limited position in June and July, 1995 on a trial basis. However, appellant was unable to continue working, claiming that the work situation aggravated his condition. Dr. Roth related that he was aware that appellant was up and about during the day, that he was not bed or house confined because of his symptoms and that appellant informed him that his tolerance for ordinary activities varied from day to day. Dr. Roth related that after many years of conservative treatment, appellant underwent a laminectomy and instrumentation fusion in September 1997. He advised that, although appellant initially benefited from the surgery, he experienced increased low back and recurrent right lower extremity complaints. Dr. Roth opined that appellant's situation was essentially unchanged from what it has been over the years.³ He further opined that appellant's lumbar and lower extremity complaints related back to his original work injury of July 1972, although there had been incidents aggravating his complaints over the years. Dr. Roth further noted that appellant also had cervical and left upper extremity complaints related to cervical spondylosis at the C5-6 level and a left carpal tunnel syndrome. He noted that appellant recently underwent coronary by-pass surgery in January 1999 and was recovering from that surgery. Appellant also experienced bouts of depression over the years.

In a March 1, 1999 report, Dr. Michael F. Lupinacci, a Board-certified physiatrist, advised that although the Office had requested to review his office notes from June and July 1995, he did not see appellant in his office until August 14, 1995. Upon reviewing the August 14, 1995 note, Dr. Lupinacci stated that appellant's back pain seemed to be at the same level as it had been prior to his return to work in June 1995. He stated that he suspected that Dr. Roth and Dr. Rychak had made an estimate of his physical capacity and his physical restrictions. Dr. Lupinacci stated that with any such estimate of chronic pain, appellant's ability to tolerate real time work was difficult if not impossible to predict. Dr. Lupinacci opined that appellant's back pain worsened with the return to work trial in June 1995, but following completion of that return to work trial, his back pain was eventually the same as it had been prior to his attempt to return to work. He noted that although appellant was able to attend a fitness club and a pain support group and was able to provide himself with transportation, this information, did not predict the ability of the patient with chronic low back pain to be successful in a physical return to work. Dr. Lupinacci opined that appellant's chronic back pain and two surgeries were all related to the original injury of July 1972. He had no documentation to the contrary.

In a March 11, 1999 report, Dr. Steven B. Wolf related that appellant underwent a posterior spine reconstruction in September 1997 and had not returned to his previous employment. He opined that appellant was totally disabled due to his lumbar spine problems. Appellant also had cervical spondylosis, recently underwent a coronary artery bypass and experienced depression. Dr. Wolf opined that appellant was totally disabled on a permanent basis. No discussion was rendered pertaining to appellant's claimed period of recurrence.

³ Although Dr. Roth related that he recently saw appellant in the office and enclosed a copy of his office note related to his visit, the record is devoid of such an office note.

In an undated report, Dr. Michael J. Asken, a clinical psychologist, stated that appellant was seen intermittently for support and counseling from 1991 to 1996 for issues related to his work-related injury of July 13, 1972. They related that appellant's symptoms of depression intensified during times when his pain symptoms worsened. Dr. Asken opined that appellant's psychological state was erratic and seemed responsive to his physical state. No opinion was rendered pertaining to the time of the recurrence of disability.

In a decision dated April 5, 1999, the Office denied appellant's claim for a recurrence of disability commencing July 3, 1995 on the basis that the medical evidence failed to demonstrate that the claimed recurrence was causally related to the injury of July 13, 1972. The Office found that Dr. Roth's May 8, 1999 report did not constitute a well-reasoned medical opinion to support that appellant could not work the light-duty job which was designed for him based on the restrictions set by his physician and an independent physician.

In the second appeal of this case, the Board issued a decision remanding the case,⁴ as the case record failed to contain the April 5, 1999 Office decision or any decision pertaining to appellant's claim for a recurrence of disability commencing July 3, 1995. The Board instructed the Office to reconstruct and assemble the record and issue a *de novo* decision on the merits of appellant's claim to preserve his appeal rights.

In a decision dated September 25, 2001, the Office denied appellant's claim for compensation for a recurrence of disability on or after July 3, 1995.

The Board finds that appellant has not established that he sustained a recurrence of disability on and after July 3, 1995 causally related to his accepted July 13, 1972 employment injury.

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 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 light-duty job requirements.⁵ With respect to his medical condition, an employee must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.⁶

The Board finds that the record is devoid of any factual evidence regarding any changes in appellant's light-duty job occurring on and after July 3, 1995. Although appellant's treating physicians were requested to provide a rationalized report addressing his medical condition on

⁴ Docket No. 99-1520.

⁵ *Richard E. Konnen*, 47 ECAB 388 (1996); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

and after July 3, 1995, the Board finds that the submitted reports are of little probative value in establishing causal relationship in this case.

The record reflects that Dr. Roth had released appellant to work four hours a day for two days a week and appellant worked only two four-hour days. Although Dr. Roth had stated in his March 8, 1999 report, that appellant was returned to work in a sedentary part-time position on a trial basis, he relied on appellant's statement that his ability to perform on a consistent basis at work was more than he could physically accomplish. Dr. Roth failed to discuss the duties within the light-duty position and supplied insufficient medical explanation as to how or why the accepted work conditions caused or contributed to appellant's disability commencing July 3, 1995. Dr. Roth failed to provide a well-rationalized medical opinion explaining how and why appellant's situation pertaining to his increased low back and recurrent right lower extremity complaints remained essentially unchanged over the years even though he underwent a reoperation in September 1997. Without such rationale, Dr. Roth's report is of diminished probative value in establishing causal relationship in this case.⁷

In a March 1, 1999 report, Dr. Lupinacci opined that appellant's back pain worsened with the trial work return in June 1995 and his back pain was essentially at the same level it had been prior to his return to work in June 1995. He further related that it was difficult to predict the ability of a patient with chronic low back pain to be successful in a real time physical return to work. Dr. Lupinacci did not provide medical rationale explaining how or why the accepted 1972 work injury caused or contributed to appellant's disability for work as of July 3, 1995. Moreover, the Board notes that Dr. Lupinacci failed to mention appellant's other medical conditions, such as a cervical spondylosis problem at the C5-6 level, a left carpal tunnel syndrome and a recent coronary bypass surgery noted by the other physicians of record. Medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.⁸ Although Dr. Asken opined that appellant's psychological symptoms increased in response to severe pain and physical disability, it is not clear from his report how appellant's psychological condition caused or contributed to his claimed disability.

Although Dr. Wolf expressed a general awareness to appellant's other medical conditions and opined that appellant was totally disabled due to his lumbar spine problems, he did not specifically address appellant's disability commencing July 5, 1995 to the accepted work injuries. This report is of diminished probative value in establishing causal relationship.

As appellant submitted insufficient evidence substantiating either a change in the nature and extent of his light-duty position on and after July 3, 1995 or an objective worsening of the accepted conditions on and after that date, he has not met his burden of proof in establishing the claimed recurrence of disability commencing on that date.

⁷ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

⁸ *See Patricia M. Mitchell*, 48 ECAB 371 (1997); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

The decision of the Office of Workers Compensation Programs dated September 25, 2001 is affirmed.

Dated, Washington, DC
February 5, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member