

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHIAL L. DUNN, SR. and DEPARTMENT OF THE ARMY,
LEXINGTON BLUEGRASS ARMY DEPOT, Richmond, KY

*Docket No. 02-1754; Submitted on the Record;
Issued January 29, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a telecommunicator and therefore had a 33 percent loss of wage-earning capacity.

On February 9, 1994 appellant, then a 42-year-old boiler operator, filed a claim for bilateral carpal tunnel syndrome which he related to a mercury spill at work on May 25, 1992. He subsequently described his work of shoveling coal and repairing the boiler which involved repetitive motions of his hands. The employing establishment indicated that appellant continued to work until November 11, 1992, after he sustained injuries to his back and neck due to a November 6, 1992 automobile accident. The employing establishment indicated that appellant was on leave without pay after the automobile accident until July 27, 1993 when his employment was terminated. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and began payment of temporary total disability compensation effective August 31, 1995. Appellant underwent carpal tunnel release surgery in January 1996 on the right arm and on February 10, 1997 on the left arm.

In a September 12, 2001 decision, the Office found appellant could perform the duties of a telecommunicator¹ and therefore had a 33 percent loss of wage-earning capacity. The Office reduced appellant's compensation effective October 7, 2001. Appellant requested a hearing before an Office hearing representative, which was conducted on February 11, 2002. In a May 7, 2002 decision, the Office hearing representative affirmed the Office's September 12, 2001 decision.

The Board finds that the Office improperly reduced appellant's compensation.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, based on the nature of the employee's injuries and the degree of physical impairment, employment, age, vocational qualifications and

¹ Department of Labor, *Dictionary of Occupational Titles*, DOT No. 379.362-018.

the availability of suitable employment.² Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.³

In an August 12, 1997 report, Dr. Luis F. Pagani, a Board-certified neurologist, stated that he was examining appellant after an absence of two and a half years. Dr. Pagani indicated that appellant had been treated with bilateral carpal tunnel surgery with no relief of symptoms. He reported that appellant complained of pain in the wrists and over the scar of the decompression with numbness, tingling and weakness of both hands. Dr. Pagani noted that on examination appellant was tender over the anterior aspect of both wrists with increased pain on percussion of the wrists as well as numbness in the hands. He found no muscular weakness or atrophy. Dr. Pagani diagnosed failed surgery and bilateral carpal tunnel syndrome, status post decompression with failure to improve.⁴

In a December 20, 1997 report, a vocational consultant stated that appellant was able to perform a variety of jobs such as factory inspection, inventory or shipping clerk, general office clerk, cashier, service station attendant, dispatcher, procurement clerk, counter clerk or records, and account clerk. The consultant indicated that the jobs were within appellant's restrictions and his academic abilities. He noted that all the jobs were reasonably available within appellant's commuting area.

In an April 11, 2000 memorandum, a Defense Department official indicated that appellant had 112 semester hours from three colleges, majoring in computer science and fire science. The official reported that appellant had 900 training hours as a data communication specialist and 800 training hours in electronics and was certified in basic electronics.

In a May 5, 2000 memorandum, an Office rehabilitation specialist selected the position of telecommunicator, also known as dispatcher, as within appellant's limitations. The job was described as a sedentary job requiring the ability to lift up to 10 pounds occasionally. The job required occasional handling and frequent fingering. The job required three to six months of vocational preparation. The specialist stated that the job was performed in sufficient numbers so as to be reasonably available within appellant's commuting area.

In a June 14, 2000 report, Dr. Pagani stated he had only reviewed the job of semiconductor assembler for appellant. He indicated that he had no objection from a medical standpoint to try appellant on the job descriptions that are within the restrictions that appellant had. Dr. Pagani commented that, if appellant could not do the jobs, he should not do the jobs.

In a February 5, 2001 note, Dr. Pagani stated that appellant had attempted to return to work on a sedentary level doing telecommunications. He indicated that appellant was unable to complete one day of work due to increased pain in the neck and arms with numbness and

² See generally, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

³ Phillip S. Deering, 47 ECAB 692 (1998).

⁴ Appellant underwent lumbar discectomy on September 8, 1998. The Office did not accept appellant's back condition as causally related to his employment.

weakness developing in the arms and increased low back pain. Dr. Pagani concluded that appellant was totally and permanently disabled from any occupation. In a March 20, 2001 note, Dr. Ram S. Singh, an internist and neurologist, indicated that an electromyogram could not be performed on appellant. Dr. Singh noted that nerve conduction studies suggested bilateral carpal tunnel syndrome. He commented that there was no evidence of ulnar nerve abnormality. In an April 16, 2001 report, Dr. Pagani stated that appellant was totally disabled based on subjective complaints of increased pain when he attempted to work eight hours in a telecommunications job.

The Office referred appellant to Dr. Robert L. Keisler, a Board-certified orthopedic surgeon, for an examination and second opinion. In a March 19, 2001 report, Dr. Keisler indicated that the findings on physical examination consisted of painful withdrawal to slight pressure anywhere above the wrist joint on either arm. He noted that all finger joints had normal movements with no visible swelling or enlargement of the joints. Dr. Keisler commented that flexion and extension movements of the wrists had inconsistent reactions. Supination and pronation were normal. Dr. Keisler stated that testing muscle strength produced cogwheel variable responses so the tests were invalid. He found no visible muscle atrophy. Dr. Keisler stated x-rays of both wrists were entirely normal. He indicated that appellant had a history of cervical spine fracture dislocation with an attempted fusion that failed, chronic neck pain secondary to degenerative cervical disc disease and a history of a herniated L5-S1 disc with unexplained chronic low back pain. Dr. Keisler noted that appellant was status post bilateral carpal tunnel release that had failed with an unexplained chronic pain syndrome. He commented that appellant had apparent clinical depression, possible chronic pain syndrome with a record of magnification and falsification. Dr. Keisler stated that he found no indication that appellant had a true carpal tunnel syndrome at any time nor any continuing symptoms as of the time of his examination. He indicated that appellant's radicular pain could be explained by other problems. Dr. Keisler commented that he could not determine whether the diagnoses of bilateral radiculopathy or neuropathy were ever investigated prior to appellant's 1992 automobile accident when he injured his neck. He stated that a simple carpal tunnel syndrome would have readily resolved from decompression and noted that it would not be reasonable to have a response of increasing symptoms after surgery. Dr. Keisler concluded that there were currently no symptoms or signs that indicated appellant had carpal tunnel syndrome in either hand. He stated that a review of the records suggested that the diagnosis of carpal tunnel syndrome was in error. Dr. Keisler indicated that he found no evidence of a work-related condition, carpal tunnel syndrome or otherwise, that would produce symptoms or impairment and limit any form of work. He stated that appellant's lumbar disc degeneration, status post failed surgery and cervical disc disease were expected to produce a significant amount of problems in the cervical and lumbar areas, particularly in activities involving bending, lifting, twisting, or long periods of sitting. Dr. Keisler stated that there appeared to be a falsification or magnification of symptoms, most probably a chronic pain syndrome. He pointed out that there were inconsistencies in appellant's current examination and in his medical history. Dr. Keisler concluded that appellant had no impairment of work activities. He indicated that appellant was able to work at either of the two jobs cited by the Office, starting part time based on nonwork-related conditions. Dr. Keisler commented that appellant had a great number of signs of falsification or magnification but also a significant combination of problems in a number of areas for which symptoms did exist. He stated that it was extremely difficult to find objective data that was valid in the examination and in appellant's medical records. In an accompanying work restriction evaluation form, Dr. Keisler indicated that appellant had no work limitations due to the employment injury.

In an October 24, 2001 report, Dr. Pagani stated that he had initially found that appellant could do sedentary work. He noted that he had changed his opinion, finding that appellant could not do any work, even sedentary work. Dr. Pagani indicated that he based his change of opinion on appellant's complaints, findings from examination and Dr. Singh's nerve conduction study of March 20, 2001. He stated that appellant was seen because pain and tingling in the hand continued. Dr. Pagani indicated that appellant had positive Tinel's sign bilaterally.

There exists a conflict in the medical evidence. Dr. Keisler concluded that appellant did not have carpal tunnel syndrome, based on his findings and his statement that surgery should have resolved appellant's symptoms. He attributed appellant's arm condition to the effects of the injury appellant sustained to his neck in an automobile accident. Dr. Keisler concluded that appellant was engaged in falsification and magnification of his symptoms. He stated that appellant could performed the duties of the job selected by the Office. Dr. Pagani, on the other hand, stated that a nerve conduction study, performed on March 20, 2001, showed appellant had bilateral carpal tunnel syndrome. He also noted that appellant had bilateral Tinel's signs. Dr. Pagani concluded that appellant was totally and permanently disabled for any work, even sedentary work. Drs. Keisler and Pagani therefore reached different conclusions of whether appellant had carpal tunnel syndrome based on differing findings on examination. Dr. Keisler found no objective evidence of carpal tunnel syndrome while Dr. Pagani pointed to the nerve conduction study evidence of bilateral carpal tunnel syndrome. Because of the conflict in the medical evidence, the Office has not established that appellant could perform the duties of a telecommunicator, particularly as it requires the ability to perform occasional handling and frequent fingering. The Office therefore has not met its burden of proof in reducing appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated May 7, 2002 and September 12, 2001 are hereby reversed.

Dated, Washington, DC
January 29, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member