

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD RAMON and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Stockton, CA

*Docket No. 01-46; Submitted on the Record;
Issued October 1, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a stock supervisor and therefore had an eight percent loss of wage-earning capacity.

On November 13, 1995 appellant, then a 49-year-old worker leader, filed a claim for carpal tunnel syndrome, which he related to packing 8 hours a day, handling material weighing from 5 to 55 pounds.

In an April 8, 1996 report, Dr. Terry L. Westfield, a Board-certified orthopedic surgeon, stated that appellant had a repetitive motion job working at a video display terminal and packing materials. Dr. Westfield related that appellant noted numbness in both hands a year previously. A recent electromyogram (EMG) showed severe right carpal tunnel syndrome. Dr. Westfield diagnosed bilateral carpal tunnel syndrome. Appellant stopped working on April 3, 1996 and underwent surgery on April 16, 1996 for release of carpal tunnel syndrome in the right arm. On December 10, 1996 appellant underwent similar surgery on the left arm.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome. The Office authorized leave buy back from April 3 through 16, 1996 and paid temporary total disability compensation effective April 22, 1996.

In an August 29, 2000 decision, the Office found that appellant could perform the duties of a stock supervisor and therefore reduced his compensation to represent an eight percent loss of wage-earning capacity, effective September 10, 2000.

The Board finds that the Office improperly reduced appellant's compensation.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, based on the nature of the employee's injuries and the degree of physical impairment, employment, age, vocational qualifications and

the availability of suitable employment.¹ Accordingly, the evidence must establish 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.²

In a series of progress reports, Dr. Westfield indicated that appellant was improving after his second carpal tunnel release operation but still had problems with weakness in the arms and fine manipulation. The Office referred appellant to Dr. Ty Goletz, a Board-certified orthopedic surgeon, for an examination and second opinion. In a June 16, 1998 report, Dr. Goletz stated that appellant had no objective findings of current bilateral carpal tunnel syndrome but had subjective symptoms that were consistent with carpal tunnel syndrome. He related appellant's condition to repetitive motion in his work. Dr. Goletz commented that the symptoms might have been prolonged beyond normal duration due to an underlying persistent entrapment of nerve, scar tissue or some other nerve injury. He noted that appellant was retired but could return to work in a position that did not involve repetitive use of the hands, such as data entry or computer work. Dr. Goletz commented that appellant could perform the duties of a packer leader but for the need to do data entry for half the time in the job.

In a July 1, 1998 report, Dr. Wilbur S. Avant, Jr., a Board-certified neurologist, stated that an EMG showed persistent median nerve compression on the right at the wrist with delays in both the sensory and motor latencies. Dr. Avant commented that the left median nerve decompression was apparently successful. He also reported mild slowing of both median and ulnar transmission across the elbows bilaterally.

Dr. Goletz submitted a July 2, 1998 functional capacity assessment indicating that appellant could lift up to 9 pounds frequently with a maximum lifting capacity of 15 pounds, sit up to 22 minutes at a time and stand up to 32 minutes. The physical therapist who prepared the report noted appellant's submaximal effort in fine manipulation tests.

In a June 11, 1999 memorandum, an Office claims examiner found that appellant could perform the duties of a stock supervisor.³ The position was described as light duty requiring the ability to lift up to 20 pounds occasionally and 10 pounds frequently. The position required reaching, handling, fingering, talking and hearing. The claims examiner commented that appellant worked 25 years at the employing establishment, 15 years in stock. He therefore concluded that appellant had the required vocational preparation for the position. The claims examiner also reported that an official with the state employment service confirmed that the position of stock supervisor was reasonably available within appellant's commuting area.

In a January 20, 2000 report, Dr. Westfield stated that he did not concur with Dr. Goletz's report. He reiterated that appellant had limitations in operating a motor vehicle and no ability to

¹ See generally, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

² Phillip S. Deering, 47 ECAB 692 (1998).

³ Department of Labor, *Dictionary of Occupational Titles*, DOT No. 222.137.034 (1980).

perform repetitive motions of the wrists and elbows. Dr. Westfield indicated that he had also found appellant could do no pushing, pulling or lifting.

In a May 4, 2000 report, he stated that appellant, on examination, had bilateral pain and numbness in his hands. Dr. Westfield commented that appellant apparently had a permanently damaged nerve on the right. He indicated that he currently did not believe that appellant continued to have problems related to his work injury. Dr. Westfield noted that appellant had weakness in both hands and therefore kept dropping items. He pointed out that appellant's previous job required the ability to lift 20 pounds frequently and 55 pounds occasionally. Dr. Westfield related that appellant could lift 9 pounds frequently and 15 pounds maximally, had bilateral grip in the four percent range for his age and had fine motor dexterities below one percent in each hand. Dr. Westfield concluded that appellant could not return to his former position.

The Office referred appellant, together with a statement of accepted facts and the case record to Dr. David A. Roberts, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Drs. Westfield and Goletz. In a July 5, 2000 report, Dr. Roberts stated that appellant had a full range of motion in the shoulders, elbows and wrists bilaterally. He noted grip strength was diminished in both hands but motor strength in the rest of the arm muscles was normal. Dr. Roberts reported intact sensation, negative Phalen's test and negative Tinel's test at both the wrists and the elbows.

Dr. Roberts concluded that appellant had some residuals from the carpal tunnel syndrome with tingling in the hands and decreased grip strength which was somewhat subjective. He found no objective evidence of ongoing carpal tunnel syndrome. Dr. Roberts concluded that appellant was capable of working within the restrictions listed in the functional capacity assessment of a 15-pound maximum lifting restriction with a 9-pound frequent lifting restriction. He stated that appellant should also limit his computer work to 30 to 40 minutes an hour, but within these restrictions, could work 8 hours a day.

Drs. Westfield, Goletz and Roberts concurred that appellant had restrictions of maximum lifting of 15 pounds and frequent lifting of 9 pounds. The job requirements for a stock supervisor, however, require the ability to lift up to 20 pounds occasionally and 10 pounds frequently. The medical evidence of record, particularly the report of Dr. Roberts, the impartial medical specialist, therefore indicates that appellant cannot perform the required physical duties of a stock supervisor. The Office, therefore, did not meet its burden of proof in finding that appellant could perform the duties of a stock supervisor and thereby reducing his compensation.

The decision of the Office of Workers' Compensation Programs dated August 29, 2000 is hereby reversed.

Dated, Washington, DC
October 1, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member