U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDY D. GRAVES and TENNESSEE VALLEY AUTHORITY, DIVISION OF POWER SYSTEMS OPERATIONS, Nashville, TN

Docket No. 01-380; Submitted on the Record;
Issued October 10, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability causally related to his accepted October 16, 1985 employment injury.

The Board has duly reviewed the case record and finds that appellant has failed to establish that he sustained a recurrence of disability causally related to his accepted October 16, 1985 employment injury.

On October 23, 1985 appellant, then a 28-year-old lineman, filed a traumatic injury claim alleging that on October 16, 1985 he fractured his left leg and back, he hurt his right heel and orbit, and he sustained multiple contusions when he fell approximately 43 feet from an insulated aerial lift bucket. He stopped work on October 16, 1985.

The Office of Workers' Compensation Programs accepted appellant's claim for left pneumothorax, fracture of the tibia and the fibra of the left leg, talus fracture of the left ankle, calcaneal fracture of the left foot, calcaneal fracture of the right foot, fracture of the back at L2 and right orbital fracture.

Appellant returned to full-duty work as a lineman on August 18, 1986. He was unable to perform the duties of a lineman and began working in the light-duty position of material clerk on May 25, 1987. Subsequently, appellant accepted the light-duty position of dispatcher which, became effective March 7, 1988.

By decision dated November 7, 1990, the Office found that the position of dispatcher fairly and reasonably represented appellant's wage-earning capacity.

Appellant was promoted to the light-duty position of engineering associate which, became effective February 20, 1995.

On August 7, 1997 appellant filed a claim alleging that he sustained a recurrence of disability on January 6, 1997. He stated that his light-duty work was withdrawn from him. On that same date, appellant filed a claim on account of traumatic injury or occupational disease requesting compensation for wage loss beginning September 26, 1997. In a previous letter dated June 16, 1997, the employing establishment advised appellant that due to a reduction-in-force (RIF), specifically, the elimination of his position of engineering associate, it would be necessary to terminate his employment effective September 26, 1997.

By letter dated November 4, 1997, the Office advised appellant to submit medical evidence supportive of his recurrence of disability claim.

In a December 11, 1997 decision, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on January 1, 1997 or beginning on September 26, 1997 causally related to his October 16, 1985 employment injury. In an undated letter, appellant requested an oral hearing before an Office representative.

By decision dated December 17, 1998, the hearing representative found the evidence of record insufficient to establish that appellant sustained a recurrence of disability beginning September 26, 1997 due to his October 16, 1985 employment injury. The hearing representative also found that appellant was not wrongfully terminated by the employing establishment, rather appellant's position was eliminated based on a RIF. Accordingly, the hearing representative affirmed the Office's decision. Appellant requested reconsideration of the hearing representative's decision.

In a September 26, 2000 decision, the Office denied appellant's request for modification based on a merit review of the claim.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, to be entitled to further compensation the employee has the burden to establish by the weight of the substantial, reliable and probative evidence that he cannot continue to perform such light-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

The regulations at section 10.509(a)[2] state as follows:

> "In general, an employee will not be considered to have experienced a compensable recurrence of disability as defined in section 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a [RIF] or some other form of downsizing. When this occurs, [the Office] will determine the employee's wage-earning capacity based on his or her actual earnings in such

[1] *See Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[2] 20 C.F.R. § 10.509(a) (1999) entitled "If an employee's light-duty job is eliminated due to downsizing, what is the effect on compensation?"

> light-duty position if this determination is appropriate on the basis that such earnings fairly and reasonably represent the employee's wage-earning capacity and such a determination has not already been made."

In this case, appellant has neither shown a change in the nature and extent of his light-duty job requirements nor in his injury-related conditions. The record shows that following his October 16, 1985 employment-related ankle and back conditions, appellant returned to work as a lineman, but was assigned light-duty work by the employing establishment as a material clerk and subsequently as a dispatcher. At the time appellant filed his recurrence claims he was working in the light-duty position of engineering associate until that position was eliminated due to a RIF.

In an August 13, 1997 response to appellant's allegation that his light-duty work was withdrawn and therefore he was improperly terminated from the employing establishment, Larry G. Akens, appellant's manager, explained why appellant's position was eliminated. He stated:

> "[Appellant] and the four other engineering associates were responsible for various duties, including gathering information via telephone and entering it into a personal computer workstation. A reorganization of the group was made based on advances in technology to retrieve and store data, and a review of work processes. This restructuring eliminated the need for round-the-clock coverage of this function. In late 1996, a surplus was announced to reduce the group's headcount by two.
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> "[Appellant] and another engineering associate were notified that their assignments would be eliminated based on the process outlined in Office of Personnel Management regulations and the negotiated contract between [the employing establishment] and the Salary Policy Panel. Two vacancies for another position within [the employing establishment] for which both employees were well qualified were identified and communicated to [appellant] and the other employee. Both were strongly encouraged to apply."

Mr. Akens noted that appellant elected not to apply for the identified position while the other employee applied and was selected for the position, therefore, he did not receive a reduction-in-force notice. He further noted that appellant was directed to career transition services for assistance in finding employment inside and outside the employing establishment while receiving full compensation benefits. Mr. Akens concluded:

> "[Appellant's] position was not eliminated because of light[-]duty work being withdrawn, his position was eliminated because of a reorganization in the work group. [Appellant] chose not to apply for an identified position within [the employing establishment] for which he was well qualified."

At the oral hearing, Mr. Akens reiterated his explanation for the elimination of appellant's engineering associate position, the termination of appellant's employment and the employing establishment's efforts to help appellant obtain employment.

In a July 3, 1997 letter, Craven Crowell, chairman of the employing establishment's board of directors, also explained the elimination of appellant's position as an engineering associate. He stated:

> "[A]s part of the ongoing reassessment of [the employing establishment's] business needs, two of the five shift associate positions were identified as surplus. Based on the method for determining retention of federal employees, [appellant] appeared at the bottom of the retention register and was notified that his position was being eliminated.
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> "Management strongly encouraged [appellant] to apply for a CAD operator trainee position. In this role, his knowledge of the transmission system would have made him a very competitive candidate. The trainee position was at a lower pay grade than his most recent position, but the opportunity existed for reclassification back to his present level when journeyman level skills were reached."

Mr. Crowell noted that appellant declined to apply for this position and that he was provided with career transition services. He concluded:

> "I believe management acted in good faith to address [appellant's] concerns. He was provided training within his own organization and he was presented the opportunity to be trained for work outside of the [e]lectric [s]ystem [o]perations organization."

As indicated in the above-referenced regulation, this RIF, which is established by the letters of Mr. Akens and Mr. Crowell and Mr. Aken's hearing testimony, did not entitle appellant to total disability compensation.[3]

Appellant has not submitted rationalized medical evidence explaining how he became disabled from performing the job of an engineering associate. Because appellant was working in a light-duty position, he bears the burden of proof to establish that he is no longer able to perform the physical requirements of that last job in order to establish a recurrence of disability. None of the medical evidence of record supports such a finding.

A July 8, 1997 report of Dr. William M. Gavigan, a Board-certified orthopedic surgeon, provided a history of appellant's October 16, 1985 employment injury and his findings on physical and objective examination. Dr. Gavigan diagnosed status post burst fracture at L2, right calcaneal fracture and osteonecrosis in the dome of the left talus. He opined that appellant's left ankle condition had worsened and that his back remained stable. In his October 2, 1997 report, Dr. Gavigan reiterated the above diagnoses and opinion regarding the status of appellant's left ankle and back conditions. In addition, he stated that, if appellant's ankle condition worsened then he would need an ankle fusion.

[3] *See Thomas A. Crow*, Docket No. 99-1455 (issued December 5, 2000).

In reports dated May 27 and December 18, 1998, Dr. Gavigan again reiterated his previous diagnoses and opined that appellant could work with his previous restrictions of 4 hours standing and 4 hours sitting in an 8-hour day and lifting no more than 30 pounds.

Dr. Gavigan's May 15 and November 4, 1999 reports indicated that the left ankle remained unchanged based on an x-ray revealing osteochondral defect in the dome of the talus. The reports also indicated one broken Harrington bone, which was old with stable lumbar fusion and the old healed burst fracture at L2 based on x-ray. Dr. Gavigan noted the same restrictions, which included lifting no more than 30 pounds and sitting 30 minutes and standing 30 minutes in an hour.

In his May 11, 2000 report, Dr. Gavigan reiterated his previous diagnoses and indicated that appellant also had osteoarthritis of the left ankle. He further reiterated appellant's restrictions as provided in his May 15, 1999 report.

Dr. Gavigan did not address how or why appellant's conditions were due to his October 16, 1985 employment injury resulting in disability for work in any of the above reports. As appellant has failed to submit rationalized medical evidence establishing that he sustained a recurrence of disability causally related to his October 16, 1985 employment injury, he has failed to meet his burden of proof.

The September 26, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 10, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member