



of a July 13, 1972 injury. Appellant returned to regular-duty work on December 6, 1972. The Office accepted that he sustained several recurrences of disability and appellant underwent surgery for a lumbar laminectomy on November 10, 1976. In June 1995, appellant returned to a part-time limited-duty position, which his treating physician, Dr. George P. Roth, a Board-certified neurosurgeon, approved. This position was for four hours a day, two days a week. Appellant worked a few shifts, before stopping work on July 3, 1995. Appellant filed a claim alleging a recurrence of disability beginning July 3, 1995.

In the first appeal, the Board issued a decision on December 14, 1998 which remanded the case for further development.<sup>1</sup> The Board determined that since there was an uncontroverted inference 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 the claimed recurrence of disability was causally related to his accepted employment injuries and whether he was unable to perform his light-duty position.

In the second and third appeals, the Board issued orders on August 14, 2001<sup>2</sup> and on July 23, 2002<sup>3</sup> remanding the case, as the Office did not adjudicate appellant's claim for a recurrence of disability commencing July 3, 1995. The Board instructed the Office to reconstruct and assemble the record and to issue a *de novo* decision on the merits of appellant's claim to preserve his appeal rights.

In the fourth appeal, the Board issued a decision on February 5, 2003 which affirmed the Office's September 25, 2001 decision denying appellant's claim for a recurrence of disability commencing July 3, 1995.<sup>4</sup> The law and the facts as set forth in the previous Board decisions are incorporated herein by reference.

Appellant, through his attorney, requested reconsideration on March 26, 2004 and submitted additional medical evidence. These included progress reports from Ann C. Vergales, a licensed social worker; a copy of an April 14, 2003 magnetic resonance imaging (MRI) scan of the cervical spine and reports from his attending physicians.

In reports dated February 25 and December 22, 2003, Dr. Ray E. Sharretts, an osteopath specializing in psychiatry, noted that he had treated appellant since May 24, 1996 for major depression, the duration of which was constant and progressive. Dr. Sharretts opined that appellant's psychiatric condition was linked to his work injury, which caused lack of functioning and severe pain, which resulted in appellant's total disability for any type of work, including light duty.

In an April 2, 2003 report and a work restriction evaluation report, Dr. Steven B. Wolf, a Board-certified orthopedic surgeon, opined that appellant was permanently disabled. He advised

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<sup>1</sup> Docket No. 96-2666 (issued December 14, 1998).

<sup>2</sup> Docket No. 99-1520 (issued August 14, 2001).

<sup>3</sup> Docket No. 02-431 (issued July 23, 2002).

<sup>4</sup> Docket No. 02-431 (issued February 5, 2003).

that appellant had a lumbar spine reconstruction performed on September 19, 1997 with an instrumented fusion and interbody fusion at L4-5, which provided some improvement after surgery. Appellant had a history of back problems with a prior lumbar spine surgery in the 1970's. He further noted that appellant had a recurrence of pain in his back and lower extremities and Dr. Roth placed him on disability in July 1995. Dr. Wolf stated that appellant "has never been able to return due to his spine difficulties in both his cervical and lumbar spine as well as significant cardiac problems." He advised that appellant recently had a "junctional" with degeneration at L3-4 with some spurring and that he had a recurrence of significant cardiac problems. He opined that he considered appellant permanently disabled. In a January 14, 2004 report, Dr. Wolf noted that appellant was initially seen at his facility on February 12, 1997, that he had surgery on September 19, 1997 and that he considered appellant disabled based on his cervical and lumbar spine conditions and his cardiac condition.

In a January 12, 2004 report, Dr. Michael F. Lupinacci, a physiatrist, advised that he initially evaluated appellant in August 1995 and that the MRI scan in 1994 showed no evidence of a herniated nucleus pulposus, but scar material was present and he had persistent symptoms. He noted the 1997 laminectomy with fusion at L4-5 and that he saw appellant on March 1, 1999 as appellant's back pain "persisted postoperatively." Dr. Lupinacci opined that "it was clear that he is totally and permanently disabled as a consequence of (the original injury of July 1972) and indeed has been unable to work in any capacity since 1995." In his August 14, 1995 report, Dr. Lupinacci noted that appellant's "most recent employment was in the past few months where he tried to return to work at sedentary level four hours a day, for two days a week, but because of his significant pain which worsened, even with attempts at alternating sitting and standing, he could not tolerate that position." Dr. Lupinacci further opined that he did not think that any further rehabilitation intervention would change the nature and character of appellant's pain and that any attempt at returning appellant to work, even to a sedentary position, would be futile for him, despite his motivation to do so. He thus recommended that appellant pursue permanent total disability.

In a merit decision dated June 29, 2004, the Office denied modification of its decisions denying the recurrence of disability claim.

### **LEGAL PRECEDENT**

A 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>5</sup>

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<sup>5</sup> 20 C.F.R. § 10.5(x) (1999).

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>6</sup>

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.<sup>7</sup>

### ANALYSIS

The Board finds that the medical evidence fails to establish that the residuals of appellant's July 13, 1972 employment injury prevented him from continuing in his light-duty employment beyond July 3, 1995. There is no evidence establishing any change in appellant's light-duty job occurring on and after July 3, 1995.

The reports from both Dr. Sharretts and Dr. Wolf are of diminished probative value and do not establish the claimed recurrence of disability. Neither physician began treating appellant until after the beginning of the period of claimed recurrent disability, July 3, 1995 and neither physician provided a specific reasoned medical opinion explaining why appellant's accepted conditions caused disability on or after that date.

In a January 12, 2004 report, Dr. Lupinacci opined that appellant was totally disabled as a consequence of his 1972 injury and that he has been unable to work in any capacity since 1995. On August 14, 1995 Dr. Lupinacci, however, mentioned that appellant had "tried to return to work at sedentary level four hours a day, for two days a week" and stated, without providing any medical rationale, that appellant's significant pain "had worsened" and that "he could not tolerate that position" despite alternating between sitting and standing positions. Although Dr. Lupinacci generally supported a causal relationship he did not fully address that appellant's condition was a recurrence of the earlier injury of July 13, 1972 or otherwise provide medical reasoning explaining why his disability was due to the July 13, 1972 employment injury.<sup>8</sup> He also did not make an attempt to explain how appellant's conditions resulting from the July 13, 1972 incident would cause or aggravate any of the other diagnosed conditions or prevent him from performing the limited-duty position, which was to be performed four hours a day, two days a week.

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<sup>6</sup> *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>7</sup> *James H. Botts*, 50 ECAB 265 (1999).

<sup>8</sup> *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Also reports from Ms. Vergales are not probative medical evidence because a social worker is not a physician within the meaning of the Federal Employees' Compensation Act.<sup>9</sup>

Accordingly, appellant has not established that there was a change in the nature and extent of the limited-duty position or a change in the degree of the work-related injury, which disabled him from performing his limited-duty position on or after July 3, 1995.

**CONCLUSION**

The Board finds that appellant has failed to establish that he sustained a recurrence of disability on July 5, 1995 causally related to his July 13, 1972 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> See 5 U.S.C. § 8101(2); *Ernest St. Pierre*, 51 ECAB 623, 626 (2000).