U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROCKY A. BIBLE and DEPARTMENT OF THE AIR FORCE, SAN ANTONIO AIR LOGISTICS CENTER, Kelly Air Force Base, TX

Docket No. 99-1244; Submitted on the Record;
Issued June 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of a security guard.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome and thoracic outlet syndrome. He stopped working on March 31, 1994.

In a report dated March 31, 1995, a second opinion physician, Dr. David A. Roberts, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed electromyograms (EMGs) and nerve conduction studies dated January 1995, which were negative and Doppler studies which showed "diminution of both radial pulses when the arm was abducted but no stenosis … in the subclavian or axillary artery." Dr. Roberts stated that the Doppler studies were consistent with a diagnosis of thoracic outlet syndrome "in that there [was] no structural abnormality within the vessel but the pulses [were] decreased with abduction secondary to pressure against, probably, the first rib." He concluded that appellant had mild residual evidence of carpal tunnel syndrome and symptoms suggestive of thoracic outlet syndrome. Dr. Roberts suggested that appellant be retrained to do light work. In a work restriction evaluation dated March 31, 1995, he opined that appellant could work 8 hours a day but must avoid repetitive lifting with his arms of 10 to 20 pounds.

On July 7, 1995 the rehabilitation counselor identified the job of security guard as a job that was within appellant's physical restrictions, appellant could learn to perform with one to three months of training and was reasonably available. The job duties were described, in part, as guarding industrial or commercial property, patrolling the buildings or grounds of the plant or establishment and possibly doing janitorial work or arresting trespassers. The physical requirement were described as light with occasionally lifting up to 20 pounds and frequent lifting of up to 10 pounds.

In a report dated July 19, 1995, appellant's treating physician, Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon, opined that appellant could not perform the work of a security guard due to continuing numbness and weakness in his upper extremities. He stated that appellant's attempt to perform that work could result in further injury to his arms and would be unsafe for others around him.

To resolve the conflict between appellant's treating physician, Dr. Valdez, and the second opinion physician, Dr. Roberts, as to whether appellant could perform the work of a security guard, the Office referred appellant to an impartial medical specialist, Dr. Richard P. Wilson, a Board-certified orthopedic surgeon. In a report dated September 11, 1995, Dr. Wilson considered appellant's history of injury, performed a physical examination and reviewed the EMGs, the nerve conduction studies and the Doppler studies. On physical examination, he found that appellant had subjective sensory decrease to pin and two point in all the fingers of both hands. Dr. Wilson found that appellant "could not recognize one or two points in any of the fingers of his hands, even involving the ulnar nerve," which was not consistent with carpal tunnel syndrome or thoracic outlet syndrome.

He concluded that appellant did not have thoracic outlet syndrome and his symptoms of bilateral carpal tunnel syndrome had subsided. Dr. Wilson stated that, although appellant had subjective decrease in sensation, he saw no evidence in appellant's fingers or hands of any burns or trauma to the fingers indicating a decrease in sensation and, therefore, thought that appellant's testing for sensation was unreliable. Dr. Wilson stated that he "doubt[ed]" that appellant had thoracic outlet syndrome and was not "even sure" that the diagnosis of carpal tunnel syndrome was present at the time of appellant's surgery due to his negative EMGs prior to surgery. He stated that "[s]ince this [was] more of a glove and stocking anesthesia, it may be more in the form of peripheral neuropathy than carpal tunnel syndrome." Dr. Wilson stated that regarding appellant's pain in his shoulders, appellant had mild, bilateral impingement syndrome and "a degree" of stenosing tenosynovitis over the radial styloid where the first compartment tendons were. He opined that appellant could perform light-duty work and "the light-duty functions described in the job recommendations."

In a notice of proposed reduction of compensation dated October 12, 1995, the Office found that Dr. Wilson's opinion constituted the weight of the evidence and that appellant could perform the position of security guard. The Office found that the position required occasional lifting, carrying, pushing and pulling up to 20 pounds and frequent lifting and carrying up to 10 pounds. The Office also found that appellant had the experience to perform the job and it was reasonably available. The Office, therefore, proposed to reduce appellant's compensation to reflect his wage-earning capacity as a security guard. The Office gave appellant 30 days to respond.

Appellant submitted a magnetic resonance imaging (MRI) scan dated September 27, 1995, which showed herniated discs at C5-6 and C6-7.

By decision dated November 13, 1995, the Office reduced appellant's compensation to reflect his wage-earning capacity as a security guard. The Office considered the results of the September 27, 1995 MRI scan and stated that it revealed "normal alignment of the cervical spine and normal marrow intensity of the cervical vertebral bodies." The Office found that, as an

impartial medical specialist, Dr.Wilson's opinion that appellant could perform the work of a security guard constituted the weight of the medical evidence.

By letter dated May 17, 1996, appellant requested reconsideration of the Office's decision. Appellant contended that the Office did not give appellant 30 days to respond to the proposed notice of reduction and complained that the Office did not provide appellant with a copy of his case record per appellant's request prior to issuing its decision. He also submitted additional evidence consisting of a medical report and work capacity evaluation dated November 1, 1996 from Dr. Valdez and two medical reports from Dr. Donna M. Boehme, a Board-certified orthopedic surgeon, dated September 18 and November 1995, respectively. In his November 1, 1995 report, Dr. Valdez stated that appellant's severe symptoms were initially thought to be thoracic outlet syndrome but "further workup" established that the symptoms were "in fact due to herniated disc in the cervical region at C5-6 and C6-7." He also diagnosed "subsequent" thoracic outlet syndrome and carpal tunnel syndrome and stated that all of appellant's medical conditions were due to his sandblasting at work which "initiated his symptoms." Dr. Valdez stated that appellant could not do "any reaching, any lifting, fine motor movements and repetitive motions of the wrist and elbow." He stated that appellant could not stand or sit for more than 20 minutes and could lift 10 pounds 10 times an hour or 20 pounds once in an hour. Further, Dr. Valdez stated that appellant was unable to work and he could not perform the work of a security guard, which involved being able to apprehend or expel miscreants, performing janitorial duties or arresting trespassers. In the November 1, 1995 work capacity evaluation, he reiterated appellant's lifting, standing and sitting restrictions.

In her September 18, 1995 report, Dr. Boehme opined that appellant continued to have numbness in his right arm, tenderness over his first dorsal compartment and a mildly positive Finkelstein's maneuver. She stated that she was requesting an MRI scan of appellant's neck. In Dr. Boehme November 4, 1995 report, she stated that most of appellant's problem was coming from his cervical spine. Dr. Boehme stated that it was "quite possible" that appellant's cervical spine problem was related to his work as a sandblaster. She opined that appellant could perform the work of a security guard due to his numbness in both hands and diminished grip "pinch."

By decision dated September 17, 1996, the Office denied appellant's request for modification. The Office considered the evidence appellant submitted and stated that Dr. Valdez's November 1, 1995 report, the September 27, 1995 MRI scan and the other evidence appellant submitted was insufficient to overcome the weight of Dr. Wilson's opinion.

By letter dated May 23, 1997, appellant requested reconsideration of the Office's decision. Appellant contended that the Office's finding that he could perform light work was based on the false assumption that he did not require neck surgery and ignorance of the fact that he had thoracic outlet syndrome for which he had not been treated. Appellant also contended that the job of security guard was not within his physical restrictions because the job description stated there was occasional lifting of up to 20 pounds and Dr. Roberts stated that appellant should avoid repetitive lifting with his arms of 10 to 20 pounds. Further, appellant contended the Office erred in failing to consider the September 27, 1995 MRI scan results showing he had two disc herniations at C5-6 and C6-7. Appellant also contended that he was denied due process because the government took 10 months to reconsider this case "the last time" and because the

Office denied him surgery for his thoracic outlet syndrome and neck. He contended that the Office had no objective standards in deciding a motion for reconsideration.

Appellant submitted a medical report from Dr. Gerald Q. Greenfield, a Board-certified orthopedic surgeon, dated January 27, 1997. In his report, Dr. Greenfield considered appellant's history of injury, performed a physical examination and reviewed the MRI scan. He stated that the MRI scan showed disc herniations at C5-6 and C6-7 and opined that they were related to appellant's work injury in his cervical spine. Dr. Greenfield stated that the herniations accounted for the symptoms in appellant's upper extremities. He also opined that appellant could not return to work.

Appellant also submitted an affidavit from his wife dated April 9, 1997, in which she stated that prior to appellant's injury, he was active in performing household chores but after the injury, he was unable to wash dishes, do laundry or work on his "vehicle." She stated that appellant was in pain when he drove. She stated that appellant could not perform the job of security guard due to his physical restrictions. Appellant's attorney submitted a brief, asserting that lay testimony can establish causation.

By decision dated September 8, 1998, the Office denied modification of its prior decisions. The Office stated that Dr. Greenfield diagnosed degenerative disc disease in the cervical area and that condition was not accepted by the Office.

By letter dated August 18, 1998, appellant requested reconsideration of the Office's decision. Appellant contended that the claims examiner, Rachael Stimson, who decided the September 8, 1998 decision, had previously been involved in the case and, therefore, was biased. Appellant contended that the Office failed to review certain medical evidence consisting of the South Texas Radiology Report dated October 1, 1995 (referring to the September 27, 1995 MRI scan), Dr. Boehme's September 18, 1995 report and Dr. Valdez's November 1, 1995 report. Appellant stated that, in their reports, Drs. Boehme and Valdez diagnosed two herniated cervical discs and stated that they were related to appellant's work injury. Appellant also contended that the Office misinterpreted the September 27, 1995 MRI scan in stating that it was normal when it showed two herniated discs. Appellant contended that Dr. Wilson's report was not complete or accurate because he did not review the MRI scan results. Appellant reiterated some of his earlier contentions that the Office did not give him 30 days to respond to the proposed reduction of benefits, denied him due process by taking ten months to consider his first motion for reconsideration and by denying him surgery for his thoracic outlet syndrome and neck, that the Office had no objective standards for deciding a motion for reconsideration and that the Office erred in finding the physical requirements of a security guard were within his restrictions.

By decision dated November 13, 1998, the Office denied appellant's request for modification.

The Board finds that the case is not in posture for decision.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[1]

Under section 8115(a) of Federal Employees' Compensation Act, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[2] When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[3] Finally, application of the principles set forth in *Albert C. Shardrick* will result in the percentage of the employee's loss of wage-earning capacity.[4] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In this case, to resolve the conflict between Dr. Robert's March 31, 1995 report that appellant could work with restrictions of 10 to 20 pounds and Dr. Valdez's July 19, 1995 report that appellant could not work, the Office referred appellant to the impartial medical specialist Dr. Wilson. In his September 11, 1995 report, based on his review of the EMGs, nerve conduction studies and Doppler studies, Dr. Wilson opined that appellant had neither carpal tunnel syndrome nor thoracic outlet syndrome. He opined that appellant had mild, bilateral impingement syndrome and "a degree" of stenosing tenosynovitis of the radial styloid. Dr. Wilson opined that appellant could perform light-duty work.

In response to the Office's October 12, 1995 proposed notice of reduction, appellant submitted the MRI scan dated September 27, 1995 showing that he had two herniated discs at C5-6 and C6-7. On November 13, 1995 the Office reduced appellant's compensation to reflect his wage-earning capacity as a security guard. The Office stated that the MRI scan was normal. In his motion for reconsideration dated May 17, 1996, appellant submitted additional medical evidence including Dr. Valdez's November 1, 1995 medical report and work capacity evaluation, in which Dr. Valdez opined that appellant had two disc herniations at C5-6 and C6-7 as well as thoracic outlet syndrome and carpal tunnel syndrome which were related to his sandblasting at

[1] *Sylvia Bridcut*, 48 ECAB 162 (1996); *James B. Christenson*, 47 ECAB 775 (1996).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, Docket No. 92-118 (issued February 11, 1993); *see also* 5 U.S.C. § 8115(a).

[3] *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[4] *Dorothy Lams, supra* note 3; *Albert C. Shardrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

work. He stated that the symptoms initially thought to be thoracic outlet syndrome were in fact due to his herniated discs. In support of his May 23, 1997 request for reconsideration, appellant submitted Dr. Greenfield's January 27, 1997 report, in which Dr. Greenfield opined that the MRI scan revealed two herniated discs at C5-6 and C6-7, which were related to appellant's work injury from sandblasting.

In the September 17, 1996 and September 8, 1998 decisions, the Office found that the medical evidence appellant submitted was insufficient to overcome the weight of Dr. Wilson's opinion. In the September 17, 1996 decision, the Office erroneously stated that the September 27, 1995 MRI scan was normal. In the September 8, 1998 decision, the Office erroneously stated that Dr. Greenfield diagnosed degenerative disc disease. He diagnosed two herniated discs which are a different condition than degenerative disc disease. Appellant submitted the September 27, 1995 MRI scan showing two cervical disc herniations after his examination by Dr. Wilson who did not consider the MRI scan and who could not comment on the work duties of sandblasting and its relationship to the herniated discs. Drs. Valdez and Greenfield opined that the disc herniations shown on the MRI scan were related to appellant's work injury from sandblasting. Their opinions are uncontradicted. Further, Dr. Valdez stated that appellant's symptoms which were initially thought to be thoracic outlet syndrome were actually due to the herniated discs. His opinion suggests that symptoms from thoracic outlet syndrome which was an accepted condition are similar to those of symptoms from cervical herniated discs and the "further workup" he performed, apparently referring to the MRI scan, established appellant had herniated discs. Because Dr. Wilson did not consider the positive MRI scan and Drs. Valdez's and Greenfield's uncontradicted opinions offer support that appellant's cervical condition may also be work related, Dr. Wilson's opinion is incomplete.

The Board has held that in a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict of medical opinion and this specialist's opinion requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[5] If the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial medical specialist for the purpose of obtaining his rationalized medical opinion on the issue.[6]

Under the circumstances of this case where new evidence appellant submitted renders the opinion of the impartial medical specialist incomplete, the case must be remanded to obtain another opinion from Dr. Wilson as to the significance of the September 27, 1995 MRI scan, if any. He should review the MRI scan and provide an opinion as to whether the herniated discs at C5-6 and C6-7 would be consistent with appellant's symptoms of numbness and weakness in his upper arms and whether the herniated discs were related to thoracic outlet syndrome or appellant's work as a sandblaster. Dr. Wilson should also consider whether the herniated discs

[5] *Elmer K. Kroggel*, 47 ECAB 557-58 (1996); *April Ann Erickson*, 28 ECAB 336, 341-42 (1997).

[6] *Talmadge Miller*, 47 ECAB 673, 682 n. 21 (1996).

would prevent appellant from performing the work of a security guard. Further, he should explain whether the conditions he diagnosed of bilateral impingement syndrome and stenosing tenosynovitis were work related and whether they could have resulted either from the accepted conditions of thoracic outlet syndrome and carpal tunnel syndrome or are in any way related to the herniated discs. Dr. Wilson should also state the nature of appellant's work restrictions, if any. If the Office is unable to obtain a supplemental opinion from him, the Office should obtain a medical opinion from a second impartial medical specialist. After further development that it deems necessary, the Office should issue a *de novo* decision.

The September 8, 1998 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
June 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member