

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MILTON H. PERKINS and U.S. POSTAL SERVICE,  
POST OFFICE, North Reading, MA

*Docket No. 03-448; Submitted on the Record;  
Issued August 11, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

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

On October 6, 1948 appellant, then a 33-year-old distribution clerk, filed a notice of traumatic injury and claim for compensation alleging that, while sorting parcels, he was struck by a heavy parcel being sorted by another clerk. The claim was accepted for a back contusion and a ruptured disc at L4-5. Appellant underwent a laminectomy for this injury in 1950.

On February 4, 1953 appellant injured his back while lifting parcels. His claim was accepted for a back strain. Appellant continued to work for the employing establishment until he resigned on June 1, 1956 to work in the private sector and later for the Massachusetts' Department of Natural Resources, Division of Forestry.

On October 7, 1970 appellant filed a recurrence claim. In a June 27, 1974 letter, he explained that he did strenuous surveys of woodland areas in the summer and winter on snowshoes and he would lose all mobility due to pain in his right hip and leg causing him to resign. In a May 13, 1974 report, Dr. Thomas Sullivan, an orthopedic surgeon, diagnosed appellant with sciatica scoliosis super imposed on an old fusion. He added that appellant needed a ¾ inch lift in his right heel and to lose 50 pounds and he could return to work, though not a job that required long-standing and heavy lifting.

Appellant received total disability compensation for his 1953 injury from September 1, 1971 to January 30, 1980. In a January 17, 1980 decision, the Office, relying on the report of Dr. Sullivan, found appellant had a loss of wage-earning capacity at 66 percent, but that he could perform the position of an order clerk. The job description of an order clerk included sedentary work with no lifting over 10 pounds. Appellant has not worked since 1971.

Appellant continued to receive medical care. In a September 23, 1986 report, Dr. Herbert Sandick, an orthopedist, noted:

“[Appellant] was progressively disabled by low back pain. He is now unable to get out of a car without supporting himself and lifting his body with his arms holding onto a window....

“He can walk for only about half an hour, drive for only 15 minutes ... before experiencing pain in his legs, more on the right.... Examination reveals that he stands with a rather straight dorsal kyphosis. All movements of the back are severely limited by anticipated pain. He continues to present findings indicative of marked disability, now about 85 percent with respect to his ability to work.”

In an April 24, 1987 report, Dr. Eric White, an orthopedist and second opinion referral, diagnosed appellant with a lumbar back strain, work related, a permanent aggravation of lumbar back strain with herniated nucleus pulposus, L4-5, recurrent back strain with nonspecific right sciatica, degenerative joint disease in his right knee after injury, 1941, exogenous obesity and diabetes mellitus, stable with mild peripheral neuropathy, both feet. He also wrote:

“It is not clear from the medical record that his herniated disc, which became apparent in January of 1950, was a permanent aggravation of his 1948 injury, since he had apparently recovered after two to three weeks.... One can also view his 1950 disc herniation as a separate injury, *i.e.*, the result of natural progression of lumbar disc disease. After the exacerbation of his back condition in February of 1953, the medical record documents on-going symptoms over the next several months including the fall and winter through 1954. Subsequent to his leaving the [employing establishment] in 1956 the patient clearly was not totally disabled, since he worked for the Commonwealth of Massachusetts through 1971.

“[T]his patient’s current and past condition of surgical excision of disc with fusion and on-going symptoms ... is rated as 25 percent permanent impairment of the whole person.... I attribute the increase to the natural progression of his disease rather than permanent aggravation of a specific injury.

“This patient is now at retirement age, and his physical capabilities are not the same as during his working years. Current physical limitation are based in part on his back condition, but also are a result of his aging, his obesity, his diabetes with peripheral neuropathy and degenerative arthritis of his right knee... [T]his individual can perform sitting, walking and standing activities on an intermittent basis, but has a restriction on routine lifting in excess of 20 pounds, as well as restrictions on bending, squatting, climbing and kneeling. Those activities restricted due to his back condition are lifting, bending forward and twisting....”

In a November 13, 1989 letter, appellant asserted he was totally disabled due to his accepted injury and requested a modification of his loss of wage-earning capacity. In support of his request, he submitted a March 7, 1989 report from Dr. John Bouillon, an orthopedic surgeon, who wrote that appellant presented with “significant spasms and tenderness in the low back, with

no sciatic notch tenderness. He does have tight hamstrings bilaterally. Deep tendon reflexes are 3+ and symmetrical. Sensation is normal, no atrophy or weakness is detected. He has good strength in all the major muscle groups.... He has significant loss of flexion/extension of the spine to about 75 percent. Right/left lateral bending and rotation is limited by 50 percent.” Dr. Bouillon diagnosed appellant with osteoarthritis and discogenic disease of the lumbar spine. He opined that appellant was totally disabled from work with the employing establishment and for all practical purposes should be totally disabled.

In a March 26, 1990 decision, the Office denied appellant’s request for modification of his loss of wage-earning capacity finding the medical evidence did not establish sufficient change in his condition that he could not perform the position of an order clerk. On March 12, 1999 appellant filed a CA-2A form alleging a recurrence of total disability. In support of his claim, he submitted a July 2, 1998 report form Dr. Bouillon who wrote:

“[Appellant] is now 78 years old. He has chronic daily pain with exacerbations in his lower back radiating to the thoracolumbar junction and gluteal masses with intermittent parathesias in the lower extremities. His legs ache intermittently after walking.... An MRI done of the lumbar spine ... [revealed] an extreme amount of spondylosis, more prominent at L4-5 with mild tri-compartmental stenosis.... He has had a quadruple bypass and has angina....”

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“At this point he is totally and permanently disabled from gainful employment.”

The Office requested more information. In an April 20, 1999 report, Dr. Bouillon diagnosed appellant with spinal stenosis, spinal claudication, bilateral radiculopathy, myofascial syndrome lumbar spine. He found his “status post abdominal aortic aneurysm, choecytectomy, coronary artery bypass, coronary arteriosclerosis heart disease. Dr. Bouillon advised that he use a cane on the right to minimize quadriceps inhibition and buckling. He indicated that appellant is totally disabled from any gainful employment. Onset of his injuries stem from the industrial accident at the employing establishment “on or about 1948, with progressive symptoms until 1971, with significant degenerative changes present a few decades later due to significant degenerative changes of the lumbar spine with foraminal stenosis including extensive lumbar discogenic disease....”

In an August 10, 1999 decision, the Office denied appellant’s recurrence claim finding the medical evidence vague and unrationalized.

In a September 13, 1999 letter, appellant requested a hearing. In support of his request, he submitted a progress note from Dr. Bouillon. In his August 24, 1999 note, Dr. Bouillon wrote:

“[Appellant] still has pain and spasm in the lower back, posterolateral thigh and buttock.... Difficulty with prolonged sitting or standing. Cannot sit straight because of pain on extension and spasm in the lower back. Deep tendon reflexes 2+ and symmetrical.... Bilateral lumbar radiculopathies are present clinically, with myofascial syndrome. It appears this condition has arisen from the

progressive wear and tear of the spine, arising from the original injury complicated by the sequelae of the fusion. [Appellant] is totally and permanently disabled from any gainful employment ... he is not to lift, bend, sit or stand for more than a half our or to lift more than 10 pounds.”

In a June 19, 2000 decision, the Office denied the claim finding the medical evidence, in light of appellants’ medical history, insufficient to warrant modifying the loss of wage-earning capacity.

In a July 24, 2000 letter, appellant requested reconsideration and submitted in support a report from Dr. Sandick. In his July 12, 2000 report, Dr. Sandick found that appellant feels exhausted after walking 100 feet, must keep his feet far apart so he does not fall, complains of pain in both lowers, swelling in his ankles and must do just about everything sitting down. He opined that appellant is fully disabled as a result of the industrial injury originally sustained and treated with spine fusion. Dr. Sandick wrote that “there is evidently a spinal stenosis which is progressive and permanent subsequent to spine fusion. This is consistent with his age, injury and treatment.”

In a November 9, 2000 decision, the Office denied modification finding that the medical evidence lacked rationale on why appellant could not perform the job as an order clerk.

In a January 10, 2001 letter, appellant requested reconsideration. In support of his request he submitted a November 30, 2000 report from Dr. Bouillon who wrote that appellant has been totally disabled for 25 years due to significant degenerative changes of the lumbar spine which have worsened following the original accidents previously described. He indicated that appellant could not bend, lift, push, pull or sit or stand for more than 5 to 10 minutes at a time or lift more than 10 pounds. He opined that appellant cannot do the work as an order clerk due to the significant pathology in his spine as well as the inability to sit or stand for a prolonged period of time.

In a June 19, 2001 decision, the Office denied modification finding the medical evidence insufficient to establish that appellant’s condition had changed so that he could not do the order clerk position.

In a July 24, 2001 letter, appellant again requested reconsideration. In support appellant submitted a January 22, 2001 report from Dr. Sandick. In his report, Dr. Sandick wrote:

“The question of whether [appellant] can carry out the duties of any job hinges upon his ability to find a job at the age of 80, get from the parking lot to his job with the walker he needs for walking more than 100 feet and get up every 15 minutes to move around for about 5 minutes before beginning his desk work again.

“The above indicates the limits of his physical capacity.

“It is likely that the job market will be the limiting factor in his total and permanent disability.”

In a July 12, 2001 report, Dr. Bouillon wrote that appellant's "long-term disability problems including his lumbar discogenic disease, lumbar myofascial syndrome and facet arthropathies stem directly from an industrial accident sustained several years ago and treated by Dr. Sandick and myself. [Appellant] will be totally and permanently disabled for any gainful employment for life due to the original trauma."

In a December 18, 2001 letter, the Office denied modification finding that the medical evidence did not provide sufficient rationale explaining why appellant's medical condition was causally related to the accepted injuries in 1948 or 1953. In a May 8, 2002 letter, appellant again requested reconsideration and submitted progress notes from Dr. Bouillon. In a March 14, 2002 note, Dr. Bouillon wrote that appellant had a recent episode where his left leg buckled and gave out. His entire left lower extremity went numb. Appellant went to the emergency room, was treated and released. He added that appellant's present disability stems solely from the long-standing orthopedic injuries sustained many years ago that have been discussed, culminating in further progressive degeneration of the spine with foraminal encroachment and lumbar radiculopathy, facet syndrome. Onset of injury 50 years at the employing establishment.

In his April 15, 2002 report, Dr. Bouillon wrote:

"It is my medical opinion within a reasonable degree of medical certainty that the patient's injury in the late 1940s with spinal surgery in 1948 and 1953 is directly related to [appellant's] present disability. His course has been that of progressive deterioration of the facet joint above the spinal fusion with further degenerative changes associated with spasm, myofascial induration of the lumbar spine with limited motion. Had [appellant] not received the procedures and had [appellant] not been injured [appellant] most likely would be without pain and would be able to engage in substantial and gainful employment. The injury accelerated [appellant's] degenerative changes and I feel the extent of the degeneration noted on x-ray studies including the disability level is related to the injury and the subsequent surgery...."

Appellant also submitted results of a computerized axial tomography (CAT) scan and x-rays dated March 22, 2002. These tests indicated osteoarthritis of the lumbar spine with narrowing of the L4-5 interspace and sequestration of the fifth lumbar segment. The CAT scan reported spinal stenosis at the L4-5 level and bilateral recess stenosis at the L5-S1 level.

In an August 28, 2002 decision, the Office denied modification finding that the medical evidence does not show how the accepted injuries changed appellant's condition in light of his age and multiple medical conditions.

The Board finds that this case is to be remanded for further development. Once a loss of wage-earning capacity is determined, a modification of such a 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.<sup>1</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>2</sup>

In the present case, appellant alleged that there was a material change in the nature and extent of his employment-related condition. Appellant has submitted numerous reports indicating that he is totally disabled and causally relating his disability to the accepted injury and its residuals impact on appellant.

In his January 10, 2001 report, Dr. Bouillon noted that appellant could not bend, push, lift, pull, sit or stand for more than 5 to 10 minutes or lift more than 10 pounds; nor perform the work of an order clerk because of the significant pathology in his spine that has worsened due to his accepted injuries. Dr. Bouillon submitted reports dated July 2, 1998 and April 20 and August 24, 1999 that also support that appellant is totally disabled due to the accepted injury and its sequela.

Dr. Sandick's also indicated that appellant cannot perform the duties of an office clerk. In his July 24, 2000 report he noted that appellant has spinal stenosis that is progressive, permanent and subsequent to the spinal fusion, consistent with age, injury and treatment.

Moreover, there is no medical evidence that controverts appellant's reports of total disability. Dr. White, a second opinion referral physician, attributed at least some of appellant's back condition to his accepted injury, as well to age, obesity and diabetes.

While the medical evidence of record is insufficient to meet appellant's burden of proof in that it does not explain why appellant could not perform the sedentary duties of an order clerk, it is sufficient to require further development.<sup>3</sup>

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<sup>1</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>2</sup> *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

<sup>3</sup> *See John J. Carlone* 41 ECAB 354 (1989).

The decisions by the Office of Workers' Compensation Programs dated August 28, 2002, December 18, 2001 are hereby set aside and the case is to be remanded to the Office for further development consistent with this decision.

Dated, Washington, DC  
August 11, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member