U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. TIPTON and TENNESSEE VALLEY AUTHORITY, WATTS BAR NUCLEAR PLANT, Spring City, Tenn.

Docket No. 97-757; Submitted on the Record;
Issued April 21, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity; and (2) whether appellant established that he sustained a recurrence of disability on or after February 8, 1991.

On December 18, 1986 appellant, then a 56-year-old carpenter, sustained an employment-related right knee strain. On June 18 and July 31, 1987 he sustained employment-related strains to the left knee.[1] By decision dated November 1, 1988, the Office found that appellant had no residuals of his left knee strains after March 4, 1988. By letter mailed to the Office on December 9, 1988, appellant requested a hearing. In a January 23, 1989 decision, an Office hearing representative denied the request as untimely. On January 18 and February 11, 1991 appellant filed recurrence claims of the December 18, 1986 employment injury, stating that he was requesting compensation because he had been "dogged off."[2] By decision dated May 20, 1991, the Office denied the claim, finding that the evidence of record failed to establish a causal relationship between the employment injury and the claimed condition. Following appellant's request, a hearing was held on December 2, 1993, where appellant testified that he had first injured his right knee at work in 1963 after which he returned to full duty and that following his 1986 and 1987 injuries, he was placed on permanent restrictions but still worked as a carpenter in the shop until he was laid off. He acknowledged that the employing establishment was currently out of the construction business.

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[1] These claims were adjudicated by the Office under file numbers A06-0508310, A06-424413 and A06-424424 respectively. On July 18, 1994 appellant filed a claim for a schedule award that was denied by the Office on November 16, 1995. Appellant did not appeal this decision.

[2] The record indicates that appellant initially stopped work on December 31, 1990, returned on January 28, 1991, stopped again on February 8, 1991 and has not worked since.

In a March 9, 1994 decision, an Office hearing representative remanded the case to the Office to obtain records regarding appellant's 1963 injury and to refer him, along with an updated statement of accepted facts and the medical record, to an appropriate Board-certified orthopedic surgeon to determine if appellant's knee injuries prevented him from performing his regular duties as a carpenter. An Office memorandum indicates that appellant sustained employment-related right knee strains on April 24 and May 4, 1963 for which he underwent surgery but that the case records for these injuries were no longer obtainable. The Office then referred appellant to Dr. Vernon H. Young, a Board-certified orthopedic surgeon, for a second-opinion evaluation. By decision dated September 15, 1994, the Office denied that appellant's disability was causally related to the December 18, 1986 employment injury. In a September 19, 1994 decision, the Office found that appellant's modified carpenter position fairly and reasonably represented his wage-earning capacity. The decision indicated that he had no loss of earnings. A second hearing was held on April 20, 1995 where appellant testified that after his 1986 employment injury he "pretty well" did the same work as other carpenters in the shop with the exception that he did not climb or squat and then returned to full duty until he injured his left knee, after which he worked in the warehouse yard until they no longer needed carpenters and then returned to the shop where he worked until he was furloughed. He indicated that he did not miss work due to either the 1986 or 1987 employment injuries. Roger D. Graham, a former employing establishment foreman and union member, also testified, indicating that the employing establishment no longer employs carpenters, that all employees but appellant were furloughed by seniority and that the employing establishment could furlough whomever it wanted.

By decision dated June 29, 1995 and finalized June 30, 1995, an Office hearing representative affirmed the September 19, 1994 decision, finding that the Office properly determined that appellant's job as modified carpenter fairly and reasonably represented his wage-earning capacity. Appellant, through counsel, requested reconsideration of the June 30, 1995 decision and, by decision dated September 4, 1996, the Office found that appellant's wage-earning capacity had been properly determined and that he had not sustained a recurrence of disability on or after February 8, 1991. The instant appeal follows.

The evidence in this case includes an employing establishment memorandum regarding reduction-in-force, signed by appellant on April 22, 1991, that indicates he would be terminated effective May 31, 1991 due to lack of work. A May 12, 1995 employing establishment letter also indicates that appellant left employment due to a reduction-in-force caused by a general lack of work.[3]

The medical evidence includes numerous reports dated August 10, 1987 to December 12, 1990 from an employing establishment physician, Dr. W.C. Zachary, who indicated that appellant's physical activities were restricted to no climbing and no squatting. Dr. J.M. Burkhart, a Board-certified orthopedic surgeon, provided a March 4, 1988 report in which his impression was severe degenerative arthritis on the right and torn lateral meniscus on

[3] The record also contains notes of a meeting held on February 28, 1991 identified as "grievance request for meeting." It does not indicate that a grievance was filed or what remedy, if any, was issued.

the left. A March 10, 1988 left knee arthrogram demonstrated mild laxity of the lateral collateral ligament and, perhaps, an old tear of the medial meniscus.

Appellant's treating Board-certified family practitioner, Dr. Richard A. Dew, provided an April 26, 1991 report in which he diagnosed post-traumatic arthritis of the right knee and indicated that appellant could not perform work requiring stooping and climbing. In a May 4, 1991 Office form report, Dr. Dew indicated that appellant could work with restrictions. In a September 7, 1991 report, he advised that appellant could do no manual labor that required standing, bending, stooping, lifting or walking and would need a total knee replacement. In a November 27, 1993 report consisting of questions furnished by appellant's counsel, Dr. Dew provided check marks indicating that the 1963 employment injury was the primary direct cause of appellant's degenerative arthritis in his right knee, that the condition was aggravated by the 1987 employment injury,[4] that his bilateral knee conditions permanently disabled him from constant climbing, bending and squatting, that the pain and mild degenerative arthritis in his left knee was due in whole or in part to the June 1987 employment injury, as well as to his occupational requirements of repetitive bending, squatting, stooping, crawling, walking, lifting, carrying, climbing and walking on rough terrain.

On June 1, 1994 the Office referred appellant, along with the medical record and a statement of accepted facts, to Dr. Vernon H. Young, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 20, 1994 report, Dr. Young noted the history of appellant's employment injuries and findings on x-ray and examination and diagnosed severe degenerative osteoarthritis of the right knee. He advised that appellant was a candidate for total knee replacement on the right, concluding:

> "I think [appellant's] present problem is primarily arthritis of the right knee brought on by age. I think it was accelerated somewhat by his injury of 1963 and, according to [appellant], symptoms were aggravated in 1986 but there is a causal relationship to this being an aggravation of a preexisting problem. The evidence in this is the knee effusion and the x-ray findings of severe degenerative arthritis of the right knee and [appellant's] age which is certainly a contributing factor.
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> "I think [appellant] does have some degree of permanent partial impairment of approximately 20 percent to the right lower extremity. I would consider him to be totally disabled for work as a carpenter of manual type labor at the present time based on the medical records of September 7, 1991 by Dr. Richard Dew."

Dr. Charles A. Gouffon, a Board-certified orthopedic surgeon, submitted treatment notes dating from May 1, 1995 to May 2, 1996 in which he diagnosed advanced osteoarthritis of the right knee and osteoarthritis of the left knee with possible internal derangement. He noted

[4] Appellant sustained an employment-related injury to his right knee in December 1986 and to his left knee in 1987.

findings on examination and performed right total knee replacement on June 16, 1995. In a May 2, 1996 note, Dr. Gouffon noted that appellant had been injured at work in 1963 and advised:

> "I think it is certainly reasonable that the findings were post traumatic since he had previous surgery and partial meniscectomy and that they could be related to his work injury. It is difficult to make an absolute determination of that given the long time between the injury and his recent surgery."

Initially, the Board finds that the Office properly determined appellant's wage-earning capacity.

The Federal Employees' Compensation Act provides for payment of loss of wage-earning capacity as follows:

> "If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."[5]

Office procedures provide that a retroactive determination of loss of wage-earning capacity may be made where the Office learns that the claimant has returned to alternative work more than 60 days after the fact and where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his ability to work.[6]

In the present case, in its September 19, 1994 decision, the Office based appellant's wage-earning capacity on a determination that his actual earnings as a modified carpenter at the employing establishment beginning December 18, 1986 represented his wage-earning capacity. This determination is consistent with section 8115(a) of the Act[7] which provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." The Board has stated, "[g]enerally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[8]

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[5] 5 U.S.C. § 8106(a).

[6] *See Elbert Hicks*, 49 ECAB ___ (Docket No. 95-1448, issued January 20, 1998).

[7] 5 U.S.C. § 8115(a).

[8] *Don J. Mazurek*, 46 ECAB 447 (1995).

The record in this case does not contain evidence showing that the modified carpentry position constituted part-time, sporadic, seasonal or temporary work.[9] Nor does the record indicate that the position was a make-shift position designed for appellant's particular needs.[10] The Board, therefore, finds that appellant's actual earnings as a modified carpenter, which he performed for a period of over four years, fairly and reasonably represented his wage-earning capacity. He is not contending that he lost earnings due to his modified position, rather that as of the date he was furloughed in February 1991, he sustained a recurrence of disability.[11] Lastly, the record indicates that appellant was initially furloughed and as indicated by the memorandum signed by him on April 22, 1991, his position was terminated due to a reduction-in-force. The record, therefore, establishes that the termination of employment was not due to appellant's light-duty status but was due to a reduction-in-force affecting all workers at the work site.

The Board, however, finds that the case is not in posture for decision regarding modification of the wage-earning capacity determination.

Once 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. The burden of proof is on the party attempting to show modification of the award.[12]

While the medical evidence in this case established that appellant could perform his modified carpenter position at the time he was terminated from work due to a reduction-in-force, in a September 7, 1991 report, Dr. Dew advised that appellant could do no manual labor that required standing, bending, stooping, lifting or walking and, in a November 27, 1993 report advised that appellant's condition was employment related. Moreover, Dr. Young, who provided a second-opinion for the Office, advised in a June 20, 1994 report, that appellant's condition was due in part to his employment injuries and that he was totally disabled for work as a carpenter. Lastly, Dr. Gouffon provided some support that appellant's bilateral knee condition was employment related. While these reports are insufficient to meet appellant's burden of proof to establish that there has been a material change in the nature and extent of appellant's injury-related condition, they do raise an uncontroverted inference of causal relation between appellant's accepted employment injuries and an exacerbation of his condition and are, thus, sufficient to require the Office to undertake further development of appellant's claim.[13] It is well

[9] *See Monique L. Love*, 48 ECAB ____ (Docket No. 95-188, issued February 28, 1997).

[10] *Id.* The Board notes that, while appellant's counsel argued that the modified carpenter position was a "make-do" job, the Board finds that the increasing lack of work was due to a general lack of work at the employing establishment which led to the reduction-in-force and was not due to a makeshift position established solely for appellant's benefit.

[11] But *see Larson*, The Law of Workers' Compensation § 57.63 (1994). If the impaired worker becomes unemployed as a result of a general layoff at the completion of a project or closing of a plant, the suggested formula would not support a finding of compensable disability.

[12] *Gregory A. Compton*, 45 ECAB 154 (1993).

[13] *See John J. Carlone*, 41 ECAB 354 (1989).

established that proceedings under the Act[14] are not adversarial in nature[15] and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[16] On remand the Office should refer appellant to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether his bilateral knee condition is causally related to his employment injuries. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs dated September 4, 1996 is hereby affirmed in part and vacated in part and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, D.C.
April 21, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] 5 U.S.C. §§ 8101-8193.

[15] *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

[16] *See Dorothy L. Sidwell*, 36 ECAB 699 (1985).