U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of CHARLES F. THOMPSON and DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY, Washington, DC

*Docket No. 97-2683; Submitted on the Record;*
*Issued January 3, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied modification of appellant's loss of wage-earning capacity determination.

This is the sixth appeal before the Board and the fourth appeal regarding the issue in the instant case. Initially, by order dated January 20, 1983, the Board remanded the case to the Office for consideration of new evidence and a *de novo* decision on the issue of appellant's loss of wage-earning capacity.[1] By decision dated October 23, 1983, the Board affirmed a decision finalized on May 24, 1983 in which the Office determined that appellant had the wage-earning capacity of a personnel worker which represented a 32 percent loss of wage-earning capacity.[2] Appellant requested reconsideration and by decision dated August 2, 1984, the Office denied his request. He timely appealed to the Board and in a November 30, 1984 decision, the Board affirmed the August 2, 1984 decision of the Office.[3] The law and facts as set forth in the previous decision and orders are incorporated herein by reference.[4]

[1] Docket No. 83-312.

[2] Docket No. 83-1384.

[3] Docket No. 84-2066.

[4] Appellant subsequently submitted a Form CA-7, claim for compensation, for the period March 1972 to June 1974. By decision dated February 5, 1986, the Office denied compensation for the period July 12 to December 21, 1972. In a decision finalized on April 30, 1986, an Office hearing representative affirmed the February 5, 1986 decision. Appellant requested reconsideration, and by decision dated May 21, 1986, the Office denied modification. Following appeal to the Board, in a decision issued July 30, 1986, Docket Number 86-1528, the Board affirmed the prior decisions. Appellant has not requested reconsideration on this issue. The record also contains a June 7, 1984 decision, Docket No. 84-699, in which the Board found that appellant was at fault in the creation of a $322.97 overpayment in compensation and that recovery of the overpayment was correct.

On February 21, 1987 appellant requested reconsideration of the wage-earning capacity finding and submitted additional evidence. By decision dated March 16, 1987, the Office denied modification of the prior decision. On August 8, 1997 appellant again requested reconsideration and submitted additional evidence. In an August 11, 1997 decision, the Office denied modification, finding the evidence of record insufficient to establish a material change in his medical condition. The instant appeal follows.

The Board finds that the Office properly denied modification of appellant's loss of 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.[5]

In this case, appellant did not submit sufficient evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. In a June 25, 1974 decision, the Office determined that he had a 32 percent loss of wage-earning capacity based on his capacity to perform the duties of a personnel worker. This determination remained undisturbed until November 12, 1981 when the Office, after further development of the case, determined that appellant had only a two percent loss of wage-earning capacity, based on his ability to perform the duties of a superintendent, plant protection. On May 9, 1983, based on evidence submitted by appellant, the Office determined that its November 12, 1981 decision was erroneous and restored appellant's compensation to his prior 32 percent loss of wage-earning capacity.[6] By decision dated October 24, 1983, the Board affirmed the May 9, 1983 Office decision.

While appellant is making a general allegation that the original determination was erroneous, he has submitted no evidence to indicate that the position does not suit his capabilities and is not reasonably available in his commuting area. Furthermore, the record does not contain

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

[6] At the time the Office determined that appellant had the wage-earning capacity of a personnel worker, this position was listed in the *Dictionary of Occupational Titles* as sedentary. Subsequent editions of the *Dictionary of Occupational Titles* have modified the job descriptions and classifications with sedentary to light physical requirements for, *e.g.*, "personnel clerk" or "human resource adviser." Sedentary work is classified as exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met. Light work involves exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly. To move objects. Physical demand requirements are in excess of those for sedentary work. Even though the weight lifted may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. *Dictionary of Occupational Titles*, revised 4th ed. (1991).

evidence that he has been retrained or otherwise vocationally rehabilitated. He has, however, submitted medical evidence.

The relevant medical evidence[7] includes reports dated February 4 and March 29, 1985 in which Dr. Elton G. Welke, a Board-certified orthopedic surgeon, diagnosed post-traumatic arthritis of the left, nondominant, elbow and noted physical findings of impaired mobility of a 20 percent loss of extension of the elbow. In a May 8, 1985 report, Dr. Louis Lesko, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, concurred with Dr. Welke's finding and conclusions. In an attached work restriction evaluation, Dr. Lesko advised that appellant could sit and walk 8 hours per day and intermittently lift 20 to 50 pounds six hours per day. He provided no hand restrictions and advised that appellant could work eight hours per day with the restriction that he avoid strenuous use of the left elbow. Dr. James E. Wood, a Board-certified orthopedic surgeon, provided a May 23, 1985 report in which he diagnosed status post trauma to the left, nondominant elbow with intermittent catching phenomenon and subjective complaints of ulnar nerve pain. Dr. Wood advised that, if the symptoms persisted and were significant, then consideration of ulnar nerve transposition surgery should be given. In a supplementary report dated June 13, 1985, Dr. Lesko advised that the function of the elbow was essentially normal in regard to normal activities of daily living. In a September 10, 1985 report, Dr. L.S. Kimbrough, an internist, diagnosed status post fracture, traumatic arthritis and ulnar neuropathy of the left elbow and personality disorder, schizoid type, secondary to stress and depression.

Dr. Welke provided a work restriction evaluation dated January 16, 1987 in which, he advised that the only restriction to appellant's physical activity was that he not lift greater than 50 pounds as a prophylactic restriction and could work eight hours per day. In a report dated January 29, 1987, Dr. Welke reiterated his conclusions of March 29, 1985. In a January 17, 1988 report, Dr. Kimbrough advised that appellant's impairment would be slowly progressive and that he should not be employed where the left upper extremity was "unduly involved." He provided a work restriction evaluation dated April 7, 1988 indicating that appellant could work 8 hours per day but could not climb and could not lift greater than 20 pounds.

In a May 22, 1997 report, Dr. Michael F. Charles, a Board-certified orthopedic surgeon, diagnosed left ulnar neuritis versus neuropathy and traumatic arthritis of the left elbow with permanent loss of motion. He recommended that appellant undergo electromyography (EMG). A June 9, 1997 EMG of the left upper extremity was reported as normal. Dr. Joyce D. Hightower provided form reports in which she noted a diagnosis of status post-traumatic injury with degenerative changes of the left elbow.

In its May 9, 1983 wage-earning capacity decision, the Office restored appellant's compensation to his prior 32 percent loss of wage-earning capacity, based on his ability to earn wages as a personnel clerk which is a sedentary or light-duty position.[8] None of the medical

[7] Additional medical evidence indicates that appellant fractured his radius in 1988 and injured his back in 1992.

[8] *Supra* note 6.

reports provided by appellant indicate that he cannot perform these duties. He, therefore, has not established that modification of the November 14, 1973 decision is warranted.

The decision of the Office of Workers' Compensation Programs dated August 11, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member