

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH LANCASTER and DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND ATLANTIC, Virginia Beach, VA

*Docket No. 00-2618; Submitted on the Record;  
Issued August 3, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective November 7, 1999, based on his capacity to perform the duties of a surveillance system monitor; (2) whether the Office properly denied appellant medical treatment for his left shoulder condition; and (3) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

Appellant, a former naval officer born on September 18, 1937, filed a notice of occupational disease alleging that he had experienced pain in his right shoulder beginning in April 1991. The shoulder pain was aggravated by eight-hour watches, which required him to handle lines, climb ladders and participate in periodic drills. Appellant further asserted that in August 1991 he experienced sharp pain in his right shoulder while attempting to restow 30 to 40 pound boxes of cargo overhead.

The Office accepted the conditions of aggravation of right shoulder impingement syndrome, right rotator cuff tear and C7-8 thoracic outlet syndrome as work related. Appellant underwent acromioplasty of the right shoulder on December 16, 1992 and had intermittent periods of disability from December 15, 1992 until October 18, 1993. He stopped working on September 19, 1993 and did not return.

In November 1994 the Office referred appellant for rehabilitation counselor based on the finding by Dr. James Sarkisian, a Board-certified orthopedic surgeon, in an April 15, 1994 report, that appellant could return to gainful employment with restrictions. Appellant began rehabilitation training, which was closed on April 5, 1999, subsequent to a nonindustrial injury to his neck and left shoulder, which was totally disabling.

On April 6, 1999 appellant filed a traumatic injury claim alleging that in August 1989 he injured his left arm and shoulder when he fell from a ladder aboard ship. Appellant indicated

that he had pain in his left shoulder approximately two to three times a year since the original injury.<sup>1</sup>

On May 4, 1999 the Office issued a notice of a proposed reduction of compensation, based on appellant's ability to earn wages as a surveillance system monitor. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages within 30 days. Appellant responded in a letter dated May 7, 1999, that his physician advised that he was not a candidate for employment until he underwent surgery for his left shoulder and received rehabilitation. Appellant also requested authorization for medical treatment for his left shoulder due to the August 1989 incident.

On May 17, 1999 the Office referred appellant to Dr. J. Pierce Conaty, surgeon for a second opinion examination to determine the nature and extent of disability due to appellant's right shoulder injury and to determine which conditions should be considered industrial. In a detailed report dated June 6, 1999, Dr. Conaty reviewed the statement of accepted facts, appellant's medical record and discussed his findings on physical examination. He opined that appellant continued to have residuals of the right shoulder surgery and that his subjective complaints of discomfort and feeling of weakness in the right upper extremity, which resulted from the injury, had not resolved. The physician indicated that appellant's left shoulder injury was nonindustrial and that he might require repair of the rotator cuff.

Dr. Conaty determined that appellant was not totally disabled from any work as a result of the industrial injury and could work within certain restrictions. However, he indicated that appellant's nonindustrial left shoulder condition increased his inability to perform the duties of the surveillance system monitor.

The Office thereafter asked Dr. Conaty to clarify his opinion. In a supplemental report dated June 29, 1999, he stated: "He is not able to perform the duties of surveillance system monitor taking only his right shoulder into account. He is not able to perform the duties of surveillance system monitor taking all of his current conditions into account." Dr. Conaty added that, contrary to Dr. Sarkisian's report dated May 19, 1999, the medical evidence did not support that appellant sustained a left shoulder industrial injury or a left rotator cuff tear prior to his April 1998 nonindustrial injury.

By decision dated August 9, 1999, the Office denied appellant's traumatic injury claim on the grounds that appellant failed to meet his burden of proof on the causal relationship between compensable employment factors and his left shoulder injury.

On November 8, 1999 the Office issued a final notice of proposed reduction of compensation and order denying medical benefits for treatment of the left shoulder. The Office

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<sup>1</sup> The Board notes that appellant's traumatic injury claim originally accompanied a recurrence claim dated April 22, 1998, alleging that the left shoulder pain he experienced while reaching to clean his windshield was attributed to the August 1989 alleged work incident. Appellant's recurrence claim was denied on December 15, 1998. Following the submission of additional evidence, the Office agreed to develop the August 1989 claim as a timely and new left shoulder claim.

found that the medical evidence indicated that appellant was no longer totally disabled from work due to the effects of the December 17, 1991 injury and reduced appellant's compensation, effective November 7, 1999, based on an earning capacity of \$ 336.00 per week in the selected position. The Office further found that appellant's left shoulder injury was nonindustrial and, therefore, not compensable.

On July 6, 2000 appellant requested reconsideration of the August 9, 1999 decision and submitted additional evidence. By decision dated July 12, 2000, the Office denied appellant's request on the grounds that the evidence submitted was immaterial, repetitious and cumulative in nature and, therefore, insufficient to warrant review of the prior decision.

Initially, the Board finds that this case is not in posture for decision on the wage-earning capacity determination due to an unresolved conflict in medical opinion evidence.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>2</sup> If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.<sup>3</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.<sup>4</sup> Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.<sup>5</sup>

In this case, the Office determined that appellant was only partially disabled and could perform the duties of the selected sedentary position of surveillance system monitor, based on the reports of Dr. Sarkisian and the second opinion examiner, Dr. Conaty. The duties of the surveillance system monitor included monitoring premises of public transportation terminals to detect crimes and disturbances, using closed circuit television monitors, notifying authorities by telephone of need for corrective action and observing television screens of transportation facility sites. The job description indicated that the person would be required to perform duties including frequent talking and listening with acuity.

Dr. Sarkisian's report dated May 27, 1997, indicated that appellant was medically capable of working eight hours per day within restrictions. Similarly, Dr. Conaty's second opinion evaluation dated June 4, 1999, indicated that appellant could work in some capacity for

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<sup>2</sup> *Bettye F. Wade*, 37 ECAB 556 (1986).

<sup>3</sup> 5 U.S.C. § 8115(a); *see also* 20 C.F.R. §§ 10.402, 10.403.

<sup>4</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).

<sup>5</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

eight hours per day within restrictions outlined in his report. Dr. Conaty was initially unclear on whether appellant was capable of performing the duties of the selected position but clearly stated in his supplemental report that appellant was not able to perform the duties, taking all of his current conditions into account. Dr. Conaty's opinion in his supplemental report creates a conflict in the medical opinion evidence on the issue of whether appellant is capable of performing the duties of the surveillance systems monitor.

The Federal Employees' Compensation Act,<sup>6</sup> provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>7</sup>

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist. The specialist shall examine appellant and submit a rationalized medical opinion to resolve the medical conflict regarding whether appellant is capable of performing the duties of the surveillance system monitor position and if not, what appellant's functional capacities in the workplace would be.

The Board further finds that the Office properly denied medical treatment for appellant's left shoulder condition.

Section 8103(a) of the Act provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or period of disability or aid in lessening the amount of monthly compensation. These services, appliances and supplies shall be furnished by or on the order of the United States medical officers and hospitals designated or approved by the Secretary. In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office's authority is reasonableness.<sup>8</sup>

Appellant filed a traumatic injury claim alleging that he sustained a left shoulder injury in the performance of duty in August 1989 and further requested medical treatment for his left shoulder condition. On August 9, 1999 the Office denied the claim on the grounds that appellant failed to establish that his left shoulder injury was causally related to factors of his federal employment. Pursuant to section 8103(a) of the Act, medical treatment shall be afforded only for injuries sustained in the performance of duty. The Office determined in its August 9, 1999 decision, that appellant's left shoulder condition was not sustained while in the performance of

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<sup>6</sup> 5 U.S.C. § 8101 *et seq.*

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> *Debra S. King*, 44 ECAB 203 (1992).

duty. Therefore, Office properly denied appellant medical treatment for his left shoulder condition in its decision dated November 8, 1999.<sup>9</sup>

The Board further finds that the Office properly denied appellant's request for reconsideration.<sup>10</sup>

Under section 8128(a) of the Act,<sup>11</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>12</sup> which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
- (ii) Advances a relevant legal argument not previously considered by the Office; or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>13</sup>

In this case, the Office denied appellant's claim on July 12, 2000 without conducting a merit review on the grounds that the evidence submitted was immaterial, repetitious and cumulative. In support of his July 6, 2000 request for reconsideration, appellant submitted evidence already of record, medical reports dated September 14 and 22, 1999 and a medical note dated December 23, 1999 from Dr. Sarkisian. These reports are immaterial in that they do not address the issue of whether appellant's left shoulder condition was causally related to employment factors, the issue considered in the prior decision. Appellant further submitted a copy of his letter to a congressman regarding his claim. However, this evidence fails to provide any new or relevant argument pertaining to the issue of causal relationship in this case.

Appellant neither showed that the Office erroneously applied or interpreted a point of law or advanced a point of law not previously considered by the Office. Nor did he submit relevant

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<sup>9</sup> The Board does not have jurisdiction of the August 9, 1999 decision. 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. *Martha L. Street*, 48 ECAB 641, 644 (1997).

<sup>10</sup> See 20 C.F.R. § 10.606(b)(2)(i-iii).

<sup>11</sup> 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.606(b) (1999).

<sup>13</sup> 20 C.F.R. § 10.608(b).

and pertinent evidence not previously considered by the Office. The Board, therefore, finds that the Office properly denied appellant's application for reconsideration of his claim.

The July 12, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed. The November 8, 1999 decision is affirmed on the issue of denial of medical treatment and set aside on the Office's determination of appellant's wage-earning capacity.

Dated, Washington, DC  
August 3, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member