United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 08-1388**
	)	**Issued: December 10, 2008**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John Goodwin, Esq., for the appellant
Hans K. Wild, Esq., for the Director

Oral Argument October 2, 2008

DECISION AND ORDER

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

JURISDICTION

On April 11, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 26, 2008 decision terminating appellant's compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's compensation benefits effective March 26, 2008.

FACTUAL HISTORY

On October 28, 1992 appellant, a 44-year-old machinery mechanic, filed an occupational disease claim for carpal tunnel syndrome. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and left cubital tunnel syndrome. It authorized bilateral carpal tunnel release surgeries and left median nerve decompression.

This case was previously before the Board. By decision dated February 16, 2006, the Board set aside the Office's October 13, 2004 decision reducing appellant's benefits, based on a finding that he was capable of performing the duties of security guard. The case was remanded for further development of the medical evidence.[1] The findings of fact and conclusions of law contained in the February 16, 2006 decision are incorporated herein by reference.

The record reflects that appellant's duties as a marine machinery mechanic included operating power equipment such as portable milling machines, boring bars, facing machines, and drills, as well as hand tools, grinders, wrenches, flushing and test equipment. Appellant was required to lift, carry, and set up equipment and components weighing up to 40 pounds. The work involved straight pulling, pulling hand-over-hand, reaching above the shoulder and the use of both hands for up to eight hours. The job was typically performed in shops and aboard ships and submarines which required working from uncomfortable and cramped positions, which involved stooping, bending, kneeling, reaching and climbing.

In a report dated May 14, 1996, Dr. Larry D. Iversen, a Board-certified orthopedic surgeon, recommended that appellant be permanently restricted from using vibrating tools or equipment and from doing any lifting, pushing or pulling over 40 pounds. Appellant returned to light duty, and subsequently received schedule awards for a 19 percent impairment of his left upper extremity and a 10 percent impairment of his right upper extremity.

Having been notified that the employing establishment could no longer provide him with light-duty employment, appellant filed a claim for recurrence of disability, which was accepted on April 4, 2002. The Office sought a second opinion medical examination to determine appellant's capacity to participate in vocational rehabilitation. In a report dated February 18, 2003, Dr. Patrick Bays, a Board-certified orthopedic surgeon, found no significant objective physical findings, and opined that appellant was able to perform the activities of daily living with no significant restrictions.

The Office found a conflict between the opinions of Drs. Bays and Staker, appellant's treating physician, who opined that he had permanent restrictions which precluded the use of vibratory tools and heavy lifting. It referred appellant to Dr. Charles Peterson, a Board-certified orthopedic surgeon, for an impartial medical examination. In a May 15, 2003 report, Dr. Peterson opined that appellant should not engage in a job requiring the use of vibratory tools or equipment and should avoid heavy lifting, pushing or pulling over 40 pounds. He also opined that, although appellant did have ongoing carpal tunnel symptoms, he did not have significant impairment due to his chondromalcia patellae and could perform activities of daily living. In a July 1, 2003 work capacity evaluation, Dr. Peterson limited appellant to pushing, pulling, or lifting a maximum of 15 pounds. Based on the restrictions outlined by Dr. Peterson, the Office referred appellant for vocational rehabilitation.

By notice dated June 3, 2004, the Office proposed to reduce appellant's compensation payments based on his ability to earn wages as a security guard. By decision dated October 13, 2004, it reduced appellant's benefits based on his wage-earning capacity as a security guard.

[1] Docket No. 05-217 (issued February 16, 2006).

Appellant appealed the October 13, 2004 decision to the Board. By decision dated February 16, 2006, the Board found the case was not in posture for decision and remanded the case for clarification of Dr. Peterson's report.

On remand, the Office referred the case to Dr. Donald Hubbard, a Board-certified orthopedic surgeon, for a new referee evaluation to resolve a conflict in medical opinion regarding work limitations. Dr. Hubbard was also asked to opine as to whether appellant had any residuals from the accepted injury. In a report dated August 29, 2006, he diagnosed, by history, left cubital tunnel and bilateral tunnel syndromes as conditions related to appellant's accepted injury. Dr. Hubbard provided findings on examination, which revealed a well-healed curvilinear incision where the left ulnar nerve was transposed at the elbow joint. A positive Tinel's sign existed bilaterally over the left median nerve at the junction of the mid to distal forearm, and over the ulnar nerve and ulnar groove on the right. Active Range of Joint Motion testing was as follows: right wrist dorsiflexion -- 60; volar flexion -- 44; left wrist dorsiflexion -- 60; volar flexion -- 54; bilateral ulnar deviation -- 22, with 20 of bilateral radial deviation. Elbow active range of motion revealed 0 to 140 flexion on the right, 0 to 132 flexion on the left, and 90 degrees pronation and supination, bilaterally. Active range of motion of the fingers and thumbs was within normal limits, although appellant experienced palmar area burning pain with thumb opposition to the finger digit tips bilaterally. Sensation was intact to light touch, vibration, temperature, and pinprick bilaterally in the upper and lower extremities. Sensation was intact in the ulnar and median nerve distributions of the upper extremities to monofilament testing. Two-point discrimination is six mm in all finger digits and thumbs. Dr. Hubbard opined that appellant had no residuals and no physical limitations related to his accepted injury, and could perform the duties of security guard, or could return to full duty in his date-of-injury position (marine machine mechanic). However, he stated that repetitive work of forceful grasping and gripping, especially at a high frequency with upper extremity neuromuscular structures, contributes to peripheral entrapment syndromes, or, as in appellant's case, carpal tunnel and cubital tunnel syndrome. Thus, in order to prevent symptomatic exacerbation of peripheral nerve entrapment, Dr. Hubbard recommended restricting repetitive high frequency and forceful grasping and gripping activities.

By notice dated May 10, 2007, the Office proposed to terminate appellant's medical and compensation benefits, based upon Dr. Hubbard's report. In a June 20, 2007 decision, it terminated appellant's compensation benefits.

By decision dated October 24, 2007, an Office hearing representative set aside the June 20, 2007 decision. The case was remanded for a supplemental medical report from Dr. Hubbard. The hearing representative noted that Dr. Hubbard had been improperly identified as an impartial medical examiner; however, at the time of his evaluation, no true conflict existed on the issue of disabling residuals. The representative found that Dr. Hubbard should be considered to be a second opinion physician.

In a supplemental report dated December 8, 2007, Dr. Hubbard reviewed a November 15, 2006 electrodiagnostic report, which revealed that appellant's accepted conditions of the left upper extremity had all but completely resolved, with only borderline residual evidence of carpal tunnel syndrome. He noted that a repeat EMG/NCS was planned to confirm his findings.

Dr. Hubbard opined that evidence of "borderline left carpal tunnel syndrome" was not clinically significant and represented no disability.

In a February 7, 2008 report, Dr. Hubbard opined that appellant had no continuing work-related disability, based upon his review of the most recent EMG and nerve conduction studies dated November 15, 2006 and January 22, 2008. He stated that the "hard" values recorded showed a worsening of conduction of the left ulnar sensory nerve across the elbow (57.1 (m/s) in 2006 versus 47.7 (m/s) in 2008). Dr. Hubbard noted that the functional significance of this change was extremely difficult to determine, since the left ulnar nerve had been transposed, which increased the potential for variation of results from examiner to examiner. He stated that the findings of the January 22, 2008 EMG/NCS study were not sufficient to establish a continuing work-related disability; however, he recommended work with limitation/restriction to prevent and lessen risk of recurrence of accepted conditions of bilateral carpal tunnel syndrome and left cubital tunnel syndrome.[2]

In a February 13, 2008 work capacity evaluation, Dr. Hubbard provided permanent restrictions related to appellant's bilateral carpal tunnel and left cubital tunnel syndromes. Appellant was restricted from engaging in repetitive movements of the wrist and elbow for more than 2 hours per day, with a 5- to 10-minute break every 30 minutes.

By notice dated February 20, 2008, the Office proposed to terminate compensation benefits on the grounds that appellant had no continuing injury-related disability.

By decision dated March 26, 2008, the Office terminated appellant's wage-loss compensation benefits, finding that the weight of the medical evidence was represented by the second opinion reports of Dr. Hubbard.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[3] The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[4] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

[2] The Board notes that Dr. Hubbard's letter is dated February 7, 2007; however, as he discusses the findings contained in a January 22, 2008 EMG report, the Board presumes that the letter was authored in 2008.

[3] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

[4] *J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

[5] *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

ANALYSIS

The Office based its decision to terminate appellant's compensation benefits on Dr. Hubbard's second opinion reports. The Board finds that his medical opinion is insufficient to meet the Office's burden of proof.

As used in the Federal Employees' Compensation Act,[6] the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents the employee from engaging in the kind of work he was doing when he was injured.[7] In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.[8]

Appellant's date-of-injury position as a marine machinery mechanic included operating power equipment such as portable milling machines, boring bars, facing machines, and drills, as well as hand tools, grinders, wrenches, and flushing and test equipment. He was required to lift, carry and set up equipment and components weighing up to 40 pounds. The work involved straight pulling, pulling hand-over-hand, reaching above the shoulder, and the use of both hands for up to eight hours. The job was typically performed in shops and aboard ships and submarines which required working from uncomfortable and cramped positions, which involved stooping, bending, kneeling, reaching and climbing.

Dr. Hubbard opined that appellant was capable of returning to his job as a marine machinery mechanic. However, his opinion is in conflict with his recommended restrictions. Dr. Hubbard stated that his examination findings and the results of the January 22, 2008 EMG/NCS study were not sufficient to establish a continuing work-related disability. However, he recommended that appellant be permanently restricted from performing repetitive movements of the wrist and elbow for more than 2 hours per day, with a 5- to 10-minute break every 30 minutes. Dr. Hubbard also recommended restricting repetitive high frequency and forceful grasping and gripping activities. Compliance with his restrictions would render appellant unable to perform the required duties of the job in which he was employed when injured and render him disabled.[9]

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[6] 5 U.S.C. §§ 8101-8193, 8102.

[7] *See Marvin T. Schwartz*, 48 ECAB 521 (1997); *Patricia A. Keller*, 45 ECAB 278, 286 (1993).

[8] *Id.*

[9] *See Prince E. Wallace*, 52 ECAB 357 (2001) (Where claimant's physician opined that he was capable of resuming the duties of his date-of-injury job, but his recommended restrictions were in conflict with the requirements of the position, the Board found that he was disabled and reversed the Office's decision to terminate compensation benefits). *See also Marvin T. Schwartz, supra* note 8 (Where the Office's second opinion physician opined that claimant's accepted condition had resolved, but provided permanent lifting and bending restrictions which did not comport to the date-of-injury job description, the Board found that he was unable to perform the type of work he was performing when injured and was, therefore, disabled. The Board found that the Office had improperly terminated his compensation benefits).

The evidence of record does not establish that appellant can perform the duties he was performing when injured. The Board finds that the Office improperly terminated appellant's compensation as of March 26, 2008.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective March 26, 2008.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board