

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**DARRYL W. GERRY, Appellant**

**and**

**DEPARTMENT OF THE NAVY,  
PORTSMOUTH NAVAL SHIPYARD,  
Portsmouth, ME Employer**

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**Docket No. 04-1795  
Issued: November 26, 2004**

*Appearances:*  
*Bradley M. Lown, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On July 12, 2004 appellant, through his representative, filed a timely appeal from a June 7, 2004 Office of Workers' Compensation Programs' decision, in which a hearing representative affirmed a finding that he had not established entitlement to compensation beginning May 1994. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that he sustained a recurrence of disability beginning May 1994 causally related to his accepted employment injury.

**FACTUAL HISTORY**

On November 29, 1984 appellant, then a 30-year-old shipfitter, filed an occupational disease claim alleging that he sustained claustrophobia and stress due to factors of his federal

employment.<sup>1</sup> The Office accepted his claim for panic attacks and panic disorder. Appellant continued to work with restrictions against working in confined spaces.

The record indicates that appellant resigned from the employing establishment effective May 27, 1994.<sup>2</sup>

In a report dated April 23, 1996, Dr. Gould noted that he initially treated appellant on July 19, 1995 for panic disorder which began in 1984, when he worked at the employing establishment. He related that appellant would “require therapy and medication monitoring for an indefinite period of time.”

In a report received by the Office on June 12, 1996, Dr. Charles S. Cole, a clinical psychologist, related that he began to treat appellant in August 1995, for panic symptoms and agoraphobia. Dr. Cole discussed appellant’s history of “develop[ing] a panic response to confined places in 1984, when he got stuck in the tank of a submarine that he was working on.”<sup>3</sup>

Drs. Gould and Cole submitted a joint report dated October 21, 1996. The physicians stated:

“[Appellant’s] problems with panic and his extensive pattern of avoiding situations where he fears being confined or trapped, began in 1984 after being stuck in a submarine in Scotland. His absence from treatment between 1991, when he last saw Dr. Newkirk and 1995, when he first saw Dr. Gould, was not the result of having resolved the problem and being symptom free. Dr. Newkirk had left the area and he did not wish to begin working with someone else.”

Drs. Gould and Cole opined that appellant’s current symptoms were part of a “continuous disorder with the major cause” his work at the employing establishment.

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<sup>1</sup> The claim form does not appear to be in the record.

<sup>2</sup> In a decision dated November 13, 1991, the Office denied appellant’s claim for a recurrence of disability on or after June 1990. In a decision dated March 10, 1992, the Office modified its November 13, 1991 decision and found that he had established that his medical expenses for treatment of panic disorder were due to his accepted employment injury. On April 2, 1996 appellant filed a claim alleging that he sustained a recurrence of disability in September 1995 causally related to his 1984 employment injury. He stated that he was not claiming lost wages and had worked as a transportation secretary in private employment from June 1994 to the present. In a decision dated August 30, 1996, the Office denied appellant’s recurrence claim. He requested reconsideration. In a decision dated February 12, 1997, the Office rescinded its August 30, 1996 decision and authorized payment of medical expenses for treatment by Dr. Mark A. Gould, a psychiatrist.

<sup>3</sup> The record contains progress notes from Dr. Gould dated April to October 1996, in which he described his treatment of appellant for panic symptoms.

On April 8, 2002 appellant filed a claim for compensation on account of disability requesting compensation for wages lost from May 1994 to the present. In a statement accompanying his claim, he stated:

“The lost wages I am seeking are from when I left my position at the [employing establishment] in May of 1994 to the present time. The ongoing struggle of the anxiety/panic disorder and the downsizing of the [employing establishment] personnel at that time was becoming to[o] much of a burden for me. I have been working since leaving [the employing establishment] but for much lower wages than I was being paid while there.”

In a report dated October 16, 2001, Dr. Cole diagnosed specific phobia, situational type which he related to appellant’s federal employment. He related:

“In May of 1994[,] [appellant] left his employment at the [employing establishment] when he could no longer tolerate the level of anxiety he was feeling at work. He reports that he was having [two] to [three] panic attacks a month. Working on the [sixth] floor, [appellant] was constantly anxious about the possibility of being trapped on the floor or in the stairwell. He was unable to use the elevator, creating discomfort with coworkers when in a group going between floors. When there was a fire alarm, the crowded, slow movement down the stairs created intense anxiety for him.”

Dr. Cole also noted that appellant was “medically discharged from the Air National Guard because he could not meet the medical criteria of service due to his anxiety disorder. Consequently, he lost his retirement eligibility.” Dr. Cole stated:

“It is highly likely that [appellant] has experienced lost income as a result of his anxiety disorder. Since leaving the [employing establishment], he has worked in smaller settings where he has had the freedom to leave the workplace if necessary. In a recent job, he did not pursue a promotion to a higher paying position because it would have necessitated travel by plane. While improved, [appellant] still is hesitant to enter crowded and unfamiliar situations where quick egress might be impeded. [His] anxiety disorder has contributed to more frequent job changes tha[n] otherwise would have occurred.”

In a letter dated April 25, 2002, the Office noted that at the time appellant resigned on May 27, 1994 he was working with restrictions. The Office informed him that the medical evidence supported that his medical condition around July 1995 was due to his employment injury, but did not address whether he was capable of performing his job duties at the time of his resignation. The Office requested additional factual information regarding appellant’s resignation as well as a detailed medical report explaining why he could no longer perform his job duties at the time that he resigned from federal employment.

In a response dated May 20, 2002, appellant related that his supervisor abided by his restrictions and that the “only problem that seemed to arise from working in this office was the fact that it was on the [sixth] floor of an office building.” He further noted that he experienced

difficulties with fire drills and anxiety during downsizing at the employing establishment in 1994. Appellant also noted that he had to resign from the Air National Guard in 1985, as he could not fly or work in enclosed spaces.<sup>4</sup>

The Office, in a letter dated November 19, 2002, again requested that appellant explain his reasons for resigning from the employing establishment and provide medical evidence supporting that he resigned due to his accepted employment condition of panic disorder.

Appellant, in a November 16, 2002 response, indicated that he resigned because he knew that he might lose his job because of downsizing. He further stated:

“I knew that my position, in the design office, was being eliminated and that this in turn may force me back to full[-]time work on the waterfront within the submarines on a daily basis. Due to the RIF [reduction-in-force] of personnel, the workload at [the employing establishment] was also downsized to a minimum. Many of the remaining personnel would be expected to travel to other shipyards to work.... Knowing that I could not travel and that this was going to be a requirement for the remaining personnel, I felt that I had no choice but to seek other employment.”

By decision dated January 15, 2003, the Office denied appellant’s claim on the grounds that he failed to establish that he had any disability for employment beginning May 1994 due to his accepted employment injury.<sup>5</sup>

On January 17, 2003 appellant requested an oral hearing.

The record contains a RIF notice dated March 29, 1994, received by the Office on March 25, 2004 notifying appellant that he would be separated from employment effective July 29, 1994, unless “attrition or other factors allow us to offer you a position or cancel your separation before 29 July 1994.”

At the hearing, held on March 25, 2004, appellant’s attorney argued that 5 U.S.C. § 8106 applied as the issue was whether appellant was entitled to compensation as he was “incapable of doing the job to which he would have been reassigned....” He described his employment injury and noted that he worked from 1984 to May 1994 in an office setting as a design technician, with restrictions against working on submarines. He also noted that he could not travel. Appellant stated that, when he received a RIF notice he did not know if he would receive another position, be downgraded or laid off. He noted that he began work in May 1994 in the transportation department of a school district.<sup>6</sup>

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<sup>4</sup> Appellant submitted no evidence documenting his resignation from the Air National Guard.

<sup>5</sup> The Office found that appellant failed to establish disability beginning May 1, 1994, the date of his resignation; however, it appears from the record that he resigned on May 27, 1994.

<sup>6</sup> At the hearing appellant’s representative stated that the RIF was effective May 1994, with the latest possible date July 29, 1994. It appears from the record, however, that the effective date of the RIF was July 29, 1994.

Dr. Cole also testified at the hearing.<sup>7</sup> He diagnosed phobic disorder, situational type and opined that appellant could not work on boats in 1994. Dr. Cole stated that he remembered appellant complaining about fire drills while working at the employing establishment. In response to a question from the hearing representative regarding whether he told appellant that he had any disability from his position as a design technician, Dr. Cole noted that he was not treating appellant during that period.

By decision dated June 7, 2004, the hearing representative affirmed the Office's January 15, 2003 decision. The hearing representative noted that as the employing establishment did not offer appellant a job, but instead terminated his employment, section 8106 did not apply in this case.

### **LEGAL PRECEDENT**

The Office's regulation defines the term recurrence of disability as follows:

“Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.”<sup>8</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she 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 or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>9</sup>

### **ANALYSIS**

In this case, appellant sustained panic attacks and panic disorder in 1984 due to factors of his federal employment. He returned to work in an office setting with restrictions on working in enclosed spaces such as submarines. Appellant worked from 1984 until May 27, 1994, the date he resigned from the employing establishment. His work stoppage effective May 27, 1994 does not constitute a change in the nature and extent of his light-duty requirements. Appellant

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<sup>7</sup> Dr. Cole noted that he was licensed by the state as a clinical psychologist.

<sup>8</sup> 20 C.F.R. § 10.5(x).

<sup>9</sup> *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

resigned from the employing establishment voluntarily on May 27, 1994 to avoid a RIF effective July 29, 1994.<sup>10</sup> He, therefore, has the burden of proof to establish, through the submission of rationalized medical opinion evidence, that he was unable to perform his light-duty employment beginning May 27, 1994, due to disability from his accepted employment injury.

In a report dated April 23, 1996, Dr. Gould indicated that he began treating appellant in July 1995, for panic disorder resulting from his work at the employing establishment in 1984. He opined that appellant needed continued medical treatment. In a report received by the Office on June 12, 1996, Dr. Cole related that he began to treat appellant in August 1995, for panic symptoms and agoraphobia and noted his history of panic beginning in 1994, while working in a submarine at the employing establishment. Neither Dr. Gould nor Dr. Cole addressed the relevant issue of whether he was disabled from his light-duty employment beginning May 27, 1994, the date he resigned from the employing establishment. Consequently, their reports are insufficient to meet appellant's burden of proof.

Drs. Gould and Cole, in a joint report dated October 21, 1996, noted that appellant had symptoms of panic disorder even though he did not receive medical treatment between 1991 and 1995. The physicians found that his current symptoms were caused in large, part by his work at the employing establishment. Again, as these physicians do not address the relevant issue of disability, their report is of little relevance to the issue at hand.

In a report dated October 16, 2001, Dr. Cole diagnosed situational phobia due to appellant's employment. He related that appellant stopped working at the employing establishment in May 1994 due to his increased anxiety. Dr. Cole found that, because he worked on the sixth floor of a building, appellant was worried about being trapped on the stairs or on the floor. He also noted that the crowded stairs during fire alarms caused great anxiety. Dr. Cole stated that it was "highly likely" that appellant had decreased income due to his anxiety disorder. He, however, did not indicate knowledge of or discuss the effect of the impending RIF on appellant's resignation in May 1994. Dr. Cole also did not discuss appellant's complaints of increased anxiety around the time of his resignation because he believed that he would be reassigned to work on submarines or have to travel.<sup>11</sup> It is well established that 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.<sup>12</sup> Additionally, Dr. Cole's finding that appellant "likely" lost income due to his employment injury is speculative in nature and thus, of little probative value.<sup>13</sup> Moreover, at the hearing, he indicated that he did

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<sup>10</sup> Office procedures provide that a recurrence of disability does not occur when an employee stops work due to the closure of a base or other facility; nor does it occur when there is a RIF that affects employees performing full-duty work as well as those performing light-duty work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997). In this case, however, appellant resigned prior to the effective date of the RIF.

<sup>11</sup> The Board notes that fear of future injury is not compensable. *Manuel Gill*, 52 ECAB 282 (2001).

<sup>12</sup> *Douglas M. McQuaid*, 52 ECAB 382 (2001).

<sup>13</sup> *Frank Luis Rembisz*, 52 ECAB 147 (2000).

not treat appellant prior to or at the time that he resigned from federal employment and thus, had not found him disabled during that time.

As appellant failed to show either a change in the nature and extent of his injury-related condition or a change in the nature and extent of his light-duty requirements, he has failed to meet his burden of proof.

Regarding appellant's attorney's argument on appeal that appellant was entitled to lost wages due to a RIF, the Board notes that he voluntarily resigned two months prior to the effective date of the RIF. Regarding the attorney's contention that 5 U.S.C. § 8106 is applicable in the instant case, the Board notes that this section applies to compensation for partially disabled employees and to the suitability of a job offer made by an employing establishment to a partially disabled employee. As appellant has not established that he was partially disabled from his light-duty position at the time of his resignation and the employing establishment had not made him a job offer, the regulation is not applicable.

**CONCLUSION**

The Board finds that appellant has failed to establish that he sustained a recurrence of disability beginning May 1994 causally related to his accepted employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 7, 2004 is affirmed.

Issued: November 26, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member