

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD T. PIPPIN and DEPARTMENT OF THE AIR FORCE,
U.S. AIR FORCE ACADEMY, CO

*Docket No. 03-205; Submitted on the Record;
Issued June 19, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on August 31, 2001 causally related to his accepted employment injuries; (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's authorization for medical treatment; and (3) whether the Office properly denied his request for reconsideration under 5 U.S.C. § 8128.

On December 6, 1995 appellant, then a 39-year-old electronic technician, filed a claim for a traumatic injury occurring on September 20, 1995 in the performance of duty. The Office assigned the case file number A12-0158542 and accepted the claim for a fracture of the right wrist.¹

On November 14, 1997 appellant filed an occupational disease claim alleging that he sustained carpal tunnel syndrome and cubital tunnel syndrome due to factors of his federal employment. The Office assigned the case file number A12-0166129 and accepted the claim for right carpal tunnel syndrome and right mononeuritis of the upper extremity. The Office authorized a right tunnel release, which appellant underwent on May 5, 1997. He returned to work with restrictions on May 27, 1997.

In an internal memorandum dated September 25, 1997, the Office noted that the employing establishment was rehabilitating appellant because it could not accommodate his work restrictions.² The Office placed appellant on the periodic rolls effective September 4, 1998.

¹ By decision dated September 16, 1996, the Office granted appellant a schedule award for a 19 percent permanent impairment of the right arm.

² Appellant was restricted to keyboarding no more than four hours a day. Appellant retired on disability effective March 14, 1998.

By decision dated April 9, 2001, the Office found that appellant had no loss of wage-earning capacity based on its determination that his actual earnings in private employment as a component engineer effective December 12, 2000 fairly and reasonably represented his wage-earning capacity.

On August 23, 2001 appellant filed a notice of recurrence of disability causally related to his September 20, 1995 employment injury. He related that his “wrist pain has gradually gotten worse over the years” and that “keyboarding has aggravated the condition.” Appellant noted that following his employment injury he was limited to performing “no more than [four hours] of keyboarding.” Appellant indicated that he had worked from December 11 through August 31, 2001 as a component engineer and that recently he had been performing “data entry which has aggravated my condition.”

In a letter dated August 29, 2001, appellant’s employer terminated him based on a physician’s note restricting him to keyboarding no more than four hours a day.

On November 14, 2001 the Office informed appellant that it had combined his two prior claims into file number A12-0158542.

On December 14, 2001 the Office notified appellant of the criteria required for a modification of a wage-earning capacity determination.

By decision dated May 23, 2002, the Office denied appellant’s claim for a recurrence of disability on the grounds that the medical evidence did not establish that he was disabled beginning August 31, 2001 due to his accepted employment injuries.

On June 11, 2002 appellant requested reconsideration of his claim and submitted additional evidence.

In a decision dated August 8, 2002, the Office denied appellant’s request for reconsideration of the merits on the grounds that the evidence submitted was repetitious and thus insufficient to warrant review of the prior decision.

The Board finds that appellant has not established that he sustained a recurrence of disability on August 31, 2001 causally related to his accepted employment injuries.

Where 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 establishes that the employee 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 to show that he or she cannot perform such light duty. 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 light-duty job requirements.³

³ *Terry R. Hedman*, 38 ECAB 222 (1986).

In a form report dated August 7, 2001, Dr. Thomas A. Eskestrand, a Board-certified orthopedic surgeon and appellant's attending physician, diagnosed cumulative trauma and a sprain of the right wrist. He checked "yes" that the condition was caused or aggravated by employment and found that appellant could perform keyboarding for four hours a day. Dr. Eskestrand's report, however, is of little probative value as the Board has held that the checking of a box "yes" on a form report, without additional explanation or rationale, is insufficient to establish causal relationship.⁴

Appellant submitted office visit notes from Dr. Eskestrand dated August 16 to December 11, 2001. In an office visit note dated August 16, 2001, Dr. Eskestrand diagnosed radiculopathy and a history of carpal tunnel and cubital tunnel surgery.⁵

In an office visit note dated August 30, 2001, Dr. Eskestrand stated: "[Appellant] comes back in having been laid off his job. He had difficulty tolerating four hours a day straight keyboarding (was not allowed to pace himself)." Dr. Eskestrand diagnosed overuse syndrome of the right wrist, status post carpal tunnel syndrome of the right wrist, status post triangular fibrocartilage (TFCC) tear and cumulative trauma. He opined that appellant should perform work at the keyboard for no more than four hours at his own pace. In his office visit notes, however, Dr. Eskestrand did not attribute appellant's condition to his prior accepted employment injuries and thus his reports are of little probative value. Further, Dr. Eskestrand did not find that appellant's disability increased beyond that previously found of no keyboarding more than four hours a day. Consequently, his reports do not support appellant's claim for a recurrence of disability.

In a report dated October 8, 2001, Dr. Eskestrand discussed appellant's history of injury and related:

"[Appellant] has developed symptoms of impingement syndrome. This is tendinitis of the shoulder on the right side with pain. [He] continues to have multiple joint pains to include shoulders, both wrists [and] both ankles. [Appellant] has developed numbness in the same hand that had the carpal tunnel release. Because of this numbness and neck pain he had a nerve study which showed a pinch[ed] nerve in his neck."

Dr. Eskestrand found that appellant could perform only limited repetitive work and that his condition was permanent. He did not specifically attribute appellant's diagnosed condition of impingement syndrome to his employment injury and thus, it is of little relevance to the issue at hand.

In an office visit note dated November 3, 2001, Dr. Eskestrand noted that appellant was on medicine for his cubital and carpal tunnel syndrome of the right upper extremity. He opined

⁴ *Calvin E. King*, 51 ECAB 394 (2000).

⁵ In a report dated June 20, 2001, Dr. Bruce H. Peters, a Board-certified neurologist, diagnosed "some evidence of a C8 radiculopathy or inferior brachial plexus lesion" based on an electromyogram and nerve conduction velocity study. He found no evidence of carpal tunnel syndrome.

that appellant's condition was "directly related to his worker[s]' comp[ensation] injury and the treatment thereof." However, Dr. Eskestrand did not explain how, with reference to the specific facts of this case, appellant's accepted employment injuries caused disability from employment beginning August 31, 2001. Further, Dr. Eskestrand did not provide any rationale for his opinion and thus it is of little probative value.⁶

In a report dated November 16, 2001, Dr. Eskestrand stated:

"[Appellant] has a work impairment of prior TFCC repair right wrist, right carpal tunnel release and right ulnar nerve transposition. He continues to have active symptoms with weakness, pain and inability to do repetitive movements (*i.e.* [k]eyboarding, etc.). This is a work[ers'] comp[ensation] injury from when he was in the [f]ederal [s]ervice...."

Dr. Eskestrand noted that appellant had been employed in private industry that the duties of his position changed. He noted:

"[Appellant's employer] expected him to do keyboarding and repetitive activities beyond three to four hours a day. Because he was unable to do this he was laid off his job. The cause of his dismissal was due to the right arm work[ers'] comp[ensation] injury. Therefore, I feel that [appellant] needs to be placed back on his work[ers'] comp[ensation] status until finding a job which allows him to avoid repetitive movements."

Dr. Eskestrand, however, did not discuss whether appellant sustained a recurrence of disability beginning August 31, 2001 independent of intervening factors. A recurrence of disability is defined as the inability to work caused by a spontaneous change in a medical condition which results from a previous injury or illness without an intervening injury or new exposure in the work environment that caused illness.⁷ In this case, it is unclear whether Dr. Eskestrand found that appellant's work in his private employment aggravated his condition as he provided no rationale explaining any nexus.⁸ Further, it is not established as factual from the record that appellant's job duties changed such that he was required to work outside of his restrictions. Additionally, Dr. Eskestrand did not find an actual increase in appellant's degree of disability as he was currently restricted to keyboarding four hours or less a day. Therefore, Dr. Eskestrand's opinion is insufficient to meet appellant's burden of proof.

In an office visit note dated December 11, 2001, Dr. Eskestrand diagnosed residual symptoms of appellant's right carpal and cubital tunnel release, left wrist pain and multiple arthralgias. In a report dated April 16, 2002, Dr. Eskestrand discussed appellant's current symptoms and diagnosed commutative trauma of the left and right upper extremity. He noted

⁶ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

⁷ 20 C.F.R. § 10.5(x).

⁸ If appellant's private employment aggravated his condition, the private employer, not the Office, would be responsible for the payment of workers' compensation.

that appellant was going to be tested for Lyme disease. As Dr. Eskestrand did not address causation, these office visit notes are of diminished probative value.⁹

As appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability was causally related to his accepted employment injuries, the Office properly denied his claim for a recurrence of disability.

The Board further finds that the Office did not meet its burden of proof to terminate appellant's entitlement to medical benefits.

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁰ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹¹ In this case, the record contains no opinion from a physician affirmatively stating that appellant had no further residuals of his accepted right carpal tunnel syndrome and right mononeuritis of the upper extremity. Thus, the Office erred in terminating authorization for medical treatment in its May 23, 2002 decision.

The Board finds that the Office improperly denied appellant's request for reconsideration.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹² Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹³

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.¹⁴ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.¹⁵ If the Office should determine that the new evidence submitted lacks substantive

⁹ *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

¹⁰ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

¹¹ *Id.*

¹² 20 C.F.R. § 10.606(b)(2).

¹³ 20 C.F.R. § 10.608(b).

¹⁴ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁵ *See* 20 C.F.R. § 10.606(b)(2).

probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁶

In his request for reconsideration, appellant submitted a statement from his employer dated June 4, 2002.¹⁷ In the June 4, 2002 letter, an official with appellant's private employer related that it had provided a description of appellant's job duties at the time he was terminated. She stated:

“At the time we reported that [appellant's] position required him to type/keyboard an average of eight hours a day. Please be advised that upon initial hire, this job requirement was typically less than four hours a day. The job requirements subsequently changed near or around June or July as [c]omponent [e]ngineers became responsible for additional activities that required data entry and extensive typing/keyboarding.”

In this case, appellant could not return to his date-of-injury position due to his employment-related disability. After vocational rehabilitation, appellant returned to work in private employment with restrictions on repetitive use of the hands not more than four hours a day. Appellant contended that the duties of his position changed such that he was unable to perform its requirements. In his request for reconsideration, appellant submitted a statement from his employer acknowledging that his job duties changed to require more than four hours a day of keyboarding. As discussed above, appellant can establish a recurrence of disability by showing a change in the nature and extent of a light-duty position.¹⁸ Therefore, the June 4, 2002 statement from appellant's employer constitutes relevant evidence not previously considered as it is pertinent to the issue of whether appellant's light-duty position changed. The Board, therefore, finds that appellant has submitted sufficient evidence to require the Office to reopen the case for merit review.

In view of the foregoing, the case shall be remanded to the Office to issue a decision on the merits of the case.

¹⁶ *Dennis J. Lasanen*, 41 ECAB 933 (1990).

¹⁷ Appellant also submitted a report dated June 6, 2002 from Dr. Eskestrand, who diagnosed residual symptoms of carpal and cubital tunnel syndrome. Dr. Eskestrand indicated that he believed that appellant's numbness was caused by his cubital tunnel syndrome rather than a C8 radiculopathy. However, as Dr. Eskestrand did not specifically address the pertinent issue of whether appellant sustained a recurrence of disability effective August 31, 2001, his report is insufficient to warrant a merit review of the prior decision.

¹⁸ *See Hedman, supra* note 3.

The decision of the Office of Workers' Compensation Programs dated May 23, 2002 is affirmed in part and reversed in part and the decision dated August 8, 2002 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
June 19, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member