

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. WELLS and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, CA

Docket No. 02-293; Submitted on the Record;
Issued June 18, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the position of word processing data entry clerk represented his wage-earning capacity.

On October 6, 1987 appellant, then a 42-year-old shipwright mechanic, filed a traumatic injury claim alleging that on October 2, 1987 he hurt his back when he slipped on axle grease on two occasions on that date. He stated that he jolted his back while trying to prevent the falls.

The Office accepted appellant's claim for a lumbar strain. Subsequently, the Office expanded the acceptance of appellant's claim to include aggravation of a herniated nucleus pulposus at L3-4 and L4-5 and authorized a lumbar laminectomy, which was performed on November 18, 1988.

Appellant worked intermittently during the period February 1 through November 18, 1988 and he was terminated by the employing establishment effective July 17, 1994.

The Office received a July 19, 1994 work capacity evaluation form from Dr. Stephen A. Wertheimer, a Board-certified orthopedic surgeon and appellant's treating physician, indicating that appellant could work with certain restrictions. Dr. Wertheimer indicated that appellant could not lift over 10 pounds less than one hour a day. He stated that appellant could not sit, walk and stand intermittently for more than four hours a day. Further, Dr. Wertheimer noted that appellant could not bend, squat, climb, kneel and twist.

Based on Dr. Wertheimer's evaluation, the Office referred appellant to a vocational rehabilitation counselor by letter dated December 12, 1994. The vocational rehabilitation counselor identified the positions of computer programmer and data entry clerk as being within appellant's medical and vocational capabilities. The vocational rehabilitation counselor developed a plan for appellant to attend computer-training classes, which was authorized by the Office.

In an April 17, 1995 letter, the Office advised appellant that the duties of a computer programmer and data entry clerk were within his physical restrictions as outlined by his physician.

In a March 19, 1999 letter to Dr. Wertheimer, the Office noted his previous report dated January 11, 1999 indicated that appellant continued to complain of numbness and pain in his hands and that he underwent right shoulder surgery on October 10, 1998. The Office further noted Dr. Wertheimer's opinion that appellant remained permanent and stationary. The Office requested that he review appellant's shoulder treatment records, including the surgery report and complete an enclosed work capacity evaluation form.

In a March 25, 1999 letter, Dr. Wertheimer stated that he had not received copies of appellant's right shoulder treatment including, the surgery report. In an accompanying work capacity form of the same date, Dr. Wertheimer indicated that appellant could work with certain physical restrictions including, sitting, walking, standing, reaching and lifting no more than 10 pounds for four hours a day, no reaching above the shoulder and twisting from zero to one hour a day. He further indicated that appellant could operate a motor vehicle for eight hours a day.

Appellant alleged that he sustained carpal tunnel syndrome as a result of computer use during his training from May 1995 through April 1997. He submitted a May 11, 1998 report from Dr. Clara Nguyen, a Board-certified internist with Kaiser Permanente, who diagnosed bilateral carpal tunnel syndrome. Dr. Nguyen ruled out right shoulder rotator cuff tendinitis and noted an abnormal sensory examination of the bilateral upper extremity, including the face and upper back. She indicated that she could not state with reasonable medical certainty that appellant's right shoulder injury and sensory loss were caused by the activities of his computer training. Regarding her diagnosis of bilateral carpal tunnel syndrome, Dr. Nguyen stated that it was reasonably probable that appellant developed this condition from improper wrist posture while using the keyboard during his training. She also stated that appellant should wear his wrist braces at work and avoid repetitive or prolonged wrist movements.

In a July 1, 1999 letter to Dr. Nguyen, the Office described the duties of the data entry position and requested that she determine whether appellant could perform the duties of this position.

In a letter dated January 31, 2000, the Office advised Dr. Nguyen that appellant's claim had been accepted for bilateral hand sprain as a result of his rehabilitation training program based on medical evidence of record. The Office requested that Dr. Nguyen determine whether appellant's carpal tunnel syndrome was caused by his training.¹

In a May 10, 2000 report, Dr. Irina Gaal, Board-certified in emergency medicine and appellant's treating physician at Kaiser Permanente, reviewed a history of appellant's employment injury and medical treatment and her findings on physical examination. She noted a review of medical evidence and diagnosed bilateral median neuropathy with no clinical symptoms or clinical evidence of carpal tunnel syndrome and bilateral shoulder rotator cuff

¹ The record indicates Kaiser Permanente advised the Office that Dr. Nguyen was no longer with the health care provider.

tendinitis/rotator cuff tear that was nonoccupational. Dr. Gaal opined that appellant's upper extremity conditions were not related to his rehabilitation training between 1995 and 1997 based upon her examination. Dr. Gaal further opined that her restriction of appellant from any prolonged continuous repetitive hand motions did not preclude him from performing any clerical duties as long as he was able to perform such duties in an intermittent manner and to take stretch breaks for every hour of continuous typing or repetitive hand motions.

In an August 15, 2000 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence of record established that he was no longer totally disabled, but partially disabled. The Office advised appellant that he had the capacity to earn the wages of a word processing machine operator and a data entry clerk. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

Appellant telephoned the Office on August 21, 2000 and stated that he was scheduled for carpal tunnel surgery in October. The Office advised appellant that the notice of proposed reduction was issued because the medical evidence established that he was no longer totally disabled. Appellant indicated that his physician, a Dr. Peters, would submit a report.

On August 22, 2000 someone from Kaiser Permanente telephoned the Office to inquire about whether appellant's claim had been accepted for bilateral carpal tunnel syndrome. The Office advised the health care provider that appellant's claim had only been accepted for bilateral hand strains.

By decision dated September 21, 2000, the Office finalized the proposed reduction of compensation.

In a March 26, 2001 letter, appellant, through his attorney, requested reconsideration of the Office's decision and submitted a December 19, 2000 report of Dr. John B. Dorsey, a Board-certified orthopedic surgeon, who noted his findings on physical and neurological examination and a review of medical records. Dr. Dorsey diagnosed cervical spine sprain/strain with probable degenerative cervical disc disease, status post rotator cuff repair of the bilateral shoulders with residuals, status post right and left carpal tunnel release with residuals and status post lumbar laminectomy with spinal stenosis. He opined that appellant was totally disabled from performing the duties of a shipwright and any type of computer work. Dr. Dorsey noted that the surgeries performed on appellant's upper extremities and stated appellant's return to the computer field, which requires keying and use of the computer would be detrimental to his overall condition. He further noted appellant's physical restrictions, which involved no heavy lifting, repeated bending, stooping, twisting, turning, prolonged weight bearing and sitting, forceful use of the upper extremities for grasping and gripping, any type of keying or repetitive movements of the hands and fingers and working at or above shoulder level with both upper extremities.

In an addendum letter dated January 16, 2001, Dr. Dorsey disagreed with Dr. Gaal's finding that appellant's rehabilitation training did not cause his complaints of numbness in his extremities. He also disagreed with Dr. Gaal's finding that appellant did not have carpal tunnel syndrome and that his bilateral shoulder problems were not employment related. Dr. Dorsey

stated that many patients that have carpal tunnel syndrome do not have positive Phalen's or Tinel's test results. He also stated that appellant's magnetic resonance imaging studies revealed rotator cuff tears with impingement of both shoulders and positive electromyogram and nerve conduction studies confirmed bilateral carpal tunnel syndrome. Dr. Dorsey concluded that both of these conditions were work related.

The Office found a conflict in the medical opinion evidence between Drs. Nguyen, Gaal and Dorsey and referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Fernando Ravessoud, a Board-certified orthopedic surgeon, for an impartial medical examination, by letter dated July 12, 2001.

Dr. Ravessoud submitted an August 20, 2001 report providing a history of appellant's October 2, 1987 employment injury and medical treatment. He indicated a review of appellant's medical records and his findings on physical examination. Dr. Ravessoud diagnosed status post surgical release of bilateral carpal tunnel syndrome with subjective improvement in symptoms postoperatively and electrodiagnostic documentation of syndrome. He also diagnosed bilateral open subacromial decompressions and repair of the rotator cuff with residuals and post-traumatic cervical spondylolisthesis and spinal stenosis secondary to post-traumatic lumbar disc disease status post laminectomy with residuals. Dr. Ravessoud opined that appellant's bilateral carpal tunnel syndrome was directly caused by repetitive typing performed during his computer training activities. He further opined that appellant's bilateral rotator cuff tear and subacromial impingement were a direct cause of his employment prior to his vocational rehabilitation training and were aggravated by the ergonomically poor design of the workstation at the rehabilitation facility. Dr. Ravessoud noted his objective findings of impairment and stated that appellant appeared to be permanent and stationary. He indicated that appellant was subject to flares of pain that would be minimally disabled and responsive to conservative therapies while other episodes would require consultation with a physician. Dr. Ravessoud recommended that appellant undergo a work capacity evaluation. He stated: "I would not feel the job of operating a word processor or data entry clerk or the job of magnetic tape composer operator would be appropriate for [appellant] given his residuals of his shoulder surgery and at this point of status-post bilateral carpal tunnel releases."

By decision dated August 30, 2001, the Office found Dr. Ravessoud's opinion sufficient to establish that appellant's bilateral carpal tunnel syndrome and subsequent surgeries were sustained during his participation in the vocational rehabilitation program, but insufficient to establish that appellant's shoulder condition constituted a consequential injury of the employment injury. The Office stated that it had not accepted as factual that the vocational rehabilitation program had poorly designed workstations in its computer laboratory. The Office found Dr. Ravessoud's determination that appellant's flares of pain precluded him from the duties of the selected positions to be prophylactic in nature, and thus, insufficient to establish total disability. Accordingly, the Office denied modification of its prior wage-earning capacity decision.

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation based on its determination that the selected position of word processing data entry clerk represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² Pursuant to section 8115(a) of the Federal Employees' Compensation Act,³ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.⁴

Section 8123(a) of the Act states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁵

In this case, the Office found a conflict in the medical opinion evidence between Dr. Nguyen, a Board-certified internist at Kaiser Permanente, who opined that appellant's bilateral carpal tunnel syndrome was probably related to his vocational rehabilitation training; Dr. Gaal, Board-certified in emergency medicine at Kaiser Permanente, who opined that appellant's training did not contribute to his upper extremity conditions and that he could perform clerical work with restrictions; and Dr. Dorsey, a Board-certified orthopedic surgeon, who opined that appellant's bilateral carpal tunnel syndrome and bilateral rotator cuff tear with impingement were employment related and that he was totally disabled from performing any type of computer work. Both Drs. Nguyen and Gaal found that appellant's shoulder condition was not due to his vocational rehabilitation training. However, each of these physicians was an attending physician to appellant. The record reflects that Dr. Gaal responded to the Office's questions after Dr. Nguyen left the health care provider Kaiser Permanente. In turn, Dr. Dorsey is also an attending physician.

The Board finds that a conflict under section 8123(a) of the Act did not arise with respect to appellant's ability to perform the duties of a data entry clerk. The only medical evidence pertinent to this claim was submitted from physicians associated with treatment of appellant. There was no opposing or contrary evidence from an Office medical adviser or referral physician.⁶ Consequently, the referral to Dr. Ravessoud constitutes a second opinion referral and not an impartial medical evaluation.

Contrary to the Office's finding, the evidence of record from Dr. Ravessoud is not merely prophylactic in nature, but general supportive of a causal relation between appellant's shoulder

² *Patricia A. Keller*, 45 ECAB 278 (1993).

³ 5 U.S.C. § 8115(a).

⁴ *See Dorothy Lams*, 47 ECAB 584 (1996).

⁵ 5 U.S.C. § 8123(a).

⁶ *See John H. Taylor*, 40 ECAB 1228 (1989) (no conflict in medical opinion as no physician acting on behalf of the United States disagreed with the reports of appellant's physicians).

conditions and his employment as a shipwright and his participation in a vocational rehabilitation program. The Federal (FECA) Procedure Manual, Part -- 2, Claims, *Reemployment: Determining Wage-Earning Capacity*, at Chapter 2.814.8(a)(2) and (4), provides that in determining loss of wage-earning capacity based on a constructed position, the Office must consider the degree of physical impairment (including impairments resulting from both injury-related and preexisting conditions) and the claimant's age.⁷ Dr. Ravessoud's report indicates that the selected position of word processing/data entry clerk was not appropriate in light of appellant's accepted bilateral carpal tunnel syndrome.

In his August 20, 2001 report, Dr. Ravessoud provided a history of appellant's October 2, 1987 employment injury, reviewed medical records and conducted a physical examination. He opined that appellant's bilateral carpal tunnel syndrome were a "direct cause" of his employment and result of repetitive typing activities and computer keyboard use. Dr. Ravessoud also attributed the diagnosis of bilateral rotator cuff tear and impingement to appellant's employment and rehabilitation efforts. While the Office has not accepted appellant's bilateral rotator cuff tear and subacromial impingement, Dr. Ravessoud's diagnoses and conclusion that appellant was unable to perform the duties of the selected positions due to these conditions cannot be disregarded. For these reasons, the Board finds that the Office did not meet its burden of proof to reduce appellant's compensation based on the constructed position of word processing/data entry clerk.

The August 30, 2001 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
June 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁷ See also 20 C.F.R. § 10.124(c).