

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH P. BOEGER and DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND-PACIFIC, Oakland, CA

*Docket No. 02-1823; Submitted on the Record;
Issued July 11, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant established that his September 28, 1994 loss of wage-earning capacity determination should be modified.

This case is on appeal before the Board for the second time. The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain, scalp contusion and somatoform pain disorder. Approximately six months after his December 1, 1988 injury, appellant resumed his regular duties as an able seaman. He later resigned his position with the employing establishment and obtained work as a truck driver. Appellant, however, sustained a recurrence of disability on November 6, 1990 and the Office placed him on the periodic compensation rolls.

By decision dated September 28, 1994, the Office determined that the selected position of order taker with earnings of \$210.40 per week represented appellant's wage-earning capacity. In a decision dated October 2, 1997, the Office hearing representative affirmed the September 28, 1994 decision. The Office later denied reconsideration by decision dated October 21, 1998.

In a decision dated May 4, 2001, the Board set aside the Office's October 21, 1998 decision denying reconsideration.¹ The Board found that the Office neglected to consider recent reports from appellant's neurologist, Dr. Mark O. Herring. Most notably, the Office failed to address Dr. Herring's July 6, 1998 report wherein he concluded that appellant was permanently and totally disabled by his chronic pain complaints and psychological factors. Accordingly, the Board instructed the Office to review appellant's claim on the merits and to issue an appropriate decision.

¹ Docket No. 99-913. The Board's May 4, 2001 decision is incorporated herein by reference.

On remand, the Office reviewed the claim on the merits, including Dr. Herring's July 6, 1998 report, and denied modification of the prior wage-earning capacity determination on June 20, 2001.

The Board finds that appellant has not met any of the requirements for modification of the Office's September 28, 1994 loss of wage-earning capacity determination.

Once the loss of wage-earning capacity 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.² The burden of proof is on the party attempting to show that the award should be modified.³

The selected position of order taker involves the processing of orders for material or merchandise received by mail, telephone or personally from customers or company employees. The job can be performed either manually or by using a computer calculating machine. Additional duties include editing orders, data entry, recordkeeping, filing and providing customer information regarding pricing, shipping date and any anticipated delays in delivery. The position is sedentary, requiring a maximum of 10 pounds of lifting, carrying, pushing and pulling. The record established that the position was vocationally suitable and reasonably available in the local labor market.

The Office accepted appellant's claim for cervical strain, scalp contusion and somatoform pain disorder. From an orthopedic and neurological standpoint, the medical evidence demonstrated that appellant was capable of performing the duties of an order taker.⁴ In concluding that appellant was capable from a psychological standpoint of performing the duties of an order taker, the Office relied on the opinions of two clinical psychologists; Dr. Gregory T. Smith and Dr. James B. Lakehomer.

Dr. Smith, an Office referral psychologist, examined appellant on May 28, 1993, and diagnosed somatoform pain disorder, passive-aggressive personality characteristics and mild depression. Additionally, Dr. Smith found that appellant's psychological diagnoses were unrelated to his 1988 employment injury and were not disabling. On June 4, 1993 he reviewed the order taker position description and approved it with certain modifications.⁵

² *Stanley B. Plotkin*, 51 ECAB 700 (2000).

³ *Id.*

⁴ In a report dated November 6, 1992, Dr. Henry H. Holmes, a Board-certified family practitioner specializing in pain management, stated that appellant was capable of performing light work, providing there was an opportunity for frequent change of position (every 30 minutes). Appellant's neurologist, Dr. Herring, initially reviewed the order taker position description on February 8, 1994 and subsequently on May 26, 1994, and on both occasions he noted his approval.

⁵ Dr. Smith evaluated appellant in conjunction with Dr. Linda Jensen, a neurologist, who co-authored the June 1993 report.

The Office also referred appellant for examination by Dr. Lakehomer, a clinical psychologist specializing in pain management. In a report dated October 20, 1993, Dr. Lakehomer diagnosed somatoform pain disorder and noted, among other things, that appellant “[c]learly ... has psychiatric difficulties coping with his soft tissue pain problem.” Dr. Lakehomer provided a supplemental report on December 6, 1993. He stated that, with the exception of the position as security guard, appellant did “not have any impairment of mental function which would render him unable to perform any of the job analyses provided by the rehabilitation counselor,” including that of order taker. Dr. Lakehomer reviewed the order taker position description again on May 2, 1994 and noted his approval.

At the time the Office issued its decision on September 28, 1994, the record established that the position of order taker was both medically and vocationally suitable. Although appellant’s neurologist, Dr. Herring, initially approved the selected position of order taker, after the Office issued its September 28, 1994 loss of wage-earning capacity determination, Dr. Herring subsequently amended his opinion. In a report dated November 18, 1994, Dr. Herring stated that he had more contact with appellant than any other physician, including those who had performed independent psychiatric evaluations, and it was his opinion that appellant was permanently and totally disabled for psychiatric reasons. He explained that, while appellant’s chronic pain disorder was not in itself disabling, it led to the development of a psychiatric disorder, which disabled appellant. Dr. Herring maintained this position through July 6, 1998. While he stressed a multidisciplinary approach to appellant’s treatment, including psychiatric evaluations and follow-up consultations with Dr. Lakehomer, Dr. Herring was unwilling to defer to the psychological assessments provided by Drs. Smith and Lakehomer given his own evaluation of appellant.

In order to modify the September 28, 1994 loss of wage-earning capacity determination, appellant must demonstrate either a material change in the nature and extent of the injury-related condition, or that he has been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous.⁶ In this instance, appellant has not alleged that he has been retrained or otherwise vocationally rehabilitated. Appellant instead relied on Dr. Herring’s post September 1994 findings that he was disabled from a psychiatric standpoint.

Dr. Herring’s more recent reports are insufficient to establish either a material change in appellant’s condition or that the prior decision was, in fact, erroneous. The fact that Dr. Herring subsequently reversed his earlier position regarding the medical suitability of the order taker position does not establish that the September 28, 1994 loss of wage-earning capacity determination was, in fact, erroneous. Dr. Herring’s belief that his treatment of appellant placed him in a better position to better assess appellant’s psychiatric condition does not, of itself, support disregarding the psychological assessments of Drs. Smith and Lakehomer.

In his most recent report dated July 6, 1998, Dr. Herring diagnosed chronic pain syndrome and adjustment disorder with mixed emotional features. He also noted that appellant had been diagnosed with somatoform pain disorder. Additionally, Dr. Herring reported that appellant had intermittent headaches and pains in his cervical, thoracic and lumbar spine.

⁶ *Stanley B. Plotkin, supra* note 2.

Dr. Herring further stated that, although appellant continued to experience pain, which appellant considered to be of a disabling nature, there was no evidence of underlying radiculopathy or myelopathy. With respect to the diagnosed adjustment disorder, Dr. Herring explained that appellant has the conviction that he has not been adequately evaluated or treated for his chronic pain complaints. Dr. Herring stated that appellant was permanently and totally disabled by his chronic pain complaints and psychological factors, which symptoms dated back to his original work injury.

Dr. Herring has not provided a rationalized medical opinion identifying the basis for his conclusion that appellant is totally and permanently disabled. He noted that there was no objective basis for what appellant characterized as pain of a disabling nature. Additionally, Dr. Herring's diagnosis of adjustment disorder appears to be based exclusively on appellant's conviction that he had not been adequately evaluated or treated for his chronic pain complaints. While he stated that appellant was disabled by his chronic pain complaints and psychological factors, Dr. Herring has not clearly identified the respective bases for his diagnoses nor has he offered sufficient explanation as to why appellant is precluded from performing the duties of an order taker. His opinion on causal relationship is nothing more than a conclusion without adequate explanation or justification. Accordingly, Dr. Herring's reports dating back to November 18, 1994 are insufficient to warrant modification of the Office's September 28, 1994 loss of wage-earning capacity determination. Appellant failed to carry his burden to justify modification of the Office's September 28, 1994 the loss of wage-earning capacity determination.

The June 20, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member