U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEWIS E. GROSS and U.S. POSTAL SERVICE,
GOLETA MAIL HANDLING ANNEX, Santa Barbara, CA

Docket No. 01-2287; Submitted on the Record;
Issued October 18, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant's change to a lower paying position effective October 7, 1989 constitutes disability causally related to his accepted employment injury.

On February 3, 1992 appellant, then a 54-year-old distribution clerk (express mail), filed an occupational disease claim asserting that his bilateral carpal tunnel syndrome was a result of the duties he performed in his previous position as a letter sorting machine operator.[1] In an attached statement he explained:

> "The original claim for carpal tunnel syndrome was filed on April 18, 1983. It was accepted by [the Office] on November 2, 1983. At the time of the initial claim I was a [l]etter [s]orting [m]achine (LSM) [o]perator. A job description for LSM [o]perator was filed with original claim.
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> "All symptoms persisted from the date of original claim until September 1989. At this time my physician advised me to change jobs to lessen the agitation. I followed my [physician's] advice and bid a non-LSM job. I was awarded the job of [d]istribution [c]lerk-[e]xpress [m]ail.
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> "For a period of time the symptoms were not as intense as when operating the LSM. However, recently the pain has intensified to the degree that medical attention is imperative."

Appellant described his duties as an express mail distribution clerk and submitted a position description for distribution clerk, level 5. To support his claim, he submitted medical reports from his attending neurologist, Dr. David G.N. Frecker, who began seeing appellant in August 1989.

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[1] The record shows that on November 2, 1983 the Office of Workers' Compensation Programs accepted a previous claim for bilateral carpal tunnel syndrome.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome and flexor tendinitis. The Office approved surgeries and paid compensation for periods of temporary total disability. The Office also paid schedule awards for permanent impairment to the arms.

Appellant filed claims for compensation indicating that his work assignment had changed because of disability resulting from his original injury in 1983: "When I sustained the injury I was a LSM [o]perator. On the advice of my physician to change my job to lessen the agitation, I bid a (non-LSM) job, which did not require me to use my wrists and hands as much."

On September 20, 1998 appellant requested compensation for the loss of wage-earning capacity caused by his bilateral carpal tunnel syndrome. He explained that his disability prevented him from performing the kind of work he was doing when injured and from earning comparable wages:

> "On June 28, 1976 I was hired by the U.S. Postal Service as a Letter Sorting Machine (MPLSM) Operator, [G]rade level 6. The initial claim for [c]arpal [t]unnel [s]yndrome was filed on April 18, 1983 and was accepted by [the Office] on November 2, 1983. At the time of the initial claim I was a still a Letter Sorting Machine (MPLSM) Operator, [G]rade level 6.
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> "In October 1989 my physician, Dr. Frecker, determined that my continuous operation of the Letter Sorting Machine (MPLSM) exacerbated my symptoms considerably. Dr. Frecker advised me to change jobs to lessen the agitation. I followed my [physician's] advice and bid the position of [d]istribution [c]lerk, [G]rade level 5 which did not have the keying factor.
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> "The working conditions on the Letter Sorting Machine (MPLSM), which caused this disease, were the repeated flexing and prolonged posturing of the wrist in a intensely arched position. Based upon my disability I was unable to perform the duties required by the LSM.
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> "Based upon the above factors I conclude that I am entitled to continued wages at level 6 from [the] initial date of injury, April 18, 1983, henceforth."

Appellant submitted a notification of personnel action showing a change to a lower level, at his request, from a letter sorting machine operator to a distribution clerk effective October 7, 1989. The change lowered appellant's Grade from 6 to 5 and his salary from $30,941.00 to $30,038.00. Appellant also submitted job information for the two positions.

On September 23, 1999 the Office requested additional information concerning the duties appellant performed in the two positions. The Office also requested "medical evidence from the time of the downgrade, which demonstrates that appellant's physician had an understanding of the differences between the two positions and that he recommended that you change from date-of-injury position to the downgraded position."

On October 5, 1999 appellant submitted descriptions of the actual duties he performed as a multi-position letter sorting machine operator and as a distribution clerk (express mail). The

employing establishment confirmed that these descriptions were true and accurate. Appellant explained the basic difference between the two positions and his reason for the downgrade:

> "The downgraded position, [d]istribution [c]lerk [e]xpress [m]ail, does not require the degree of repetitive work, as did the Multi Position Letter Sorting Machine (MPLSM) operation. The downgraded position does not require the repeated flexing of the wrist, nor the prolonged posturing of the wrist in a tensely arched position. Only 1 to 1½ hours of my workday involves the flexing of the wrist.
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> "In July or August 1989, after discussing my date-of-injury position (MPLSM) with my physician, he advised me that since my job had a tremendous amount of hand activity and wrist flexion my symptoms were exacerbated considerably. He further advised me to change jobs to lessen the agitation. I contacted [the Office] and informed my [c]laims [e]xaminer as to my physician's advice. I was informed by the [c]laims [e]xaminer that if another job would lessen my agitation and since my physician had advised me to change jobs, that I should follow the advice of my physician."

Appellant submitted an October 25, 1999 report, from Dr. Frecker who stated:

> "[Appellant] is a patient of mine who has been seen in this office since August 2, 1989. Prior to that time, he was cared for by Dr. Paul Willis in this office.
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> "[Appellant] has been diagnosed with bilateral carpal tunnel syndrome. He has undergone carpal tunnel release surgery subsequent to his diagnosis. In addition, he has other orthopedic problems with his hands requiring now a total of five separate surgeries performed on four separate dates. The last of these was performed in September 1998.
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> "Previous to this date and also on this date, I have advised [appellant] to avoid both work and nonwork activities requiring a great deal of repetitive motion. Primary amongst this is a job position requiring keyboard work on a long-term (greater than 4 hours daily) basis. In late 1989, it was recommended that [appellant] stop a job that required a great deal of repetitive wrist and finger motion. This, in fact, took place and he is now performing a job, which although there is a requirement for hand manipulation, repetitive and persistent wrist and finger motion is not a requirement. [Appellant] can, in fact and should, utilize his hands. Specifically, he can lift, manipulate and carry objects as long as it is not performed in [a] precisely repetitive way for periods of time longer than 3 to 4 hours. It is my understanding that his current position does not require this type of activity that I requested him to avoid.
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> "For the above-noted reason, I feel that his change of job position in 1989 was medically requested and indicated."

In a decision dated March 14, 2001, the Office denied appellant's claim for compensation. The Office found that the medical evidence did not establish that he was unable

to perform the duties of his date-of-injury position noting the contemporaneous medical evidence from Dr. Frecker did not establish that appellant was given specific work restrictions that precluded him from performing the duties of his date-of-injury position as a letter sorting machine clerk. Instead, Dr. Frecker appeared to advise against repetitive work and appellant then sought a change of position on his own. The Office noted that there was no evidence that appellant's change-in-job duties was based on an offer of modified-duty work made by the employing establishment in response to established medical restrictions. Instead, appellant chose to change jobs to a lesser-paying position with less hand-intensive duties.

The Board finds that the evidence is insufficient to establish that appellant's change to a lower paying position effective October 7, 1989, constitutes disability causally related to his accepted employment injury.

A claimant seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4]

As used in the Act, the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[5] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[6]

Appellant has not met his burden of proof. He addressed how specific physical requirements exacerbated his symptoms considerably and caused him to become disabled for his LSM position. Appellant related discussions with his neurologist, Dr. Frecker, either in August, September or October 1989 and asserted that he followed his physician's advice when he bid a non-LSM job. The Office requested that appellant submit medical evidence from the time of the downgrade demonstrating that Dr. Frecker had an understanding of the differences between the two positions and that he recommended the change to the downgraded position.

Appellant has submitted no such evidence. Dr. Frecker's October 25, 1999 report, comes 10 years after the fact, is vague as to the positions in question and tends to support that his recommendation to "stop a job that required a great deal of repetitive wrist and finger motion" was precautionary or prophylactic in nature. The Board has held that fear of future injury, or

[2] 5 U.S.C. §§ 8101-8193.

[3] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

[6] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

fear of a recurrence of disability if the employee returns to work, is not compensable; there must be medical evidence showing that a claimant is currently disabled for work due to an employment-related condition.[7] Dr. Frecker's 1999 report does not establish that appellant could no longer perform his LSM job in 1989, nor does it explain the absence of contemporaneous treatment notes finding that appellant was disabled for work or directing him to change positions. Without such contemporaneous medical evidence, the Board is unable to evaluate whether Dr. Frecker's recommendation was to protect appellant against future injury or whether residuals of the employment-related bilateral carpal tunnel syndrome were such that, from a medical standpoint, they prevented appellant from continuing in his date-of-injury position as a letter sorting machine operator in 1989. The 10-year lapse of time does not relieve appellant of his responsibility to produce such evidence, as he bears the burden of proof to establish the essential elements of his claim by the weight of the evidence.

The March 14, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 18, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[7] *William A. Kandel*, 43 ECAB 1011 (1992); *Mary A. Geary*, 43 ECAB 300 (1991).