

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARLAN E. PIKE and DEPARTMENT OF JUSTICE, BUREAU OF PRISONS,
FEDERAL CORRECTIONAL INSTITUTE, Manchester, KY

*Docket No. 00-2626; Submitted on the Record;
Issued April 26, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 16, 2000.

On April 15, 1993 appellant, then a 42-year-old security officer, filed a notice of traumatic injury alleging that on March 15, 1993, while in flight to New Mexico for work training, he busted an eardrum due to the altitude of the plane.¹ The Office accepted the claim for acoustic trauma, right ear and dysequilibrium. Appellant received appropriate compensation for wage loss until he returned to work on June 3, 1996.

The record indicates that appellant underwent surgery for a stapedectomy on May 19, 1993 with Dr. Jan Weisberg, a Board-certified otolaryngologist. Postoperatively, he experienced significant nausea and vertigo. When appellant's symptoms failed to improve, he had exploratory surgery on June 23, 1993 to correct the problems with his prior graft and to insert a vein graft to close the fistula. Over the years to follow, appellant received medical treatment from several physicians for complaints of vertigo and dizziness. Appellant was also diagnosed with a significant hearing loss in the right ear.

Although appellant was released to work with restrictions by his treating physician effective July 20, 1994,² the employing establishment refused to offer appellant a limited-duty job. The Office, therefore, referred him for vocational rehabilitation and sought to reemploy him

¹ Appellant has a history of a right ear injury in Vietnam that required surgery.

² Appellant was also examined by an Office referral physician, Dr. Gregory Snider, a Board-certified physician in occupational medicine, who approved appellant for a return to work. In a report dated April 26, 1996, Dr. Snider opined that appellant demonstrated the abilities to safely perform what appeared to be all the essential job tasks of a security officer/locksmith. He concluded that appellant had reached maximum medical improvement and that no further medical treatment was necessary or reasonable at that time.

with another agency. Appellant subsequently accepted a full-time position with the Kentucky State Prison System as a Corrections Officer/Locksmith on June 3, 1996.

On August 7, 1996 the Office rendered a loss of wage-earning capacity determination and adjusted appellant's compensation in accordance with his new position.

Appellant was separated from the employing establishment on May 6, 1996 and filed a discrimination suit alleging that he was refused a reasonable accommodation. On May 11, 1998 an administrative law judge ordered the employing establishment to make an assessment of appellant's condition and to return him to work if it was determined that he could perform the essential functions of the position or a comparable position, with or without accommodation.

On October 13, 1998 the employing establish sent appellant for a fitness-for-duty evaluation with Dr. Robert Woods, a Board-certified otolaryngologist, who indicated that appellant was under no medical restrictions with respect to his ear condition and that he could return to work as a correctional officer.

In a December 2, 1998 letter, the employing establishment offered to reinstate appellant in the position of a correctional officer (GS-08) with comparable pay equal to his date-of-injury job as a (GS-10) locksmith/security officer.³

Appellant by counsel declined the job offer on December 8, 1998 stating that he was not interested in being reinstated as a federal employee and was seeking compensation for discrimination by the employing establishment based on appellant's handicap or disability due to hearing loss.

The Office referred appellant for a second opinion evaluation with Dr. Donald V. Welsh, a Board-certified otolaryngologist.

In a report dated September 30, 1999, Dr. Welsh noted appellant's history of work injury, symptoms of severe dizziness and complete hearing loss in the right ear. He further related that appellant had returned to work for the state prison system in a job similar to the one he held at the time of his work injury. Physical findings were reported and he diagnosed "profound sensorineural hearing loss, right side, following stapedectomy." Dr. Welsh stated:

"I do not feel this diagnosis is related to [appellant's] barotrauma of [March 15, 1993], specifically because there was no fluid noted in the middle ear preceding his stapedectomy. Rather I feel like his stapedectomy was done for long-standing conductive loss *i.e.*, otosclerosis. [Appellant] does claim the residual vertigo is due to his work injury. I do not feel there is objective clinical findings to support this. I do feel that his dizziness has stabilized and that he is able to drive at this point and carry on a reasonably normal work life."

³ The job descriptions are similar in that both positions require the incumbent to maintain security of the prison by escorting inmates and being prepared to use physical force when necessary. The locksmith position also involves being in charge of the security devices on the premises of the prison and may reasonably be seen as a more specialized position.

Dr. Welsh opined, "I do feel that [appellant] could return to work in the correctional facility as evidenced by the fact that he is already working in a State institution doing in essence the same thing." He recommended, however, that appellant not be placed in a position that required him to climb ladders or work at any height due to some lingering unsteadiness.

On April 18, 2000 the Office issued a notice of proposed termination of compensation for wage loss and medical benefits. The Office advised appellant that the medical evidence no longer established that appellant was disabled or had any residuals due to work injury.⁴ Appellant was given 30 days to submit additional evidence or argument if he disagreed with the proposed action.

By letters dated May 9 and June 30, 2000, appellant resubmitted evidence that was already of record, arguing that the proposed termination of his compensation was in error.

In a decision dated July 13, 2000, the Office terminated appellant's wage-loss compensation and medical benefits effective July 16, 2000.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶

In this case, the Office accepted that appellant suffered from acoustic trauma of the right ear with associated dysequilibrium following a flight to New Mexico, which appellant had been required to take in the performance of duty on April 15, 1993. He received appropriate compensation and returned to work as a security officer at a state prison on June 3, 1996.

The Office properly referred appellant for examination by a second opinion physician to determine his ability to work and to ascertain whether or not appellant had any residuals due to his work injury. Appellant underwent a complete evaluation with Dr. Welsh on September 30, 1999. He prepared a well-reasoned medical report finding that appellant had no objective clinical findings to support his complaints of residual vertigo due to his work injury. Dr. Welsh also specifically stated that appellant was capable of working in the job of a correctional officer as offered by the employing establishment since it was virtually identical to the job appellant held with the state prison. Because Dr. Welsh's opinion is sufficiently reasoned, based on a proper medical history and is not contradicted by any other medical

⁴ The Office specifically noted that the physical requirements of the position as a security officer held at the time of the injury and the new offered position as a correctional officer/locksmith were identical.

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

⁶ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

opinion,⁷ the Board finds that the Office properly terminated appellant's compensation on the grounds that he is no longer disabled and has no residuals due to the April 15, 1993 work injury.

The July 13, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 26, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).