U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD JACKSON and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, Ala.

Docket No. 97-385; Submitted on the Record;
Issued January 27, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that the September 23, 1993 wage-earning capacity determination should be modified.

On January 3, 1989 appellant, then a 32-year-old letter carrier, filed an occupational disease claim, alleging that, beginning April 11, 1988, he sustained sesamoiditis in the right foot due to excessive walking on all types of terrain while in the performance of duty. On April 5, 1989 appellant filed a notice of traumatic injury and claim, alleging that he sustained sesamoiditis in his left foot due to factors of his federal employment. The Office of Workers' Compensation Programs accepted appellant's claims for permanent aggravation of sesamoiditis in both feet and hallux rigidus in the right foot. On January 4, 1989 appellant returned to work for four to six hours per day working limited duty. On August 4, 1989 appellant returned to work for eight hours a day. On October 30, 1989 appellant requested a voluntary transfer to another job position due to his inability to work as a mail carrier. Thereafter, appellant had intermittent periods of temporary total disability. Appellant filed another voluntary request for permanent light duty which was accepted by the employing establishment on March 4, 1991. On March 9, 1991 appellant began working as a distribution clerk.

By decision dated August 29, 1991, appellant received a schedule award for a 41 percent permanent impairment to his right great toe for a total of 15.58 weeks of compensation from March 19 to July 6, 1991.

Appellant underwent surgery in November 1991 and filed a claim for recurrence of disability beginning November 3, 1991 which was accepted by the Office. On March 26, 1992 appellant was released for full-time limited-duty work by his attending physician. By letter dated April 2, 1992, the Office advised appellant that the position of distribution clerk was suitable and within his physical capabilities. The Office notified appellant of the penalty provision set forth in section 8106(c) of the Federal Employees' Compensation Act and indicated that he had 30 days to accept the position. On April 8, 1992 appellant accepted the

offered position. Appellant had intermittent periods of temporary total disability throughout 1992. On June 29, 1993 the employing establishment implemented changes effective June 26, 1993 in appellant's limited-duty work assignment due to difficulties he had been experiencing with his feet. Appellant's time for reporting to work was moved up two hours at his request, his stool was changed to a level position to prevent pressure on his feet, he was instructed to not make rounds to take work from other employees to decrease the amount of walking he did and his work was to be placed in a "tub" next to his work station to decrease his walking.

On August 26, 1993 the Office notified appellant that he had 15 days to fully return to the offered limited-duty assignment and advised him that he had not provided any valid medical documentation for his failure to work. By letter dated September 11, 1993, appellant refused the limited-duty job offer, alleging that his condition was not suitable for work on a concrete floor and that he had sustained acute inflammation of his foot due to the working conditions. On September 21, 1993 the Office determined that appellant had been reemployed as a modified distribution clerk effective June 26, 1993 with wages of $33,131.00 per year and $637.13 per week, and no loss in wage-earning capacity.

On October 20, 1993 appellant filed a claim for recurrence of disability beginning October 5, 1993. By letter dated November 1, 1993, the Office construed appellant's claim for a recurrence of disability as a request to modify its formal decision on his loss of wage-earning capacity. Subsequently, appellant requested that the Office's September 21, 1993 decision be reviewed, asserting that the original determination that the limited-duty position was suitable was erroneous. By merit decisions dated December 29, 1993, March 16, 1994, March 15, 1995 and September 20, 1996, the Office denied appellant's request for reconsideration of its September 21, 1993 decision on the grounds that the evidence submitted was not sufficient to warrant modification. By decision dated January 31, 1994, the Office also denied appellant's request for a hearing on the grounds that he had previously requested and the Office had adjudicated a request for reconsideration.

The Board has duly reviewed the entire case record and finds that appellant has not established that the September 21, 1993 decision should be modified.[1]

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 the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.[2]

In the present case, the employing establishment offered and appellant accepted a limited position as a modified distribution clerk which was altered effective June 26, 1993 to accommodate additional restrictions on appellant's bilateral foot condition. This position

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on October 23, 1996, the only decision before the Board is the Office's September 20, 1996 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] *Don J. Mazuek*, 46 ECAB 447 (1995); *Odessa C. Moore*, 46 ECAB 681 (1995).

continued to remain available when appellant filed a claim for recurrence of disability on October 20, 1993. Thus, the Board notes that this case does not involve a scenario where the employing establishment withdrew a light-duty assignment and therefore the Office properly construed appellant's claim and subsequent communications as requests for reconsideration of its loss of wage-earning capacity formal determination.[3]

Appellant contends that the determination of the Office was erroneous as there was a material change in the nature and extent of his injury, asserting that he was advised to cease work by his physician in October 1993, and therefore the position was not suitable. The Board notes that the Office properly found that this position was suitable as it was altered to comply with medical restrictions imposed by appellant's attending physician, Dr. John B. Morris, a Board-certified orthopedic surgeon. In support of his request for modification of the loss of wage-earning capacity determination, appellant submitted several reports by Dr. Morris and a diagram of his workplace to demonstrate why he was required to walk in excess of his physical limitations. In his June 30, 1993 report, Dr. Morris had indicated that appellant was to do no lifting over 45 pounds, not pick up any items below 10 inches off the floor, no standing over 15 to 20 minutes or kneeling over a few seconds and no squatting. His chart notes dated July 15 and September 10, 1993 indicated that the employing establishment had complied with these restrictions as memorialized in the letter dated June 29, 1993 by the employing establishment. In an office note dated October 8, 1993, Dr. Morris indicated that appellant was taken off work because he reported that he was not able to tolerate the concrete floor and an examination revealed tenderness in the plantar margin of his foot. In a report dated November 19, 1993, Dr. Morris reiterated that appellant could not tolerate the concrete floor and reported that he was not sure anyone knew why inflammation occurs and that he did not know why appellant's suddenly got worse. He concluded that appellant had a recurrence of disability when he stood on his feet a lot. In a report dated January 11, 1994, Dr. Morris stated that appellant had a problem with a bad foot and was taken off work to relieve the pain. He indicated that appellant reported a 500 foot walk to and from his work station and that this caused difficulty. Dr. Morris also noted that appellant reported standing quite a bit and problems even while sitting. The November 1993 report is not sufficient to substantiate that appellant's medical condition had worsened due to his limited-duty position since, Dr. Morris did not provide a conclusive opinion concerning why appellant developed the diagnosed inflammation, especially in light of the accommodations made to that position to comply with the doctor's restrictions. Similarly, the January 1994 report does not discharge appellant's burden of proof since Dr. Morris failed to explain how appellant's condition worsened with work. Although the Office later accepted appellant's diagram as factual which indicated that he walked 630 feet from the door of his job to his work station, Dr. Morris did not provide a rationale addressing why this distance would aggravate or cause a worsening of appellant's accepted injuries. Moreover, as noted by Dr. Morris in his office notes, appellant's statement that he was required to stand a lot and that sitting put pressure of his feet is not supported by the record as the employing establishment modified appellant's position to level his stool so that he would not have pressure on his feet and limited appellant's standing. Therefore, Dr. Morris' report is not rationalized as he did not provide an adequate explanation for his conclusions and it is based in part on an inaccurate factual history.[4] In a January 17, 1995

[3] *Cf.* FECA Transmittal No 97-10 (issued May 29, 1997).

[4] *James A. Wyrich*, 31 ECAB 1805 (1980).

report, Dr. Morris noted that appellant was required to walk ¾ of a mile a day on the concrete floor and indicated that appellant should not walk ¾ of a mile at any one time. He reported that being consistently on a concrete floor would aggravate appellant's medical problem and that if a job could be provided where appellant walked shorter distance with no prolonged time on a concrete floor appellant would be able to work. As previously noted, appellant's diagram indicated that he walked 630 feet from the front door to his work station and this is substantially less than ¾ of a mile or 3,960 feet. Appellant has not presented any evidence to substantiate his claim that he was required to walk this distance either at one time or during the course of one day. The modified distribution clerk position description indicated that appellant was to remain seated during the majority of his workday. As Dr. Morris' January 1995 report is based on inaccurate facts and since the prescribed limitations had been complied with by the employing establishment, this report is not rationalized and cannot discharge appellant's burden of proof. Appellant also submitted a June 7, 1995 report by Dr. Morris who noted that appellant should not lift over 45 pounds, should not pick up anything below 10 inches from the floor, should not stand over 10 to 15 minutes at a time or walk over 6 minutes, should not kneel over a few seconds and should not squat. He concluded that violation of these limitations would probably result in a recurrence of disability. The limitations set forth in the June 7, 1995 report are substantially the same as the limitations set forth in Dr. Morris' June 30, 1993 report which he indicated the employing establishment had complied with by the accommodations listed in the June 29, 1993 letter. As Dr. Morris has not noted and since the record does not support that these restrictions were in fact violated, this report is of limited probative value. In addition, the physician's prediction of future injury does not establish that there is a current recurrence of disability. Therefore, this does not substantiate appellant's contention that his condition had worsened due to factors of his federal employment.[5] Appellant has not established that modification of the Office's September 21, 1993 is warranted.

[5] Appellant also submitted a decision dated March 29, 1996 by the Merit Systems Protection Board that indicated that appellant had been removed due to his inability to perform the position of modified distribution clerk. Findings of other administrative agencies are not determinative with regard to proceedings under the Act which is administered by the Office and the Board. *George A. Johnson*, 43 ECAB 712 (1992).

The decision of the Office of Workers' Compensation Programs dated September 20, 1996 is hereby affirmed.

Dated, Washington, D.C.
January 27, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member