U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. HOLLOWAY and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK

Docket No. 02-770; Submitted on the Record;
Issued July 30, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has met his burden of proof to establish that his October 25, 1993 loss of wage-earning capacity determination should be modified.

On February 1, 1988 appellant, then a 43-year-old materials expediter, filed an occupational disease claim for an injury commencing on June 15, 1987 and the Office of Workers' Compensation Programs accepted that appellant sustained bilateral epicondylitis in the performance of duty. He sustained a recurrence of disability on January 18, 1990 and was terminated from his position on August 1, 1990. Effective July 28, 1991 appellant began receiving compensation benefits for temporary total disability.

In a report dated August 27, 1993, rehabilitation specialist John Thomason stated that, taking into consideration all of appellant's significant preexisting impairments and pertinent nonmedical factors, he could perform the job duties of a correspondence clerk. He noted that appellant could type 41 words per minute (WPM). The Department of Labor's *Dictionary of Occupational Titles* (DOT) described the position of correspondence clerk as sedentary with no lifting, carrying, pushing or pulling over 10 pounds and involved composing letters in reply to correspondence concerning such items as requests for merchandise, damage claims, credit information, delinquent accounts, incorrect billing, unsatisfactory service, reading incoming correspondence and gathering data to formulate a reply, operating a typewriter, keeping files or correspondence, processing orders, preparing order forms and checking the progress of orders. Mr. Thomason noted that appellant had worked as a union president, material expediter, equipment cleaner and warehouseman and had acquired many more skills in his employment history than the skills required of a correspondence clerk. He stated that a state employment service representative, Chuck Davis, confirmed that the job was performed in sufficient numbers so as to make it reasonably available in appellant's commuting area and paid weekly wages of $300.00.

Dr. G. David Casper, appellant's attending Board-certified orthopedic surgeon, indicated, in a work restriction evaluation dated July 29, 1991, that appellant could work for eight hours a

day with no lifting over ten pounds. He gave no restrictions on fine manipulation of the hands. The Office referred appellant to Dr. John F. Tompkins, a Board-certified orthopedic surgeon and an Office referral physician, who stated, in an April 21, 1993 report, that appellant could work for eight hours a day with intermittent lifting limited to one hour, no lifting over ten pounds or any repetitive pushing or pulling and only light grasping. He stated that there were no specific restrictions regarding fine manipulation of the hands. Based on Dr. Tompkins report, appellant was referred for typing training.

By letter dated September 14, 1993, the Office advised appellant that it proposed to reduce his compensation based on his capacity to earn wages as a correspondence clerk. The Office noted that his rehabilitation counselor had reported that he was qualified to work as a correspondence clerk, that this position was available in appellant's commuting area and that the entry-level pay was $300.00 per week.

On October 9, 1993 appellant expressed his disagreement with the Office's proposed reduction of his compensation. He alleged that he did not have the capacity to earn $300.00 per week as a correspondence clerk because that salary was unrealistically high for a clerical position, the job was not reasonably available in his area, he did not have the necessary typing and computer skills, he experienced pain when typing and the rehabilitation counselor did not consider all his medical conditions and physical limitations.

By decision dated October 25, 1993, the Office advised appellant that his compensation benefits would be reduced effective November 14, 1993 on the grounds that the weight of the evidence established that he was able to earn wages as a correspondence clerk.

By decisions dated September 15, 1997, May 18, 1998, September 21, 2000 and October 31, 2001, the Office denied modification of its October 25, 1993 decision on the grounds that the evidence submitted was insufficient to warrant modification.

The Board finds that appellant has failed to establish that his October 25, 1993 loss of wage-earning capacity determination should be modified.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[1] The burden of proof is on the party attempting to show modification.[2] In this case, appellant sought modification of the Office's wage-earning determination and, therefore, bears the burden to prove his contention that the original wage-earning decision should be modified.

In his requests for reconsideration, appellant argued that the Office erred in its original decision in finding that the position of correspondence clerk was vocationally suitable for him. He stated that the state employment representative advised him that no specific positions were

[1] *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Derrick Higgin*, 50 ECAB 213 (1998).

[2] *James D. Champlain*, 44 ECAB 438 (1993).

discussed with Mr. Thomason, that he did not know of any positions titled "correspondence clerk" and that $300.00 per week would be an unrealistically high salary for a clerical position. However, Laura Miller, a rehabilitation specialist, indicated, in a November 3, 1993 memorandum to the file, that state employment personnel cannot cite specific numbers of jobs for specific DOT categories but rather categorized jobs under occupational groupings and Mr. Thomason had obtained information about a certain occupational category. She stated that it was Mr. Thomason's professional opinion that, based on the number of jobs in that category, the job of correspondence clerk would be reasonably available. She noted that the job of correspondence clerk required a specific vocational preparation (SVP) of six which was considered skilled and required the ability to write and, therefore, had a higher salary than general office clerk jobs with SVPs of three or four that were considered only semiskilled and did not pay as much. In a memorandum dated April 21, 1998, James Howard, another rehabilitation specialist, stated that the job description for the correspondence clerk position, provided in 1993 by appellant's rehabilitation counselor, was accurate according to the DOT and that the Oklahoma Employment Security Commission indicated that the position was reasonably available in appellant's commuting area.

Appellant stated that the clerical position available in his area required significant levels of education, skill and experience and his 41 WPM typing speed did not meet minimum standards. He stated that the normal qualifications for minimum wage general office positions required proficiency in using computer systems that he did not possess. However, Mr. Howard stated, in his April 21, 1998 report, that a June 3, 1993 document indicated a typing test result of 35 words per minute with a 6-word error rate, that appellant's typed correspondence to the Office confirmed a high level of competence and that it was evident that appellant's educational background and experience as a union representative and president would enable him to develop skills in producing a variety of correspondence. The rehabilitation specialist noted that the correspondence clerk position did not require the typing proficiency of a clerk/typist or secretarial job.

Appellant argued that the correspondence clerk position was not reasonably available in his commuting area. However, as noted above, Mr. Howard reviewed the case and advised that the state employment office indicated that the position was reasonably available within appellant's commuting area.

The medical evidence submitted, after the Office's October 25, 1993 loss of wage-earning capacity decision, is insufficient to establish a material change in the nature and extent of the injury-related condition such that appellant could not perform the correspondence clerk position.

In a report dated April 25, 1990, received by the Office on April 1, 2000, Dr. Fatjana E. Caddell, D.O., indicated that appellant had permanent work restrictions due to diabetes and upper extremity impairment of only light carrying and lifting, no pulling or pushing, no climbing involving use of the arms, no operation of motor vehicles, no working on ladders or scaffolding, no working where vibrations were involved and no work where sudden loss of consciousness or grogginess could be dangerous. However, this report was not received by the Office prior to its October 25, 1993 decision and, therefore, does not show that the Office's decision was erroneous. As the report does not establish that there has been a change in the nature and extent

of appellant's injury-related condition, bilateral epicondylitis, appellant had not met his burden of proof to establish that the Office's October 25, 1993 loss of wage-earning capacity should be modified.

In a report dated February 9, 1994, Dr. Barry S. Rogers stated that appellant had pain and weakness in his elbows, forearms, hands and fingers aggravated with use and that his arms became useless with sustained activity such that he was not able to hold utensils, feed himself or write. He provided findings on examination and opined that appellant had a strain and sprain of the elbows due to his June 15, 1987 employment injury. Dr. Rogers stated his opinion that appellant was developing a chronic bursa-synovitis/tendonitis of the elbows with median nerve entrapment as well as claudication in the muscles of the forearm and hand and had permanent impairment of both upper extremities due to nerve, vascular and joint injury. However, as this report was submitted subsequent to the Office's October 25, 1993 decision, it does not establish error in that decision. Additionally, Dr. Rogers did not provide sufficient medical rationale explaining how appellant's "developing" elbow condition was caused or aggravated by his 1987 injury-related bilateral epicondylitis or how there had been a change in the nature and extent of his injury-related condition such that he could not perform the correspondence clerk position. Therefore, this report does not establish that the Office's October 25, 1993 loss of wage-earning capacity should be modified.

In a report dated July 12, 1994, Dr. J.R. Fulgham, a neurologist, stated his opinion that appellant was totally disabled due to a progressive neuropathy most likely caused by his diabetes. However, he later clarified that he saw appellant only one time in 1994, subsequent to appellant's employment injury and the Office's October 25, 1993 wage-earning capacity decision. In a May 5, 1998 letter, Dr. Fulgham stated that he first saw appellant in June 1994 for symptoms of neuropathy, most likely caused by his diabetes with polyradiculoneuropathy and this was not uncommon in diabetes patients. He found no other possible etiologies and it was, therefore, his impression that appellant had a diabetic neuropathic process and was totally disabled at the time he was seen in June 1994. However, these reports were received subsequent to the Office's October 25, 1993 decision and, therefore, do not establish that the decision was erroneous. The reports do not indicate a change in the nature and extent of appellant's injury-related condition such that he was unable to perform the position of correspondence clerk. Therefore, they are insufficient to discharge his burden of proof.

In a report dated October 25, 2000, Dr. John W. Ellis, a Board-certified family practitioner, diagnosed bilateral lateral epicondylitis, diabetes mellitus, polyneuropathy of the hands and feet and herniated discs. He stated his opinion that appellant had been temporarily totally disabled since August 1, 1991 due to his bilateral lateral epicondylitis of the elbows, diabetes with polyneuropathy of the hands and feet and herniated discs in his neck and back and could not work as a correspondence clerk. Dr. Ellis stated:

> "From the review of the records, it is clear that due to [appellant's] bilateral lateral epicondylitis of the elbows, he has not been able to work in the past and will not be able to work in the future as a correspondence clerk. He is considered temporarily totally disabled due to his lateral epicondylitis of the elbows….

> "It should also be noted that appellant has other conditions besides his lateral epicondylitis that prevent him from working as a correspondence clerk including his diabetes mellitus with polyneuropathy of the hands and feet and his herniated discs in the neck and … lower back. Even if he was not temporarily totally disabled due to the lateral epicondylitis, he would be for these other conditions, and has been since before October 1993."

However, this report is of diminished probative value as Dr. Ellis did not provide sufficient medical rationale as to how the nature and extent of appellant's accepted condition had materially changed such that he could not perform the correspondence clerk position. Further, as it was not of record prior to the Office's October 25, 1993 decision, it does not establish that the decision was erroneous.

Dr. Stephen P. Wolf, an internist, stated in a June 30, 1998 report, that he had treated appellant since January 27, 1992 for insulin dependent diabetes and complications of peripheral neuropathy and diabetic retinopathy. He stated that appellant had developed chronic inflammatory demyelinating polyneuropathy in conjunction with his diabetes which caused confinement to a wheelchair at times and required treatment with intensive immunosuppressives by a neurologist. However, Dr. Wolf's report was submitted subsequent to the Office's October 25, 1993 decision and it therefore, does not establish that the decision was erroneous. Additionally, Dr. Wolf did not address the issue of whether there had been a change in the nature and extent of appellant's injury-related condition, bilateral epicondylitis, such that he was disabled for work. Appellant has therefore, not met his burden of proof to establish that the October 25, 1993 loss of wage-earning capacity should be modified.

As appellant failed to meet his burden of proof to establish that there was a material change in the nature and extent of the injury-related condition such that he could not perform the correspondence clerk position or he had been retrained that the original determination was erroneous, the Office properly denied modification of its October 25, 1993 wage-earning capacity decision.

The decision of the Office of Workers' Compensation Programs dated October 31, 2001 is affirmed.

Dated, Washington, DC
July 30, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member