

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY L. HEWITT and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 96-2563; Submitted on the Record;
Issued November 16, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of salesperson fairly and reasonably represented appellant's wage-earning capacity, and reduced his compensation benefits effective May 26, 1996, based upon his ability to earn wages as a salesperson.

The Office accepted that on September 24, 1987 appellant sustained lumbar strain, contusion of the right elbow, a right ulnar nerve lesion, and peripheral nerve transposition when a 20 foot pipe fell off his shoulder and struck his elbow. Concurrent conditions noted to exist at that time, but which were not accepted as work related included diabetes, renal failure, ulceration of the foot and diabetic retinopathy.

Appellant underwent surgery for a bilateral carpal tunnel release and for a right ulnar nerve decompression. Appellant subsequently received retraining as a paralegal/legal assistant, graduating on December 22, 1989. He returned to work briefly as an orthotic technician's apprentice, but had to stop on September 16, 1990 because of right arm problems. Electromyographic (EMG) testing on October 17, 1990 was reported as demonstrating mixed axonal and demyelinating right upper extremity diabetic polyneuropathy, mild right ulnar neuropathy across the elbow and mild right carpal tunnel syndrome. Appellant then underwent further right ulnar nerve decompression surgery and a medial epicondylectomy. Thereafter he received retraining as an emergency medical technician, graduating on December 7, 1991. He worked as an emergency medical technician but had weakness of the right forearm, pain and decreased sensation, with slight clawing of the small finger, and stopped work again. Thereafter appellant underwent an ulnar nerve transposition. Following this surgery, appellant was again placed on the periodic rolls for receipt of compensation.

By rehabilitation report dated February 28, 1993, the rehabilitation counselor concluded that appellant's paralegal training had been supplanted in the marketplace by a two-year program which was now what employers wanted, and that because of his 1992 right arm reinjury, surgery,

and subsequent decrease in range of motion, he could no longer perform the skilled emergency medical technician work, so the rehabilitation counselor chose the positions of salesperson and office clerk to explore as potential employment.

By report dated May 11, 1993, Dr. William H. Kirkpatrick, a Board-certified hand surgeon, opined that he had nothing further to offer appellant as his continued right arm weakness and decreased sensation in the ulnar distribution was apparently due to his diabetes which had significantly worsened.

On August 3, 1994 the Office referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic hand surgeon, to clarify the extent of his injury-related impairment. By report dated August 24, 1994, Dr. Didizian noted that appellant was an insulin-dependent diabetic with hypertension, anemia, arthritis and renal failure, and was being considered for dialysis. Dr. Didizian noted that appellant had water retention secondary to renal failure in both legs. Dr. Didizian examined appellant's right upper extremity, diagnosed status post multiple ulnar nerve surgery on the right, and opined that appellant had residual deficiency in the sensory and motor component of the right ulnar nerve. He opined that appellant was partially disabled from gainful employment, and he attached a work capacity evaluation which indicated that appellant should limit lifting with the right hand, could lift 30 pounds with both hands and could work eight hours per day. Dr. Didizian also noted that other medical factors which needed to be considered in identifying a position for appellant included hypertension, diabetes, edema and renal failure. He did not, however, address how many hours appellant could sit, stand or walk due to these other conditions which needed to be considered.

Thereafter, in July 1995, the Office determined that the positions of salesperson and general office clerk were readily available and were appropriate to appellant's condition. The Office noted that both positions required lifting up to 20 pounds, the abilities to reach, handle, finger, feel, talk, hear and see, including acuity, depth perception, field of vision and accommodation. The Office did not obtain a current medical report addressing appellant's condition related to his accepted employment injuries or to his preexisting medical conditions.

On March 18, 1996 about 19 months after Dr. Didizian's report, the Office issued appellant a notice of proposed reduction of compensation, finding that the weight of the medical evidence was Dr. Didizian's report which showed appellant was capable of performing the position of salesperson for eight hours a day. The Office stated that Dr. Didizian advised that appellant's injury residuals only caused partial disability and that the rehabilitation counselor identified two positions that appellant was capable of performing. The Office did not address who decided that these positions could be performed by appellant in his 1996 state of health as related to his preexisting medical problems of diabetes mellitus and its sequelae of renal failure and resulting hypertension, edema, atherosclerosis and advanced polyneuropathy.

In response to the Office's proposal, appellant, through his representative, submitted two years worth of medical records addressing his diabetic-related medical problems which, she urged, prevented him from performing the position of salesperson. Appellant's representative argued that Dr. Didizian acknowledged that appellant suffered from diabetes mellitus, renal failure and edema due to renal failure, but failed to discuss what disability has resulted from these conditions or how appellant can work 8 hours a day when he's undergoing peritoneal

dialysis for 10 hours per day, 7 days per week. The representative also noted that on December 16 and 24, 1994 and on January 12, 19 and 31, 1995 appellant underwent surgical left thigh exploration and debridement of necrotic muscles due to preexisting medical problems aggravated by appellant's diabetes and resultant peripheral vascular disease, which required nursing home care. She further noted that appellant had developed a diabetic left plantar ulcer which precluded weightbearing, diabetic retinopathy causing decreased visual acuity and blurred vision, and end-stage renal disease secondary to Type 1 diabetes mellitus, which required peritoneal dialysis 7 days a week for 10 hours a day. The representative also reported the complications, including acute peritonitis and 15 pounds of edema, uremia, anemia and fluid overload, secondary to the dialysis that appellant experienced, which required multiple hospitalizations, intravenous antibiotics, and a switch to hemodialysis until the peritoneal catheter began working again. The representative explained that as a result of the peritoneal catheter appellant could not bend, stoop or lift, and remained completely exhausted with barely enough energy to walk. She noted that appellant frequently had to be carried from place to place and could not climb stairs, and that he was on a waiting list for kidney and pancreas transplants. The representative noted that appellant could barely write and was not able to bend his right elbow, and that the arm surgeries never healed properly due to the diabetes. She suggested that the Office arrange a reexamination of appellant to assess his 1996 condition.

The attached medical records supported the representative's allegations as to appellant's diabetic-related medical problems and their preclusion of appellant working eight hours a day as a salesperson. The medical records identified appellant's condition as end stage renal disease secondary to Type 1 diabetes mellitus on cycled peritoneal dialysis beginning in November 1994. The records also identified antibiotic resistant peritonitis infections with flavobacterium and staphylococcus aureus and described required blood transfusions to combat appellant's anemia.

By decision dated May 10, 1996, the Office finalized its reduction of appellant's compensation based on his ability to perform the position of salesperson. The Office concluded that while the submitted medical records showed significant disability, none of the documents refuted the finding that appellant could perform the position of salesperson. The Office stated that no medical evidence had been submitted which showed that residuals of appellant's work injury prevented him from performing the position of salesperson. It did not consider whether residuals of preexisting medical problems prevented appellant from such work.

By letter dated May 28, 1996, appellant requested reconsideration, and he enclosed a recent work capacity evaluation from his treating physician Dr. Allen Auerbach, an osteopath. Dr. Auerbach indicated that appellant should limit all activities and could work zero hours per day. He also noted that appellant had limitations in fine motor movement of his extremities and had gynecomastia with severe breast and chest wall pain, severe degenerative changes in his metatarsophalangeal joints with consequential restricted motion. Dr. Auerbach further noted that appellant was status post excision of adductor muscles of bilateral thighs and had severe peripheral vascular disease. Dr. Auerbach indicated that appellant could not perform repetitive motions of the wrist or elbow, and he indicated that these restrictions were due to appellant's chronic disease of diabetes. He indicated that these restrictions were indefinite with no return to work expected.

By decision dated July 31, 1996, the Office denied appellant's request for modification of the prior decision finding that the evidence submitted was insufficient to warrant modification. The Office correctly quoted the law about it being required to consider conditions which preexisted the work injury, but then it inexplicably found that there was no documented evidence to demonstrate that the nonwork conditions preceded the work injury, and that therefore Dr. Didizian's two-year-old report constituted the weight of the medical evidence.

The Board finds that the Office's reduction of appellant's compensation based upon his ability to perform the position of salesperson must be reversed.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office did not meet its burden of proof to modify appellant's compensation in this case.

According to the Office's Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(a)(2) (December 1993) factors which must be considered in assessing suitability of a selected constructed position include the degree of physical impairment, "including impairments resulting from *both* injury-related and *preexisting conditions*." (Emphasis added.) In the instant case, the Office failed to adequately consider the current impairments appellant manifested due to his preexisting uncontrolled diabetes mellitus, in determining that he could perform the position of salesperson.

The Office accepted that on September 24, 1987 appellant sustained lumbar strain, contusion of the right elbow, an ulnar nerve lesion, and peripheral nerve transposition. Concurrent conditions noted to exist at that time, but which were not accepted as work related included diabetes, renal failure, diabetic neuropathy, ulceration of the foot, and diabetic retinopathy. It is the impairments resulting from these preexisting diabetes mellitus-related conditions, which the Office acknowledged existed at the time of injury but which it later chose to disregard, and from further diabetes mellitus sequelae, which, the medical evidence supports, continue to disable appellant from employment.

Review of the medical evidence of record demonstrates that appellant had been suffering from insulin-dependent diabetes mellitus since 1977. Even the medical report upon which the Office is relying, Dr. Didizian's report, indicated that appellant had been an insulin-dependent diabetic for over 17 years. Therefore, his diabetic condition preexisted his employment injuries by more than 10 years, and consequently, any current disability due to complications from his preexisting uncontrolled diabetes mellitus must be considered when determining whether a constructed position fairly and reasonably represents his wage-earning capacity. Further, the Board notes that Dr. Didizian specifically listed preexisting conditions which must also be considered in determining a suitable job, which included diabetes, hypertension, edema and renal failure, none of which the Office gave any consideration to in its determination that appellant could perform the position of salesperson. The Office instead selectively read and interpreted Dr. Didizian's report, failed to consider all of Dr. Didizian's recommendations, and failed to

¹ *Harold S. McGough*, 36 ECAB 332 (1984); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Period Review of Disability Cases*, Chapter 2.812.3 (March 1987).

pursue any further development of appellant's work tolerances related to his diabetes, renal failure and consequent hypertension and edema, from a medical specialist in an appropriate field in accordance with Dr. Didizian's recommendations. Instead, the Office substituted its own judgment and decided that these preexisting conditions did not matter, nor did Dr. Didizian's recommendations that appellant's preexisting diabetes and its sequelae of renal failure and consequent edema and hypertension, be considered in making a suitable work determination, and then failed to obtain a current medical report when, two years later, it finally made a loss of wage-earning capacity determination. This determination is fundamentally flawed for these reasons, and therefore cannot stand.

Further, upon receipt of appellant's objections to the proposed reduction in compensation, the Office failed to adequately review any of the material presented, failed to recognize that appellant's frail and labile condition had seriously degenerated within the ensuing 19 months while it languished in its decision making, and failed to recognize that virtually all of appellant's present extremely debilitating medical problems originated with his uncontrolled Type 1 diabetes mellitus, including his renal failure and consequent edema, fluid overload, hypertension and uremia, his peripheral vascular disease and peripheral necrosis for which he underwent multiple debridement surgeries, his diabetic macular degenerative which affected his vision, disqualifying him from the physical requirements of a salesperson, his multiple infections and his need for constant peritoneal dialysis and its consequent weakness and restriction of bending motion due to the peritoneal catheter, all of which clearly must be considered as being causally related to the preexisting uncontrolled diabetes mellitus condition.

The Office erroneously finalized its wage-earning capacity determination, and then incorrectly denied modification of that decision, ignoring appellant's treating physician's work capacity evaluation indicating that appellant could perform no work whatsoever. Because the Office ignored appellant's disability from preexisting conditions and ignored Dr. Didizian's recommendations that appellant's preexisting diabetes mellitus and renal failure be considered in determining appellant's work capacity, it did not meet its burden of proof to modify appellant's compensation, and hence its determination that appellant could perform the position of salesperson in 1996 is improper and inappropriate, and therefore cannot stand.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated July 31 and May 10, 1996 are hereby reversed.

Dated, Washington, D.C.
November 16, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member