

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGIL E. HERRING and U.S. POSTAL SERVICE,
POST OFFICE, San Bernardino, Calif.

*Docket No. 97-1015; Submitted on the Record;
Issued March 22, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant has met his burden of proof to establish that he had any disability resulting from his work injury of April 16, 1991.

On April 16, 1991 appellant, then a 48-year-old letter sorting machine distribution clerk, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome as a result of his employment activities. The Office of Workers' Compensation Programs accepted the claim for bilateral carpal tunnel syndrome and bilateral epicondyle. Appellant underwent surgery on October 23, 1992 for release of the lateral epicondyle extensor tendons. He received temporary total disability benefits from August 14, 1991 until July 1993, when he returned to full-time modified-duty work. Appellant stopped work on December 6, 1994.

By decision dated February 22, 1994, the Office notified appellant that the light-duty position at which he was working, fairly and reasonably represented his wage-earning capacity and that he had a zero percent loss of wage-earning capacity.

By decision dated November 25, 1994, the Office awarded appellant a schedule award for an 18 percent permanent loss of use of the right arm and a 20 percent permanent loss of use of the left arm. The schedule award covered the period October 25, 1993 through February 1, 1996.

Appellant stopped work on December 6, 1994. By decision dated February 17, 1995, the Office denied appellant's request for compensation for the period December 6, 1994 through January 6, 1995 for the reason that the claimed period of disability was not causally related to the original work injury. The Office specifically found that the medical evidence supports that the claimed period of disability was a result of an intervening cause and advised appellant that he might want to file a CA-1 traumatic injury claim.

By decision dated October 24, 1995, the Office denied additional claims for wage-loss compensation for the periods December 6, 1994 through July 1, 1995, on the basis that appellant had not established a recurrence of his disability and had additionally received a lump sum schedule award for this period.

On April 17, 1996 appellant filed a notice of recurrence of disability alleging that he was in constant pain and therefore unable to perform the duties of his light-duty position.

By letter dated April 26, 1996, the Office noted that on February 22, 1994, it was determined that the position of distribution clerk fairly and reasonably represented appellant's wage-earning capacity. The Office advised appellant that in order to have his recurrence claim accepted, he would have to establish that the original rating was in error or provide medical evidence to substantiate a material worsening of his condition since February 22, 1994. The Office noted that the most recent medical report of record from Dr. Virchel E. Wood, a Board-certified orthopedic surgeon and appellant's treating physician, on February 27, 1996, stated that appellant was permanent and stationary with regard to his upper extremities. He noted that there were no new injuries, and electromyogram (EMG) testing was completed recently and was negative. Dr. Wood recommended that appellant's disability status be evaluated by the physician treating his back condition. Based on his February 27, 1996 report, the Office found that appellant's condition had not materially worsened and that he remained capable of performing the duties of a distribution clerk. The Office held the record open for 30 days to provide evidence that his upper extremity condition has worsened to the point where appellant is not able to perform the duties of a distribution clerk. By letter dated May 14, 1996, appellant requested an additional 30-day extension, which the Office granted.

In an April 18, 1996 report, Dr. Rebecca J. Patchin, a specialist in pain management, examined appellant's upper extremity complaints and diagnosed status post carpal tunnel release and radial nerve release and bilateral upper extremity pain. She recommended an in-patient pain management program.

On May 28, 1996 Dr. Wood provided a physician's form recommending a pain clinic which stated that appellant was totally temporarily disabled.

By decision dated July 22, 1996, the Office denied appellant's claim for recurrent disability benefits noting that appellant failed to show that the original rating in their wage-earning capacity decision was in error or that appellant's industrial injury has undergone a material change which prevents him from performing the duties of the light-duty position. The Office advised that this decision does not affect appellant's entitlement to medical benefits.

The Office subsequently received a May 28, 1996 medical report from Dr. Woods, who provided the impression of bilateral pain of unknown etiology. He opined that appellant is permanent and stationary. Dr. Wood noted that the EMG was normal. He stated that no further orthopedic treatment was warranted. No objective findings were given and Dr. Wood did not address appellant's ability to work.

On December 12, 1996 the Office received a reconsideration request from appellant. In his letter, appellant argued that his pain is so severe that he cannot sleep for more than 15 to 30

minutes at a time. He stated that none of the treatment given by his doctor, including the surgery, worked. Appellant stated that after he went back to work, he missed a lot of time which he did not claim for this work injury. He additionally alleged that he did not do all his work duties because of the pain. No evidence was provided to support these allegations.

In support of his reconsideration request, appellant submitted additional evidence.

In an August 12, 1993 letter, Heidi Lorren-Jackson, an occupational ergonomics consultant, wrote to Dr. Wood describing the work requirements of the modified-duty job. Appellant alleged that these requirements were not consistent with the medical restrictions provided by his physician.

A February 24, 1993 discharge summary from Rehabilitation Technology Works was provided.

A copy of the March 1, 1994 light-duty job offer, which appellant alleges is against his work restrictions.

Appellant provided a copy of Dr. Wood's August 17, 1993 OWCP-5 form, which was completed after he returned to work. The limitations noted within the August 17, 1993 report meets the limitations within the light-duty offer of March 1, 1994.

Copies of medical reports were received dated April 28, 1993, December 2, November 25, November 11, October 27, May 11, December 21 and November 2, 1992. These reports, however, are irrelevant to the issue of whether appellant's rating is in error or whether appellant sustained a recurrence of disability as the reports precede appellant's successful return to work by several months.

An October 31, 1996 letter from the Office advising appellant that, if he disagreed with the July 22, 1996 decision, he should follow the appeal rights attached to that decision was submitted.

An August 13, 1996 medical report from Dr. Wood stated that "the objective findings are that the man cannot function. I do not know how much more objective you can get. He cannot work, he is constantly moving with pain. There is nothing surgically that can be done because the EMG's have been negative." Dr. Wood opined that this pain is related to the original injury and recommended an in-patient pain, multidisciplinary approach.

An October 31, 1996 letter from the employing establishment to appellant stated that appellant was being removed from his job for the reason that he was absent without leave since December 23, 1994.

By decision dated December 17, 1996, the Office denied appellant's request for modification based on a merit review of the claim.

The Board finds that appellant has failed to meet his burden of proof to establish that he had any disability resulting from his work injury of April 16, 1991.

In this case, appellant returned to full-time modified-duty work in July 1993. In a February 22, 1994 decision, the Office notified appellant that the light-duty position at which he was working fairly and reasonably represented his wage-earning capacity. Appellant stopped work on December 6, 1994.

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-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 cannot perform such limited-duty work. 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 limited-duty job requirements.¹ This burden further includes the necessity of furnishing rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition,² and supports that conclusion with sound medical reasoning.³ Where no such rationale is present, medical evidence is of diminished probative value.⁴

In this case, the Office found in its February 22, 1994 decision that the modified position which appellant had performed since July 1993 fairly and reasonably represented his wage-earning capacity. Appellant stopped work on December 6, 1994. The determination of whether an employee is physically capable of performing a modified position is a medical question which must be resolved by medical evidence.

The medical evidence is insufficient to modify the Office's wage-earning capacity decision which found appellant medically capable of performing the duties of the light-duty position. In her April 18, 1996 report, Dr. Patchin diagnosed status post carpal tunnel release and radial nerve release and bilateral upper extremity pain and recommended an in-patient pain management program. On May 28, 1996 Dr. Wood stated that appellant was totally temporarily disabled on a physician's form recommending a pain clinic. No rationale was provided by either Dr. Patchin or Dr. Wood to support total temporary disability. No objective findings of a material change in appellant's condition were documented. Moreover, neither report included an evaluation of appellant's light-duty requirements or explained why appellant was no longer able to perform his modified duties.

In his May 28, 1996 report, Dr. Wood provided the impression of bilateral pain of unknown etiology. He opined that appellant is permanent and stationary. Dr. Wood did not address appellant's ability to work and, although he noted that the EMG was normal, no objective findings were given. Thus, this report is insufficient to establish that the original rating

¹ See *Terry R. Hedman*, 38 ECAB 222, 227 (1986); see also *Willard N. Chuey*, 34 ECAB 1018 (1983).

² *Kevin J. McGrath*, 42 ECAB 109, 116 (1990).

³ *Lourdes Davila*, 45 ECAB 139, 142 (1993).

⁴ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

was in error or that appellant's medical condition had undergone a material change that prevented him from working at his light-duty position.

The August 12, 1993 letter from Ms. Lorren-Jackson describing the work requirements of the modified duty position and the February 24, 1993 discharge summary from Rehabilitation Technology Works are insufficient to establish that the original rating was in error as it was based on the fact that appellant had been successfully working at the modified-duty position for 17 months.

Contrary to appellant's contention that the light-duty offer dated March 1, 1994 is against his work restrictions, there is no evidence to support that the original rating was in error. It is noted that appellant worked at the modified-duty position for 17 months before stopping work. Moreover, the limitations noted within Dr. Wood's August 17, 1993 report are consistent with the light-duty offer of March 1, 1994.

Additionally, there is no medical evidence which provides the necessary causal relationship to establish that appellant's disability was causally related to the accepted injuries. In his August 13, 1996 report, Dr. Wood opined that appellant's inability to function is an objective finding. He also noted appellant's subjective complaints of pain and opined that this pain is related to the original injury. Dr. Wood's opinion, however, is insufficient to establish appellant's claim. Without objective findings to support a particular diagnosis, the etiology of pain cannot be determined. Since appellant's pain is of unknown etiology, the connection between appellant's current condition and the original work injury cannot be established. The fact that the etiology of the disease is unknown or obscure does not shift the burden of proof to the Office to disprove an employment relationship, neither does the absence of a known etiology for his condition relieve appellant of the burden of establishing a causal relationship by the weight of the evidence, which includes affirmative medical opinion based on material facts with supporting rationale.⁵ Although Dr. Wood opined that appellant's pain is related to the original work injury, no rationale or medical evidence is provided to support this opinion. Thus, this report is insufficient to meet appellant's burden.

Thus, as appellant has failed to provide any rationalized medical evidence establishing that he sustained a medical condition or disability causally related to his April 16, 1991 employment injury or any other factors of his employment, he has failed to discharge his burden of proof.

The decisions of the Office of Workers' Compensation Programs dated December 17 and July 22, 1996 are affirmed.⁶

⁵ *Ronald K. White*, 37 ECAB 176 (1985).

⁶ The Board notes that appellant submitted additional medical evidence after the Office's December 17, 1996 decision. As some of this evidence was not previously considered by the Office prior to its decision of December 17, 1996, the evidence represents new evidence which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b).

Dated, Washington, D.C.
March 22, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member