U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY J. VENTI and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 01-1024; Submitted on the Record;
Issued October 1, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective February 1, 1998 based on his ability to perform the selected position of small parts assembler.

The Office accepted that on or before January 1, 1981 appellant, then a 44-year-old rigger, sustained an aggravation of preexisting degenerative joint disease of the shoulder, left knee and low back, due to strenuous work and a series of injuries sustained while performing the duties of a rigger. He received compensation for intermittent periods of disability.[1] Appellant was placed on light duty effective October 29, 1990, stopped work shortly thereafter and voluntarily retired from the employing establishment effective April 1, 1991.

By decision dated November 13, 1992, the Office awarded appellant a schedule award for a 26 percent permanent impairment of the left knee, with the period of award running from July 6, 1992 to December 12, 1993. He elected to receive wage-loss compensation benefits under the Federal Employees' Compensation Act, in lieu of the Office of Personnel Management (OPM) retirement benefits, effective December 13, 1993. Appellant received compensation on the daily and periodic rolls.

Appellant submitted periodic medical reports through 1995 from Dr. Andrew J. Collier, Jr., an attending Board-certified orthopedic surgeon, finding appellant totally disabled for all work due to degenerative arthritis of the knees, shoulders and lumbosacral spine and supraspinatus tendinitis of both shoulders.

On February 27, 1995 the Office referred appellant to Dr. Seymour Shlomchik, a Board-certified orthopedic surgeon, to obtain a second opinion regarding whether he continued to be

[1] On September 30, 1996 the Office found that an overpayment of $3,998.90 existed in appellant's case due to underdeduction of health insurance premiums. The Office found that appellant was without fault and waived recovery of the overpayment due to financial hardship.

totally disabled for work due to the accepted conditions. Dr. Shlomchik submitted a March 29, 1995 report, noting appellant's occupational injuries from 1964 onward and treatment since 1981. He obtained x-rays showing degenerative changes of the acromioclavicular joints, very minimal degenerative arthritis of both knees and lumbosacral anatomy within normal limits. On examination, Dr. Shlomchik found no signs of bicipital tendinitis, tenderness of the right lumbar paraspinal musculature and no pathology of the knees other than a "[two]-finger breadth bowlegged deformity." Dr. Shlomchik noted that appellant's hands were calloused with "dirt under the finger nails," indicating that appellant was "doing some heavy work." He stated that there was no objective clinical basis for Dr. Collier's diagnoses of subacromial bursitis, bicipital tendinitis, lumbosacral degenerative disc disease or degenerative arthritis of the knees. Dr. Shlomchik opined that there were no objective clinical findings to support any of appellant's complaints and released him to full-time unrestricted duty.[2]

Dr. Collier submitted chart notes from January 30 to May 10, 1996, finding that appellant's bilateral shoulder and knee symptoms continued to require monthly corticosteroid and anesthetic injections.[3] Beginning in August 1996, Dr. Collier chronicled appellant's exacerbations of knee and shoulder symptoms after gardening and driving a tractor mower.[4]

The Office then found a conflict of medical opinion between Dr. Collier, for appellant and Dr. Shlomchik, for the government. To resolve this conflict of medical opinion, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon. In a December 16, 1996 report, he provided a history of appellant's occupational injuries since 1964 and reviewed the medical record. On examination, Dr. Klinghoffer found a normal orthopedic and neurologic examination of the upper extremities, a normal gait, no abnormalities of either knee and a slight restriction of lumbar motion. He obtained lumbar x-rays showing slight anterosuperior spurring from L2-5, less than normal for age and reviewed cervical x-rays showing degeneration and spurring from C5-7 with moderate encroachment at C5-6 on the left. Dr. Klinghoffer opined that the cervical abnormalities were competent to produce "intermittent neck symptoms," but not appellant's other complaints. He stated that as appellant experienced back pain while performing heavy

[2] As Dr. Shlomchik found appellant able to work, the Office referred appellant to a vocational rehabilitation counselor, who worked with him from February 1995 to January 1996. Vocational aptitude tests performed in June 1995 revealed that appellant had the training and capacities to perform electrical assembly and repair work. In a January 19, 1996 report, the counselor recommended case closure as appellant stated that he could not work, had unrealistic employment expectations and was generally uncooperative. The counselor identified the position of "Assembler, Electro-Mechanical, as within appellant's restrictions and "very reasonably available to the injured worker."

[3] Appellant underwent physical therapy in August 1996 to treat diagnosed degenerative joint disease of the lumbar spine.

[4] In an August 27, 1996 note, Dr. Collier stated that appellant presented with minor back and leg pain after mowing his lawn the day before with a tractor mower, then picking up the grass. On examination, Dr. Collier found a 10 to 20 percent loss of lumbar range of motion, slight tenderness of the iliolumbar ligaments, with shoulder and knee symptoms resolved, mandating a reduction in medication. In an October 8, 1996 note, Dr. Collier stated that appellant "[d]id a lot of work around the homestead" and complained of shoulder, neck and foot pain requiring anti-inflammatory and anesthetic injections.

work as a rigger, he should avoid "heavy physical work," although there was no identifiable lumbar pathology.

In a March 26, 1997 letter, Dr. Collier found positive impingement tests in both shoulders with tenderness under the acromion and positive crepitus, mild synovitis and effusion of both knees, "patellofemoral crepitus, medial collapse, lateral thrust on ambulation," lumbosacral tenderness and loss of the lumbar lordotic curve. Dr. Collier diagnosed "subacromial bursitis, bicipital tendinitis in both shoulders," lumbosacral degenerative disc disease without radiculopathy or herniated discs, mild degenerative arthritis of both knees with "patellofemoral chondromalacia." He attributed these diagnoses to the cumulative effects of appellant's duties as a rigger at the employing establishment. Dr. Collier found appellant capable of "sedentary to light duty." He submitted monthly chart notes through April 1997, noting that appellant cut "down a small tree in his yard," used "a small chipper, lifting his arms up to put the branches in," dug in his garden, installed "a little flooring," and moved "a few things" in his daughter's new house. Dr. Collier continued monthly injections of appellant's knees and shoulders with Celestone and Lidocaine.[5]

In a May 18, 1997 supplemental report, Dr. Klinghoffer opined that appellant had no objective physical abnormality that would disable him for work. He explained that as appellant was "60 years old and ha[d] not worked for many years," he recommended that he refrain from "heavy physical duties."

By letter dated June 24, 1997, the Office proposed to terminate appellant's wage-loss compensation on the grounds that any work-related disability had ceased, based on Dr. Klinghoffer's reports.

Appellant responded by July 15 and 18, 1997 letters, describing the arduous duties he performed as a rigger, including climbing ladders while hoisting equipment on both shoulders, lifting up to 80 pounds frequently, shipbuilding, positioning metal shell plates and building scaffolding 100 feet high. He alleged that he remained totally disabled for work due to the cumulative effects of those duties. Appellant also alleged that Dr. Klinghoffer was incompetent as he failed to recognize his arthritis of both knees and shoulders, which Dr. Collier felt required monthly corticosteroid injections for a period of six years. Appellant admitted that he performed gardening, landscaping and other tasks at his home, explaining that he was unable to afford to pay someone else to do it.

In a September 17, 1997 work capacity evaluation, Dr. Collier released appellant to full-time restricted duty. He allowed appellant to sit, stand and walk for up to six hours a day, lift and carry up to 100 pounds occasionally and occasionally bend, squat, crawl and climb.

[5] In a May 20, 1997 report, Dr. Collier noted that appellant experienced debilitating bilateral shoulder and knee pain while walking in a shopping mall for 10 minutes. Dr. Collier administered corticosteroid injections in both knees and shoulders.

Dr. Collier prohibited using either foot for repetitive movements, or operating controls requiring pushing or pulling with either arm. He noted that these restrictions were permanent.[6]

Based on Dr. Collier's work release, the Office referred appellant for vocational rehabilitation. In an October 17, 1997 closure report, Mr. John Heathcote, a vocational rehabilitation counselor, identified the position of Assembler, Small Products I as appropriate to appellant's aptitudes and medical restrictions. The position was classified as "light," with lifting up to 20 pounds, fine manipulation and grasping and a vocational preparation period of 30 days. Mr. Heathcote noted that a Pennsylvania State employment service representative confirmed that the assembler position was reasonably available in appellant's commuting area, with an average weekly wage of $276.40. The Office reviewed Mr. Heathcote's reports and found the small products assembler position to be suitable work.

By letter dated November 4, 1997, the Office advised appellant that it proposed to reduce his wage-loss compensation benefits to reflect his ability to earn wages as a small product assembler. The Office determined that the selected position was within the medical restrictions prescribed by Dr. Collier on September 17, 1997 and, therefore, constituted suitable work. The Office noted that Dr. Klinghoffer's opinion that appellant had no permanent impairment was erroneous, as he had received a schedule award for a 26 percent permanent impairment of the left knee.

Appellant responded by a December 2, 1997 letter, asserting that he had work-related degenerative arthritis of both knees and shoulders which totally disabled him for work.

Dr. Collier submitted progress notes dated November 4 and December 2, 1997 finding crepitus of both knees and shoulders, with pain requiring corticosteroid injections. In a January 6, 1998 report, he noted that a magnetic resonance imaging (MRI) scan showed severe bilateral acromioclavicular arthritis, producing pain, crepitus and decreased range of motion. Dr. Collier also noted rotator cuff tendinitis on the right with no tears. He administered corticosteroid injections.

By decision dated January 8, 1998, the Office reduced appellant's compensation benefits effective February 1, 1998 to reflect his ability to earn wages as a small parts assembler. The Office found that appellant's adjusted earning capacity as a small parts assembler was $216.80 a week, which was $325.20 less than his date-of-injury position's weekly pay rate of $542.00. The Office further found the position to be suitable work within appellant's medical restrictions, including those pertaining to his left knee, as prescribed by Dr. Collier, his attending physician. The Office noted Dr. Collier's agreement with Dr. Klinghoffer's opinion that appellant was medically capable of light-duty work.

Appellant disagreed with this decision and in a January 18, 1998 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review, which was held September 28, 1998. At the hearing, appellant reiterated his assertions that he remained totally

[6] In a September 23, 1997 note, Dr. Collier noted that appellant reported increased pain in both shoulders, requiring corticosteroid injections.

disabled for all work due to the cumulative effects of his strenuous duties as a rigger for a 30-year period. He submitted additional medical evidence.

In a January 30, 1998 report, Dr. Collier stated that appellant's increasing knee problems were placing an additional strain on his back due to a "lumbering" gait. Dr. Collier submitted monthly progress notes through August 1998, stating that he administered monthly corticosteroid injections to both knees and shoulders due to appellant's symptoms after carrying "three or four" bricks, painting patio furniture with a small brush and doing "a little work around the house."

A September 10, 1998 functional capacity evaluation demonstrated that appellant was able to sit intermittently for a total of 6 hours a day, stand intermittently for 2 hours, walk intermittently for 1 hour, lift and carry up to 20 pounds occasionally, perform simple grasping and fine manipulation with either hand and occasionally operate hand or foot controls. Appellant was permitted to bend, squat and reach occasionally.

In a September 15, 1998 note, Dr. Collier noted the Office's determination that appellant could perform sedentary work. He stated that appellant had difficulty with daily activities, "getting around, walking, climbing … going up and down stairs." Dr. Collier noted objective findings of decreased range of motion with crepitus of the knees and shoulders bilaterally, with positive impingement signs in both shoulders. He continued monthly corticosteroid injections of both knees and shoulders.

Accompanying a September 20, 1998 letter, the employing establishment submitted appellant's job description as a rigger, including duties of lifting and carrying loads of 75 pounds or more in all types of weather conditions, setting up and rigging heavy equipment, operating cranes, shipbuilding and repair and installing rigging in confined areas necessitating prolonged work in awkward positions.[7]

In October 17 and 20, 1998 letters, appellant alleged that Dr. Collier and the Office were not handling his claim in an ethical manner, causing him to be "infuriated" and "despondent." Appellant asserted that he was the most expert authority on his own condition and that his opinion should, therefore, carry the weight of the medical evidence. He enclosed excerpts from publications concerning the injury rates at the employing establishment and medical literature regarding pain.

By decision dated and finalized November 24, 1998, the Office hearing representative affirmed the January 8, 1997 decision of the Office. The hearing representative provided a detailed chronology of appellant's eleven compensation claims from 1979 onward and an overview of appellant's medical treatment. The hearing representative found that Dr. Collier opined that appellant was capable of sedentary duty and that the September 10, 1998 functional capacity evaluation demonstrated that appellant could perform the duties of the selected position of small products assembler.

[7] An October 13, 1998 x-ray of the right wrist showed old, healed fractures of the fourth and fifth metacarpals with slight angulation of the fifth metacarpal and "an old fracture of the radial styloid, with some minimal degenerative changes [of the] radiocarpal joint."

Appellant disagreed with this decision and in a February 13, 1999 letter, requested reconsideration. He submitted additional evidence.[8]

In a December 15, 1998 letter, Dr. Collier opined that appellant's "problems … [of the] neck, back, shoulders, knees, hands, etc." were "related basically to his cumulative traumas at work in the [employing establishment] over the 30 years employment." He provided work restrictions against lifting more than 20 pounds, squatting and crawling, allowed intermittent sitting for up to six hours a day, standing for two hours a day and walking for one hour. Dr. Collier permitted using both hands for simple grasping and fine manipulation, but noted that appellant could not operate arm controls requiring pulling or pushing. He submitted periodic chart notes through April 1999 relating appellant's continuing musculoskeletal symptoms and noting monthly corticosteroid injections in multiple joints.[9]

By decision dated May 14, 1999, the Office denied modification of the prior decision on the grounds that he submitted insufficient medical evidence to establish that the selected position of small parts assembler was not within his medical capacity.

Appellant disagreed with this decision and in a May 11, 2000 letter, through his representative, requested reconsideration.[10] Appellant enclosed a copy of his preemployment physical showing that he did not have any musculoskeletal conditions prior to his federal employment. Appellant's attorney alleged that the Office did not take into account appellant's other occupational-related injuries when determining that the position of small products assembler was within his medical capabilities.[11] He submitted additional medical evidence.

In monthly progress notes from June 4 to August 31, 1999, Dr. Collier noted a possible degenerative tear in the medial meniscus of the left knee with a positive MacMurray's sign, mild synovitis of both knees, a positive impingement sign in the right shoulder, crepitus in both knees and shoulders. He continued monthly corticosteroid injections.

By decision dated December 12, 2000, the Office denied modification of the prior decision on the grounds that the evidence submitted was insufficient to warrant such modification. The Office noted that Dr. Klinghoffer and Dr. Collier were both fully informed of

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[8] In a November 10, 1998 report, Dr. Collier noted that appellant experienced a flare-up of bilateral knee and shoulder symptoms after "doing a little bit of yard work." He administered corticosteroid injections to both knees and shoulders.

[9] A March 30, 1999 MRI scan showed a "[s]mall partial thickness rotator cuff tear" and acromioclavicular osteophytes in the right shoulder and a left shoulder within normal limits. This report does not contain any work restrictions or comments regarding appellant's ability to perform the small product assembler position.

[10] Appellant stated that he could not, walk on his left foot; climb steps or squat due to a right knee condition; lift, twist or bend due to back and shoulder conditions; turn or nod his head.

[11] Appellant's attorney enclosed a chronology, chart notes and employing establishment documents indicating that he sustained a 1970 elbow and forearm injury filed under Claim No. A-2-248777 and a June 26, 1984 fracture of the fourth and fifth metacarpals of the right hand filed under Claim No. A-3-95190. Appellant also listed four knee, four shoulder and four back injuries occurring from March 1963 through November 1979. None of these claims is before the Board on the present appeal.

appellant's prior occupational injuries and their opinions were, therefore, based on a complete medical history. The Office also noted that appellant lost no significant time from work due to these injuries and that they resolved quickly and completely, indicating that they had no permanent effect on his health. The Office concluded that appellant submitted no persuasive medical evidence establishing that he remained totally disabled for all work due to the accepted aggravation of preexisting degenerative joint disease.[12]

The Board finds that the Office properly reduced appellant's compensation effective February 1, 1998 based on his ability to perform the position of small parts assembler.

Section 8115 of the Federal Employees' Compensation Act[13] provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage- earning capacity in his disabled condition.[14]

When the Office makes a medical determination of disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open 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. Finally, application of the principles set forth in *Albert C. Shadrick*[15] will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[16]

The medical record establishes that appellant is physically capable of performing the small parts assembly position. The Office referred appellant for a second opinion evaluation with Dr. Shlomchik, a Board-certified orthopedic surgeon, who opined on March 29, 1995 that appellant had no work-related duty restrictions. Dr. Klinghoffer, a Board-certified orthopedic surgeon and impartial medical examiner, determined in his December 16, 1996 and May 18, 1997 reports, that appellant was able to perform any job that did not require heavy physical duties.

[12] Appellant filed his appeal with the Board on March 12, 2001.

[13] 5 U.S.C. §§ 8101-8193, 8115.

[14] *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[15] 5 ECAB 376 (1953).

[16] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

Dr. Collier, appellant's attending Board-certified orthopedic surgeon, opined in March 26 and September 17, 1997 reports, that appellant was able to perform light-duty work, with lifting up to 100 pounds and unlimited fine manipulation and simple grasping. The Board notes that although the Office based its January 8, 1998 decision on the September 17, 1997 report, medical reports as early as August 1996 indicate that appellant was medically able to work. In reports from August 1996 through August 1998, Dr. Collier related that appellant was able to cut down small trees, use a chipper, ride a tractor mower, lay flooring, move household items, paint patio furniture with a small brush, dig in his garden and carry three or four bricks.

On the basis of Dr. Klinghoffer's opinion, the Office referred appellant for job placement services to Mr. Heathcote, a rehabilitation counselor. Mr. Heathcote interviewed appellant, reviewed his work restrictions, conducted a labor market survey, then determined as of October 17, 1997 that the position of Assembler, Small Products I, was within appellant's physical limitations and was available in suitable numbers to make it reasonably available to appellant within his commuting area. The Office then reviewed the position description and appellant's limitations as provided by Drs. Klinghoffer and Collier and determined that appellant could perform the duties of the position.

Therefore, the record establishes that appellant is physically able to perform the work of a small products assembler and that the position is reasonably available.[17]

At the September 28, 1998 hearing and several subsequent letters, appellant made several arguments regarding what he believed to be improper or unethical acts by the Office, Drs. Klinghoffer and Collier in the adjudication of his claim.

First, appellant alleges that the Office and the referral physicians were unaware of the arduous physical duties he performed during his 30 years as a rigger at the employing establishment. However, appellant's official position description appears at several places in the record and was, therefore, available to Dr. Klinghoffer. Arguendo, the critical issue is no longer the causal relationship of the original injuries to appellant's duties, but whether appellant remained totally disabled for work on and after February 1, 1998. The medical evidence does not establish any objective disability that would prevent him from performing the small product assembler position on and after February 1, 1998. Therefore, the nature of appellant's duties as a rigger is a moot point as he was not disabled for work by any cause on and after February 1, 1998.

Second, appellant alleges that he has been totally disabled for all work since he retired from the employing establishment effective April 1, 1991. There are two problems with that assertion. The chief difficulty is that Dr. Collier, his own attending orthopedic surgeon, opined that appellant was able to perform limited-duty work as early as March 26, 1997. Also, he chronicled appellant's physical activities in August 1996 through August 1998, including painting patio furniture; driving a lawn tractor, laying flooring, moving furniture; chopping down trees, using a chipper; gardening and carrying bricks. Appellant admits performing these

[17] The Board notes that the Office's monetary calculations using the *Shadrick* formula in determining appellant's wage-earning capacity appear to be correct. He does not contest the accuracy of these calculations. *See Albert C. Shadrick*, *supra* note 15.

activities even while asserting to the Office that he was totally disabled for all work. The scope and variety of the physical demands of these activities and that they were performed regularly over a two-year period from 1996 to 1998, indicates that appellant was not totally disabled for all work.

Third, appellant asserts that his opinion deserves the weight of the medical evidence, as he is the expert on his own medical condition. The Board does not doubt appellant's accuracy in relating his subjective pain symptoms or that he feels himself to be totally disabled. However, to be of probative value in a compensation claim under the Federal Employees' Compensation Act, medical evidence must be given by a qualified, trained medical professional, most frequently a medical doctor.[18] Appellant is not a physician. Therefore, appellant's opinion about his own condition, while apparently sincere, is of no probative medical value in this case and cannot be used to establish whether or not he was disabled from performing the small parts assembly position on and after February 1, 1998.[19] The Board notes that Dr. Collier, appellant's orthopedic surgeon and a physician of his own choosing, did not support total disability on and after February 1, 1998.

Therefore, the Office met its burden of proof in reducing appellant's compensation based on his wage-earning capacity in the selected position of Assembler, Small Products I.

The decision of the Office of Workers' Compensation Programs dated December 12, 2000 is hereby affirmed.

Dated, Washington, DC
October 1, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] 5 U.S.C. § 8101; *Kenneth R. Love*, 50 ECAB 193 (1998).

[19] *See James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is not competent evidence on the issue of causal relationship).