

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. VESTUTO and DEPARTMENT OF THE ARMY,
LOUISIANA AIR NATIONAL GUARD, New Orleans, LA

*Docket No. 00-184; Submitted on the Record;
Issued January 29, 2001*

DECISION and ORDER

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

The issue is whether appellant has established that he is entitled to compensation for wage loss commencing August 14, 1993, the date his employment was terminated.

The case has been before the Board on a prior appeal. In a decision dated June 18, 1996, the Board found that appellant was in the performance of duty on June 7, 1991; and therefore the Office of Workers' Compensation Programs had not met its burden of proof to rescind acceptance of the claim.¹

By decision dated August 10, 1998, the Office determined that appellant was not entitled to compensation for wage loss commencing August 14, 1993, the date his employment was terminated. The Office found that the termination was not due to an employment injury.

In a decision dated August 12, 1999, an Office hearing representative affirmed the prior decision.

The Board has reviewed the record and finds that appellant has not established entitlement to compensation for wage loss commencing August 14, 1993.

The Board notes that appellant was employed in a civilian position that required, as a condition of employment, continuing membership in the National Guard. Appellant's military status in the Louisiana National Guard was terminated as of August 14, 1993; he was

¹ 47 ECAB 632 (1996).

notified by letter dated June 25, 1993 that his civilian position would be terminated on the same date pursuant to the provisions of 32 U.S.C. § 709.² There does not appear to be any dispute that if appellant can show that an employment injury caused disqualification for the military status required for his position, then he would be entitled to compensation for wage loss.³ The Office has determined that in this case the termination of appellant's employment was not due to his employment injury.

With respect to the accepted employment injuries, a July 24, 1996 letter stated that the accepted conditions were right ankle strain and left wrist strain with carpal tunnel release. The record does not establish that the underlying condition of carpal tunnel syndrome was accepted by the Office.⁴

In an employing establishment medical board report dated February 7, 1993 Dr. Charles L. Myers diagnoses carpal tunnel syndrome and states "qualification questionable." In a report of the same date, Dr. Myers provided a history and results on examination. He noted that an electromyogram (EMG) in September 1991 was consistent with median nerve neuropathy due to carpal tunnel syndrome, and an EMG in May 1992 was normal. Dr. Myers concluded, "the board determines that [appellant] is medically unacceptable for worldwide duty or qualification is questionable because of decreased strength and general efficiency of his left hand and wrist."

The record indicates, however, that the employing establishment did not medically disqualify appellant for military membership. The employing establishment medical reports contain a stamp dated March 15, 1993 indicating that appellant remained medically eligible for National Guard membership. In a letter dated June 3, 1993, appellant indicated that he had received a medical waiver from the National Guard Bureau. An employing establishment supervisor indicated in an undated statement received by the Office on July 14, 1999, that the National Guard Bureau had found that appellant's injuries were not sufficient to warrant a medical discharge.

In a letter dated June 9, 1993, appellant was advised that his military enlistment would not be extended beyond August 14, 1993.⁵ The reasons given by Lieutenant Col. Dennis Hugg

² 32 U.S.C. § 709(e)(1) provides "a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."

³ With respect to civilian positions that carry a military status requirement, the Board has held that injuries resulting solely from active duty in military reserve are not sufficiently related to civilian employment to be covered under the Federal Employees' Compensation Act, *see Patrick O'Hara*, 34 ECAB 493 (1982); the Board has not precluded coverage where the injury results from civilian duties and disqualifies the employee for a military status that is required for civilian employment.

⁴ A January 24, 1993 report from an Office medical adviser notes that appellant underwent surgery in December 1991; the medical adviser stated that "the diagnosis of the condition causing continuing symptoms is not established," and that it "seems reasonable to conclude that symptoms were not caused by a compression neuropathy (carpal tunnel syndrome) as was suspected when operation was performed."

⁵ Appellant had been given a three-month extension in May 1993.

were “reluctance to put unit needs ahead of your personal needs, an inability to successfully interact as a team member with workers and supervisors in your section and your continued inability to perform necessary work functions to fulfill wartime tasking.”

Appellant contends that “the inability to perform necessary work functions” establishes that the military enlistment was denied because of an employment injury. There is no indication in the June 9, 1993 letter that there was a physical inability to work. As noted above, the medical evidence did not establish a medical basis for discharge. There is no probative medical evidence of record indicating that appellant was unable to perform any required military duties as of August 13, 1993 due to an employment injury. Appellant’s military enlistment expired on August 13, 1993 and was not renewed. The employing establishment stated, in the undated statement received on July 14, 1999, that appellant was discharged due to the expiration of his term of service, and the decision of the military command that it was not in its best interests to retain him.⁶ Under these circumstances, the Board finds that the evidence is insufficient to establish that an employment-related condition contributed to the termination of his military status and his civilian position.

It is also noted that appellant may establish entitlement to compensation as of August 14, 1993 if he submitted medical evidence establishing that he could not perform his assigned civilian duties as a result of his employment injury.⁷ The record does not contain any probative evidence on this issue.

The Board accordingly finds that appellant has not established entitlement to wage loss commencing August 14, 1993, the date his federal employment was terminated.

⁶ There is also a January 15, 1998 memorandum from the employing establishment stating that appellant was not discharged due to medical reasons.

⁷ See, e.g., *Dennis J. Lasanen*, 43 ECAB 549 (1992).

The decision of the Office of Workers' Compensation Programs dated August 12, 1999 is affirmed.

Dated, Washington, DC
January 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member