

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VICENTE F. AMPARAN and DEPARTMENT OF THE ARMY,  
ARMY DEPOT, Corpus Christi, TX

*Docket No. 99-1656; Submitted on the Record;  
Issued February 28, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant had any disability due to his right knee condition causally related to his employment injury subsequent to December 9, 1990.

On August 25, 1993 appellant, a 44-year-old former forklift operator and warehouse worker for the employing establishment, filed a claim for benefits alleging that while working for the employing establishment he engaged in heavy lifting of boxes and crates which caused back spasms in addition to pain and discomfort in his spine, shoulders, knees and wrist. He was terminated by the employing establishment on December 8, 1990.<sup>1</sup> Appellant has not returned to work.

By decision dated April 21, 1994, the Office of Workers' Compensation Programs denied appellant's claim, finding that he failed to submit medical evidence sufficient to establish that he sustained an injury causally related to his federal employment.

Appellant requested a hearing by letter dated May 26, 1994, which was held on March 10, 1995.

In a report dated April 18, 1994, Dr. Robert Q. Lewis, a Board-certified orthopedic surgeon, stated that he had been treating appellant for degenerative arthritis in both knees since

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<sup>1</sup> In a notice of personnel action dated December 6, 1990, the employing establishment indicated that appellant was removed for the following reasons: loafing, defiance of authority, failing to obey an order immediately, arguing with the supervisor and challenging the supervisor to step outside the matter and settle the matter. The notice also indicated that this was appellant's third offense.

March 1990. He advised that he had performed arthroscopic surgery on appellant's right knee,<sup>2</sup> a partial medial meniscectomy and chondroplasty. Dr. Lewis stated that appellant's work at that time involved standing, walking and repetitive lifting which would predispose a joint such as his to premature arthritis. He also stated that appellant had been seen for pain and restricted movement on both shoulders and on a recent x-ray, he was found to have degenerative arthritis mainly involving the acromioclavicular joints. Dr. Lewis advised that appellant also had experienced pain in his cervical and lumbar spine and discomfort which had restricted his ability to function on a daily basis. He concluded that, as indicated by his present condition, appellant was physically disabled for any type of employment with no expectation of any change in this status in the future.<sup>3</sup>

By decision dated June 20, 1995, an Office hearing representative set aside the April 21, 1994 decision, finding that the evidence of record did not establish whether appellant's preexisting medical conditions were aggravated by his employment with the employing establishment. The Office hearing representative stated that the record was unclear as to whether appellant was on light duty at the time he was terminated by the employing establishment, noting that the evidence pertaining to this issue was contradictory. The Office therefore remanded the case for further development of the factual and medical evidence and instructed the employing establishment to submit a statement containing a description of appellant's light duties and the dates they were performed. In addition, the hearing representative instructed that the Office should refer appellant, his medical records and a statement of accepted facts to a Board-certified medical specialist for an examination to determine whether appellant's current condition or disability was causally related to his federal employment.

In a letter to the Office dated October 30, 1995, the employing establishment attached a copy of appellant's official job description, in addition to two statements, dated November 3, 1995, from appellant's supervisor describing the duties appellant was assigned. The second statement described the duties appellant usually performed while on light duty, which were assigned at the supervisor's discretion.

The Office referred appellant for a second opinion examination with Dr. Charles W. Kennedy, a Board-certified orthopedic surgeon, for January 2, 1996. In a report dated January 2, 1996, he stated that appellant did heavy work for approximately three years of employment, subsequently performing limited duties with occasional heavy work. Dr. Kennedy related that appellant initially noted low back pain in December 1986 and then developed right knee pain followed shortly by left knee pain and discomfort in both shoulders and neck. He stated that, based on the results of a computerized axial tomography scan of his lumbar spine, appellant had a unilateral spondylolysis at L5. Dr. Kennedy detected a decreased range of motion of the shoulders and low back and knees, with normal range of motion of the cervical spine. He opined

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<sup>2</sup> This surgery was performed by Dr. Lewis on March 19, 1990.

<sup>3</sup> In a report dated November 9, 1990, Dr. Lewis stated that he had examined appellant and concluded that he continued to have symptoms with his right knee related to the arthritic condition, which affected his capabilities at work and his ability to cope with the mental strain.

that all the above conditions were ongoing at the time he began his employment with the employing establishment. Dr. Kennedy stated:

“Heavy work such as he performed during the first three years of employment with [the employing establishment] certainly could have aggravated his conditions, but certainly did not cause them. The simple acts of daily living could also have provided his painful condition.”

He advised that:

“It is possible that this heavy work conditions for three years mildly aggravated his osteoarthritic conditions and the spondylolysis of L5. I do not feel that his work activities worsened the disease process itself, but rather aggravated his symptoms.... It seems likely that his aggravated knee symptoms would become permanent, but his back should have improved after discontinuance of the heavy activity. His neck, back, shoulder and ankle symptoms should have subsided after his job termination in December 1990.” With regard to his knee condition, however, it is accepted that his right knee condition was permanently altered, as knee surgery was performed March 1990. Consequently, permanent aggravation of the right knee condition is accepted.”

By decision dated February 23, 1996, the Office accepted appellant’s claim for a temporary aggravation of osteoarthritis of bilateral shoulders, left knee, L5 spondylolysis and cervical spondylosis which ceased by December 1990 and for a permanent aggravation of right knee osteoarthritis.

By letter dated March 13, 1996, appellant requested an oral hearing.

By decision dated June 13, 1996, following a review of the record, an Office hearing representative, set aside the Office’s February 23, 1996 decision and remanded for further development of the medical evidence.<sup>4</sup> The hearing representative found that the Office’s acceptance of appellant’s claim was contradictory, in that it had accepted a permanent aggravation of the right knee even though it had also found that the work-related aggravation ceased in December 1990. In addition, the hearing representative found that Dr. Kennedy’s second opinion medical report was speculative regarding causal relationship and the cessation of the causal relationship. The hearing representative therefore instructed that the Office resolve the contradiction in findings and obtain a supplemental medical opinion which explained whether a causal relationship existed and whether appellant was currently disabled from his date-of-injury job due to his accepted conditions.

In a report dated August 20, 1996, Dr. Kennedy stated that he had failed to mention in his previous report that there were no obvious physical abnormalities in appellant’s ankles, in concurrence with the previous medical evidence. He stated that the lack of any progressive physical abnormalities from the time of a February 1993 examination to his own January 1996

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<sup>4</sup> The hearing representative noted in the decision that the case was not in posture for a hearing.

examination led him to conclude that there were not ongoing, serious problems in those areas. Dr. Kennedy stated that his findings were based on judgment and experience, factoring in the previous medical examination and diagnostic tests, in addition to his own findings on examination of appellant.

By decision dated September 9, 1996, the Office accepted appellant's claim for a temporary aggravation of osteoarthritis of bilateral shoulders, left knee, L5 spondylolysis and cervical spondylosis which ceased December 1990.

By letter dated October 3, 1996, appellant requested an oral hearing.

By decision dated June 30, 1997, an Office hearing representative set aside the September 9, 1996 decision and remanded for further development of the medical evidence.<sup>5</sup> The Office hearing representative stated that Dr. Kennedy's supplemental report had still not resolved the extent of disability appellant sustained as a result of his right knee condition. The Office therefore referred the case back to Dr. Kennedy for another supplemental opinion.

In a report dated September 9, 1997, Dr. Kennedy stated, "It is my definite opinion that [appellant's] inability to return to hard work was a combination of his back plus knee complaints and if he was bothered from his knee only than he should have been able to return to his normal work. I have not seen [appellant] since [January 2, 1996] and have no idea of his present situation. [For] that reason [I] cannot address the question of whether or [not] he is still disabled from performing his job."

By decision dated October 27, 1997, the Office found that the medical evidence of record indicated that appellant's right knee condition did not prevent him from performing his normal work duties prior to his termination on December 9, 1990 and, therefore, he was not entitled to benefits subsequent to that date.

By letter dated November 12, 1997, appellant requested an examination of the written record.

By decision dated March 26, 1998, an Office hearing representative set aside the October 27, 1997 decision and remanded the case for further development of the medical evidence. The Office hearing representative stated that Dr. Kennedy's September 9, 1997 report was speculative and did not contain a rationalized opinion with regard to which periods appellant had been disabled from performing the job he held until December 8, 1990 due to his right knee condition. The case was remanded for referral to a new specialist to submit an opinion, with medical rationale, as to which periods appellant was disabled as a result of the right knee condition.

The Office referred appellant to Dr. Theodore W. Parsons, III, a specialist in orthopedic surgery, who related in a report dated June 27, 1998 that appellant initially began noticing right knee pain in February 1989. He noted that following surgery on March 19, 1990, appellant

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<sup>5</sup> The hearing representative noted in the decision that the case was not in posture for a hearing.

returned to light duty where he worked until being terminated in December 1990. Dr. Parsons diagnosed severe bilateral tri-compartmental arthritis of the knees, degenerative in nature, with modest degenerative arthritis of the lumbosacral spine, moderate degenerative changes in the hands and chronic pain syndrome with evidence of functional overlay. He concluded that appellant was clearly suffering from severe degenerative arthritis in both knees, with modest degenerative changes in his back, but a normal motor sensory examination. Dr. Parsons noted, however, that appellant's examination was obvious for a chronic pain syndrome with fairly significant functional overlay. He stated:

“In terms of assessing which periods of time [appellant] was disabled from performing the job he held up until December 1990, as a result of his knee condition, it is difficult to quantify this precisely. [Appellant] continued to work after the onset of knee pain in February 1989, until his surgery in March 1990. It appears that he was given a limited[-]duty position in April 1989, I assume secondary to the knee pain he was having, in an effort to be in a position which was less physically demanding. I assume that this change was made because of both back and knee problems.... My suspicion is, since he returned to work in May [1990], that he could have continued to work in this modified[-]duty capacity for some time....”

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“My personal feeling is that [appellant] [is] disabled from performing any job that requires him to get up and move around on a regular basis because of his knees. However, I feel strongly that he would be able to work in a sedentary job provided to him, provided he be placed in a comfortable chair. [Appellant] does not walk well, has difficulty arising from his seated position, but were he placed in a sedentary position where he could move around at his own pace and periodically stand and stretch his back, I believe he would be able to perform in an appropriate fashion, at least in the physical sense.... It is very clear ... that his job did not cause his arthritis, nor his current situation. [Appellant] is disabled from heavy physical labor, predominantly as a result of his knee arthritis. However, at most we can only speculate that his heavy labor exacerbated his back problems or his knee problems, but certainly without question his job occupation did not cause his arthritic condition.... Any aggravation of [appellant's] low back problems as a result of his heavy labor, at least in the soft tissue sense, would have long since resolved. His structural changes by report are not particularly significant and I believe that much of his complaint regarding his back is associated with a chronic pain syndrome with functional overlay more than any anatomic problem *per se*.

“In summary, [appellant] is a 50-year[-]old gentleman who has not worked since 1990, currently he is disabled from any physical labor in most capacities because of his degenerative knee arthritis. His back, while a contributing factor, is only secondary in my opinion. However, I believe that he is able to physically perform in a sedentary capacity, provided one is available to him and vocational

rehabilitation is provided. I believe it inappropriate to state that he is totally disabled from any activity, as there are many individuals who suffer from serious arthritis who still are gainfully employed.”

In a work capacity evaluation dated June 27, 1997, Dr. Parsons stated that appellant was capable of working six to eight hours per day, but restricted him to one to two hours of pushing and pulling, not to exceed five pounds, lifting only at a desk or bench, not to exceed five pounds, with one hour of walking, standing, reaching, reaching above the shoulder, twisting, with frequent, hourly breaks and no kneeling, climbing or operating a motor vehicle.

By decision dated July 31, 1998, the Office denied appellant’s claim, finding that the weight of the medical evidence established that the work-related aggravation of his preexisting osteoarthritic right knee condition ceased no later than December 9, 1990, the date of his termination from the employing establishment. The Office relied on Dr. Parsons’ referral opinion that appellant was capable of performing sedentary work.

By letter dated August 26, 1998, appellant requested a review of the record. In support of his claim, appellant submitted a December 15, 1998 report from Dr. Lewis, who reiterated that appellant was restricted to a limited, light-duty status from April 1989 to December 1990 due to his medical condition. He stated that he most recently examined appellant in October 1998, at which time he had end-stage disease of both knees which had worsened to the point that total knee arthroplasty was scheduled. Dr. Lewis stated:

“On reviewing [appellant’s] medical records as well as reports from [the Office], I would consider his arthritic condition to be preexisting although certainly aggravated and accelerated due to the physical labor involved as a warehouse worker. From previous reports, his condition was felt to be a temporary problem which should have improved after he discontinued his heavy labor. This was obviously found to be false. [Appellant] has continued to have aggressive deterioration of function in both shoulders, lower back as well as both knees.... He is most definitely unable to return to any of his prior employment and at this point would be unemployable except in a sedentary position. If this position were available, he would need to have the freedom to move around during the course of the day and minimize lower back symptoms.”

By decision dated January 27, 1999, based on a review of the written record, the Office affirmed the July 31, 1998 decision terminating wage-loss benefits, but modified the decision to find that appellant was entitled to continuing medical benefits for his right knee condition.

The Board finds that the Office met its burden of proving that appellant had no disability of his right knee causally related to his employment injury subsequent to December 9, 1990, the date the Office terminated his compensation benefits.

Once the Office accepts a claim it has the burden of justifying modification or termination of compensation.<sup>6</sup> After it has been determined that an employee has disability

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<sup>6</sup> *Edwin Lester*, 34 ECAB 1807 (1983).

causally related to his employment, the Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>7</sup> As used in the Federal Employees' Compensation Act the term disability means incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.<sup>89</sup>

In the instant case, the Office accepted appellant's claim for a temporary aggravation of osteoarthritis of bilateral shoulders, left knee, L5 spondylolysis and cervical spondylosis which ceased December 1990 and a permanent aggravation of right knee osteoarthritis. Following the acceptance of the claim, appellant contended that he continued to experience residuals from his right knee condition, which he claimed prevented him from engaging in any form of gainful employment and was a permanent condition entitling him to total disability compensation. In its July 31, 1998 decision, the Office modified its initial acceptance of a permanent right knee condition, finding that appellant's osteoarthritic right knee constituted a disabling condition until, but not beyond, December 9, 1990 when he was terminated from his modified, light-duty job because of disciplinary reasons and not because he became physically unable to perform the position. The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.<sup>10</sup> In the instant case, the Office found that Dr. Parsons' June 27, 1997 medical report represented the weight of the medical evidence. He advised that appellant was disabled from heavy physical labor and from performing any job requiring him to get up and move around on a regular basis because of his knees. Dr. Parson indicated, however, that appellant could have continued to work in his modified-duty capacity indefinitely and asserted that appellant would currently be able to work in a sedentary job, if he were provided with a comfortable chair. He stated that, although appellant did not walk well and had difficulty arising from a seated position, he would be physically able to perform in a sedentary position where he could move around at his own pace and periodically stand and stretch his back. In addition, Dr. Parsons advised in his work capacity evaluation that appellant was capable of working six to eight hours per day with restrictions of one to two hours of pushing and pulling, not to exceed five pounds, lifting only at a desk or bench, not to exceed five pounds, with one hour of walking, standing, reaching, reaching above the shoulder, twisting, with frequent, hourly breaks and no kneeling, climbing or operating a motor vehicle.

Based on Dr. Parsons' opinion, therefore, the Office properly found that appellant was capable of performing light duty at a sedentary position, such as that from which he was terminated on December 9, 1990. In addition, appellant's employment records, as established by the November 3, 1995 statements from his supervisor, indicate that appellant was able to perform light duty in his modified job until the employing establishment terminated him on December 9, 1990. Accordingly, the Office properly found that appellant's disability for work

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<sup>7</sup> *Id*; see also *Melissie Powers*, 41 ECAB 541 (1990); see *Thomas Lindsey*, 39 ECAB 562 (1988).

<sup>8</sup> *Ralph W. Baker*, 39 ECAB 1413 (1988).

<sup>9</sup> See *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124.

<sup>10</sup> *Robert Dickerson*, 46 ECAB 1002 (1995).

after December 9, 1990 was not due to his accepted right knee condition. Dr. Parsons' referral opinion was probative, rationalized and represents the weight of medical opinion at the time of the Office's termination decision.

Subsequent to the Office's July 31, 1998 termination decision, the burden of proof in this case shifted to appellant, who thereafter submitted Dr. Lewis' December 15, 1997 medical report. This report, however, does not contain sufficient medical rationale explaining how appellant was disabled from his modified position after December 9, 1990 due to his accepted right knee condition. Dr. Lewis stated that appellant was definitely unable to return to any of his prior employment and was unemployable except in a sedentary position. He advised that, if such a sedentary position were available, he would need to have the freedom to move around during the course of the day. This opinion does not diminish the weight of Dr. Parsons' report, in which he specifically outlined appellant's physical restrictions, unlike Dr. Lewis and concluded that appellant could perform a sedentary job such as that described by the November 3, 1995 employing establishment statements of work. Moreover, he generally agreed that appellant could perform sedentary work, therefore, his opinion is not in conflict with the opinion of Dr. Parsons.<sup>11</sup> Dr. Lewis' report does not satisfy appellant's burden of proof to submit medical evidence sufficient to establish that his disability for work after December 9, 1990 is due to his accepted knee condition. For this reason, he is not entitled to wage-loss compensation after that date.

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<sup>11</sup> The Board notes that, prior to the Office's July 31, 1998 decision, the Office had determined that there was a conflict in the medical evidence and scheduled an impartial medical examination, which appellant failed to attend. Although the Office demurred from taking any administrative action in response to appellant's failure to attend, thereby leaving the conflict unresolved, the fact that the opinions of the Office referral physician, Dr. Parsons and appellant's treating physician, Dr. Lewis, are not in conflict renders the Office's inaction on this matter moot.

The January 27, 1999 and July 31, 1998 decisions of the Office of Workers' Compensation Programs are therefore affirmed.

Dated, Washington, D.C.  
February 28, 2000

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member