

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**JESUS YBARRA, Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, KELLY  
AIR FORCE BASE, San Antonio, TX, Employer**

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**Docket No. 04-903  
Issued: February 22, 2005**

*Appearances:*  
*Richard Rodriguez, for the appellant*  
*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On February 23, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 18, 2003 denial of reconsideration and June 26, 2003 denial of his claim. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant met his burden of proof in establishing that he is entitled to compensation for wage loss as of June 3, 2000; and (2) whether the Office properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

**FACTUAL HISTORY**

Appellant, a 46-year-old nondestructive tester, filed a claim for an occupational disease on June 1, 2000, alleging that he sustained injuries to both elbows, causally related to factors of his employment. Appellant resigned from the employing establishment on June 2, 2000. The Office

accepted the claim for bilateral elbow epicondylitis and a left lateral epicondylectomy on August 21, 2001.

Appellant submitted a November 10, 2000 report from Dr. Donald F. Dutra Jr., Board-certified in physical medicine, who treated him on October 23, 2000 for elbow pain which had been present since December 1999. He stated that appellant had undergone conservative treatment for his diagnosed condition of lateral epicondylitis with myalgia. Dr. Dutra concluded that this condition was consistent with his job duties, which required heavy lifting and dipping. He did not offer an opinion regarding disability for work.

Appellant was referred to Dr. Govindasamy Durairaj, a Board-certified orthopedic surgeon for a second opinion evaluation. In a report dated July 10, 2001, he opined that appellant had bilateral epicondylitis which was caused by his work due to constant lifting and dipping materials which weighed between 40 and 70 pounds. Dr. Durairaj explained that appellant could not perform his date-of-injury job duties, but could work full time with restrictions. He did not offer any opinion regarding the date that appellant's disability began.

In a report dated September 25, 2001, Dr. Frank J. Garcia, a Board-certified orthopedic surgeon, stated that appellant was completely disabled from doing his usual work due to his bilateral epicondylitis. He also diagnosed bilateral carpal tunnel syndrome. Dr. Garcia advised that, if appellant were to return to work, he would require extensive restrictions only perform sedentary work. He essentially reiterated these findings and conclusions in an October 16, 2001 report.

On December 10, 2001 the Office granted appellant schedule awards for a 10 percent permanent impairment of the right upper extremity and an 11 percent permanent impairment for the left upper extremity for a total of 65.2 weeks of compensation. The period of awards ran from September 25, 2001 to December 27, 2002. The Office subsequently issued appellant a lump-sum payment in the amount of \$23,046.92.

Appellant submitted a January 7, 2003 Form CA-7 requesting wage loss for total disability as of June 3, 2000 and continuing. He submitted a January 7, 2003 report from Dr. Garcia, who noted that appellant underwent surgery, which failed to cure his chronic epicondylitis. He stated:

“There is evidence of osteoarthritis that is present in both elbows, and therefore, it is not just the soft tissues but the arthritic nature of his elbows that is causing him the symptoms. From the type of work that he is attesting to doing, I do not believe that he is able to return back to that kind of work, and therefore in terms of definitions, he is disabled. I think this disability is permanent based on the fact that it is a bilateral condition. [Appellant] may be a candidate for vocational rehabilitation based on his previous education and experience level... Nevertheless, at this moment I cannot return him back to any meaningful work based on his symptoms, findings on physical examination per present disability.”

By letter dated May 12, 2003, the Office advised appellant that it required additional medical evidence, including a comprehensive medical report, in support of his claim. In a report

dated May 20, 2003, Dr. Garcia stated that appellant continued to experience significant bilateral elbow pain, with loss of function and motion. On physical examination, he noted diminished grip strength, pain on palpation over the lateral epicondylar ridge, and significant weakness. Dr. Garcia reiterated that appellant was permanently and totally disabled.

By decision dated June 26, 2003, the Office denied appellant's claim for compensation based on wage loss, finding that he failed to establish that his disability as of June 2, 2000 was causally related to his accepted employment injury.

On December 3, 2003 appellant's representative requested reconsideration. The letter requested a production of documents, including all of appellant's medical records, all correspondence between the Office, the employing establishment and his treating physician, and copies of any other claims appellant filed. Appellant did not submit any additional medical evidence in support of his claim.

By decision dated December 18, 2003, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

It is the employee's burden of proof to establish disability during the period of time for which wage-loss compensation is claimed. The term "disability" is defined by implementing regulation as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total."<sup>1</sup> The Board has long held that whether a particular injury causes an employee disability for employment is a medical question which must be resolved by competent medical evidence.<sup>2</sup> Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. The Office shares responsibility in the development of the evidence to see that justice is done.<sup>3</sup> While the employee has the burden of proof to establish that claim, once the Office has begun to develop the claim, it must pursue the evidence as far as reasonably possible.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The medical reports of record from both Dr. Garcia as well as Dr. Durairaj, the Office's second opinion physician, support that appellant was disabled at some point in time after June 2, 2000 due to the accepted bilateral elbow conditions. Appellant was referred to Dr. Durairaj for an opinion on the diagnosis of appellant's condition, an opinion on causal relationship and a finding on appellant's disability for work. He explained that appellant's heavy lifting duties,

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<sup>1</sup> 20 C.F.R. § 10.5 (f).

<sup>2</sup> See *Donald E. Ewals*, 51 ECAB 428 (2000).

<sup>3</sup> *William J. Cantrell*, 34 ECAB 1233 (1983).

<sup>4</sup> See *Edward Schoening*, 41 ECAB 277 (1989).

which required that he lift and dip materials weighing 40 to 70 pounds on a repetitive basis, caused bilateral elbow conditions and that he could not perform his date-of-injury job duties.

The Board notes that the Office developed the medical evidence with regard to whether the bilateral elbow conditions were causally related to the alleged employment factors. The physicians of record responded affirmatively to the question of whether appellant was disabled, but did not fully address the specific issue of when appellant's disability began or the period of his disability for work. The case will be remanded to the Office for further development of the medical evidence on the issue of whether appellant was totally disabled for the period June 3, 2000 to September 24, 2001 and after December 27, 2002.<sup>5</sup>

### **CONCLUSION**

The Board finds that the claim requires further development of the evidence. This case will be remanded to the Office for further development consistent with this decision of the Board. The Board finds that the second issue regarding the denial of reconsideration is moot.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 18 and June 26, 2003 decisions of the Office of Workers' Compensation Programs be set aside and this case is remanded for further development to be followed by an appropriate decision.

Issued: February 22, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> As appellant received compensation under the schedule awards from September 25, 2001 to December 27, 2002, he may not receive compensation for wage loss for the same period of time. See *Eugenia L. Smith*, 41 ECAB 409 (1990).