U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROMES ANTOINE and DEPARTMENT OF THE ARMY,
U.S. ARMY ENGINEER DISTRICT, New Orleans, LA

Docket No. 01-325; Submitted on the Record;
Issued June 4, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied modification of appellant's lost wage-earning capacity.

On October 7, 1996 appellant, then a 52-year-old engineer equipment operator, filed a timely notice of traumatic injury and claim for compensation (Form CA-1), claiming that he sustained a low back injury that date when he slipped on wet dirt while in the performance of duty. By letter dated December 17, 1996, the Office accepted appellant's claim for lumbosacral strain. The claim was also accepted for aggravation of lumbar spinal stenosis. On April 2, 1997 the Office authorized an L2-4 decompressive laminectomy.

Appellant's treating orthopedic surgeon, Dr. M. Lawrence Drerup, a Board-certified orthopedic surgeon, referred appellant to Dr. Phillip Osborne for a functional capacity evaluation. In a November 6, 1997 report, Dr. Osborne indicated that he could not get a valid functional capacity and he thought that there was "so much magnification of symptomatology that you really can[no]t even assess the underlying pathology."

On a Form OWCP-5 completed on November 25, 1997, Dr. Drerup opined that appellant was capable of working eight hours per day with certain restrictions. He limited appellant to 2 hours of sitting and reaching, 1 hour of operating a motor vehicle and 30 minutes of walking, standing, twisting, pushing and pulling (limited to 10 pounds). Dr. Drerup prohibited appellant from squatting, kneeling and climbing.

On September 16, 1998 the Office issued a notice of proposed reduction of compensation to the claimant, proposing to reduce his compensation on the basis that he is not totally disabled and is capable of performing the duties of a hotel clerk. The claimant did not submit a timely response to the Office's proposed reduction. On November 17, 1998 the Office notified the claimant that it was reducing his compensation effective December 6, 1998 on the basis that the

position of hotel clerk represented his wage-earning capacity. Appellant disagreed and requested an oral hearing.[1]

In a medical report dated January 18, 1999, Dr. E.J. Kalifey, a general practitioner, noted that he had treated appellant for injuries arising out of an accident, which occurred on October 7, 1996. It was his opinion that appellant was totally disabled from engaging in any gainful employment. Dr. Kalifey noted that appellant used a walking cane about 90 percent of the time, that he could only drive for short distances, was unable to sit continuously for more than 30 minutes without getting up and moving around, that he was unable to stand or walk for more than 30 minutes without stopping and that he would be unable to do frequent lifting of more than 10 pounds. He noted that range of motion restrictions and pain would impair his ability to climb, stoop, kneel, crouch, crawl and reach. Dr. Kalifey noted that forward bending of his lumbar spine was 25 percent or less and that extension was markedly limited to 5 to 10 degrees at most. He concluded that he knew of no occupation appellant could assume due to the foregoing limitations. In a letter dated June 6, 1999, Dr. Kalifey stated that appellant was not doing well, that he was still in a lot of pain and currently disabled.

In a report dated May 25, 1999, Dr. James W. Quillin, a psychologist, indicated that he had conducted neurocognitive function studies. Dr. Quillin reported that appellant's intellectual function studies, *i.e.,* the WAIS-III, revealed "low borderline function." He noted that appellant's performance placed him at the second percentile relative to the general population and noted that inspection of his performance showed "a generalized suppression of cognitive function across both verbal and nonverbal spheres with the exception of simple visuoconstructive function which is normal as is social reasoning and judgment." Dr. Quillin also found appellant's memory to below normal, or at the 14 percentile relative to the general population. He noted that immediate and auditory recall was now normal while immediate visual recall was borderline. Dr. Quillin noted that appellant's academic attainment showed spelling and reading at first grade level and arithmetic function at approximately the third grade level. He concluded that appellant had "borderline intellectual function with poor academic attainment." By letter dated May 26, 1999, Dr. Quillin stated that he reviewed the job description for hotel clerk and that based on that description appellant's academic capabilities and general cognitive level would render it extremely difficult for him to fulfill the job duties. Dr. Quillin noted that his academic activities in particular were quite poor.

A hearing was held on May 7, 1999 wherein appellant testified that he needed his "stick" to get around and that he has pain in his back all the time. He noted that he had not returned to work since October 8, 1996. He believed that his ability to do the job of hotel clerk would be hampered by his inability to read and his inability to stand for longer than 5 to 10 minutes.

In a decision dated July 21, 1999, the hearing representative found that the Office appropriately reduced appellant's compensation based on his wage-earning capacity as a hotel clerk. However, he noted that there was a difference of opinion between Drs. Drerup and Kalifey as to appellant's work capacity and that, therefore, appellant should be referred for an

[1] The Board notes that these documents, *i.e.,* the proposed reduction of compensation and the Office's November 17, 1998 decision, are not in the record. This information was obtained from the hearing representative's decision of July 21, 1999.

impartial medical examination. Upon receipt of the impartial medical specialist's report, the hearing representative stated that the Office should determine whether appellant was capable of performing the duties from an orthopedic perspective. Furthermore, the hearing representative noted that appellant was functionally illiterate and that, therefore, based on his cognitive limitations it appeared that he may not be vocationally qualified to perform the duties of hotel clerk. Therefore, he stated that referral to an "independent psychologist" was warranted.

In a report dated May 11, 2000, Dr. Randall D. Lea, a Board-certified orthopedic surgeon, diagnosed appellant as "post multilevel decompression of the lumbar spine with some persistence of lumbar pain." Dr. Lea was unsure as to why appellant still had the pain at the level he did. He stated that he had a "legitimate basis for having complaints of pain, yet at the same time, there was some mild symptom overdramatization present." Dr. Lea noted that appellant's lumbar strain, in all probability, resolved fairly soon. He opined that appellant had a permanent aggravation of his preexisting lumbar spinal stenotic condition. He found that appellant was no longer able to perform his job as engineering equipment operator. Dr. Lea set appellant's functional limitations as follows:

> "[Appellant] should sit and walk no more than an hour at a time without a 30-minute break of doing another activity. He can stand one-half to one hour at a time. He can twist, but no more than four hours a day intermittently. He can push, pull and lift 3 hours out of an 8-hour day intermittently, with maximum lift of 20 pounds to be done no more than 5 to 10 percent of a workday, weights of 15 pounds to be done no more than 15 percent of a workday and weights of 5 pounds or less can be lifted on an on-going basis. In general, his overall lifting should not exceed three hours a day out of an eight-hour day total. The vast majority of his lifting should be done from thigh to shoulder height with minimization of floor-to-waist lifting of less than 10 percent of a workday. Squatting should be limited to less than an hour, as should kneeling. Climbing should be limited to two flights of stairs only with appropriate siderails. In general, he should be allowed to use his cane, if need be. Incidentally, carrying should be limited to 5 pounds or less, so as to allow him to use his cane. In general, he is in the sedentary to minimum light category. He is capable of an eight-hour workday."

When asked if appellant could perform the duties of a hotel clerk, he replied that he was not provided with a copy of it. He went on to say, however, "[F]rom an orthopedic standpoint, as long as the job description fits within the restrictions, as mentioned above, he should be capable of doing it." After receiving this report, the Office sent Dr. Lea a description of the duties of a hotel clerk, from the *Dictionary of Occupational Titles*, which stated as follows:

> "Performs any combination of following duties for guests of hotel, motel, motor lodge, or condominium-hotel: Registers and assigns rooms for guests. Issues room key and escort instructions to BELLHOP (hotel & rest). Date-stamps, sorts and racks incoming mail and messages. Transmits and receives messages, using equipment, such as telegraph, telephone, [t]eletype and switchboard. Answer inquiries pertaining to hotel services, registration of guests; and shopping, dining, entertainment and travel directions. Keeps records of room availability and guests' accounts. Computes bill, collects payment and makes change for guests

[CASHIER (clerical) 1]. Makes and confirms reservations. May sell tobacco, candy and newspapers. May post charges, such as room, food, liquor or telephone, to cashbooks, by hand."

Dr. Lea replied, in a letter dated June 26, 2000, that appellant should be able to perform this job based on his work-related injuries.

Appellant requested reconsideration. By decision dated August 1, 2000, the Office denied appellant's request for reconsideration, as it found that the evidence submitted was duplicitous of evidence previously considered and that the arguments were irrelevant and insufficient to warrant review of the prior decision.

The Office also requested that appellant see Dr. Nabil M. Gad, a Board-certified psychiatrist, who conducted a psychiatric history/mental status examination of appellant on August 10, 2000 and in a report dated October 3, 2000, diagnosed appellant as having adjustment disorder (chronic and depressed mood) and "Borderline Intellectual Functioning as per Dr. Quillin's evaluation," *inter alia*. Dr. Gad found no psychiatric or emotional limitations, although he noted that appellant did seem concerned about sitting or standing for long periods of time. Dr. Gad recommended that appellant start part time as a hotel clerk and that once he made the adjustment and tested his ability to do the job, the hours could be increased.

In a decision dated October 5, 2000, the Office determined that appellant was only partially disabled for work and that the position of hotel clerk fairly and reasonably represented his wage-earning capacity.

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

The Board notes that the Office initially determined appellant's loss of wage-earning capacity based on Dr. Drerup's report, which indicated that appellant was capable of returning to work within certain restrictions. Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[2]

The weight of the medical evidence that appellant is physically capable of performing the position of hotel clerk rests with the opinion of Dr. Lea. In a detailed and well-rationalized report, he opined that appellant was no longer able to work his previous job as an engineering equipment operator and placed restrictions on appellant's abilities to do other work. Dr. Lea opined that appellant could work an 8-hour workday with limitations of sitting and walking for no more than 1 hour at a time without a 30-minute break for some other activity, standing 30 minutes to 1 hour at a time, pushing, pulling and lifting intermittently for 3 hours out of an 8-hour workday, maximum lifting of 15 pounds no more than 15 percent of the workday, but 5 pounds could be lifted on an ongoing basis. Subsequently, he was sent a description of the duties of a hotel clerk from the *Dictionary of Occupational Titles* and concluded that appellant should

[2] *See Don J. Mazurek*, 46 ECAB 447 (1995).

be able to perform this job based on his work-related injuries. Dr. Lea specifically reviewed the job description and determined that appellant "should be able to perform this job based on his work-related injuries." This report is consistent with Dr. Drerup's opinion that appellant was capable of working 8 hours per day, with restrictions of 2 hours of sitting and reaching, 30 minutes of walking, standing, twisting, pushing and pulling (limited to 10 pounds) and no squatting, kneeling and climbing. As Dr. Lea's opinion specifically considered the requirements of a position as a hotel clerk, applied them to appellant's condition and indicated that appellant was physically capable of performing these duties, his opinion is well rationalized and represents the weight of the medical evidence.

Dr. Kalifey's opinion that appellant was disabled and that he knew of no occupation appellant could assume due to his limitation is entitled to less weight. Dr. Kalifey never specifically discussed the requirements of the position of hotel clerk, nor did he explain why appellant's limitations rendered him totally disabled. Dr. Kalifey noted that appellant could not do frequent lifting of more than 10 pounds, that he was impaired in his ability to climb, stoop, kneel, crouch, crawl and reach. However, Dr. Kalifey's restrictions are not much more severe than those of Drs. Drerup and Lea, who found that appellant could be able to find work within his restrictions. Accordingly, the Office properly found that appellant was physically capable of performing the job of hotel clerk.

However, a conflict in the medical evidence now exists between appellant's physician, Dr. Quillin and the second opinion physician, Dr. Gad regarding appellant's cognitive ability to perform the duties of a hotel clerk. Dr. Quillin indicated that appellant was "borderline intellectual function with poor academic attainment." He reviewed the job description of hotel clerk and based on his description of appellant's academic capabilities and general cognitive level, Dr. Quillin determined that it would be extremely difficulty for appellant to fulfill these job duties. The Office, in its July 21, 1999 decision, noted that appellant may not be able to fullfill the job of hotel clerk due to his cognitive limitations and recommended referral to an independent psychologist. Appellant was subsequently seen by Dr. Gad, a psychiatrist, who found that appellant had no psychiatric or emotional limitations. He recommended that appellant start part time as a hotel clerk and that his hours be increased as he made the adjustment to the job. Accordingly, there now exists a conflict between Dr. Quillin, appellant's physician and Dr. Gad, the second opinion physician, as to whether appellant has the cognitive ability to perform the position of hotel clerk.

Section 8123 of the Federal Employees' Compensation Act[3] provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.[4] The Board has interpreted the statute to require more than a simple disagreement between two physicians. To constitute a true conflict of medical opinion, the opposing physician's reports must be of virtually equal weight and rationale.[5]

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8123(a).

[4] *Robert D. Reynolds*, 49 ECAB 561, 565 (1998).

[5] *Id.*

As Drs. Quinlin and Gad's opinions were conflicting as to appellant's cognitive ability to work as a hotel clerk, the Board remands this case and instructs the Office to refer appellant, the case record and the statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation pursuant to section 8123(a).

The October 5 and August 1, 2000 decisions of the Office of Workers' Compensation Programs are vacated and this case is remand for further consideration consistent with this opinion.

Dated, Washington, DC
June 4, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member