U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY BONGIORNO and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 99-1431; Submitted on the Record;
Issued March 12, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of an office clerk and, therefore, had a 63 percent loss of wage-earning capacity.

On March 11, 1993 appellant, then a 53-year-old machinist marine, was climbing a 100-foot ladder in the pump room of an aircraft carrier when he felt something pop in his right elbow. He developed swelling in the right forearm and numbness in the fingers of the right hand. On April 11, 1995 appellant while performing light-duty work, was trying to sit in a rolling chair when he knocked the chair away and fell, hitting his left elbow on a desk.[1] The Office accepted appellant's claim for tendinitis of the right elbow, epicondylitis of the right forearm, cervical and lumbosacral strain and a ganglion of the left wrist that was surgically removed. Appellant received continuation of pay for the period March 12 through April 21, 1993. He lost time from work intermittently thereafter until April 12, 1995 when he stopped working. His employment with the employing establishment was terminated effective April 14, 1995. The Office began payment of temporary total disability compensation effective April 17, 1995.

In a January 22, 1997 decision, the Office found appellant could perform the duties of an office clerk and, therefore, had a 63 percent loss of wage-earning capacity, effective February 2, 1997. Appellant requested a hearing before an Office hearing representative which was held on September 26, 1997. In a December 10, 1997 decision, the Office hearing representative found that the duties of an office clerk were within appellant's physical

[1] In a March 27, 1995 notice, the employing establishment informed appellant that he would be separated from the employing establishment effective April 11, 1995 due to his inability to perform the full duties of his marine machinist position. After the April 11, 1995 employment injury, the employing establishment extended his employment to April 14, 1995.

restrictions. He further found that appellant had the vocational ability to perform the duties of an office clerk.

In a February 10, 1998 letter, appellant's attorney requested reconsideration. In a February 18, 1998 merit decision, the Office denied appellant's request for modification of the prior decisions. In an April 17, 1998 letter, appellant's attorney again requested reconsideration. In a July 20, 1998 merit decision, the Office denied appellant's request for modification of the prior decisions. In an August 7, 1998 letter, appellant's attorney made a request for reconsideration. In a December 9, 1998 merit decision, the Office denied appellant's request for modification of the prior decisions.

The Board finds that the Office improperly determined that appellant could perform the duties of an office clerk.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, based on the nature of the employee's injuries and the degree of physical impairment, employment, age, vocational qualifications and the availability of suitable employment.[2] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[3]

In a May 5, 1993 report, Dr. Richard G. Paolino, an osteopath, indicated that an April 9, 1993 magnetic resonance imaging (MRI) scan of the right elbow showed degenerative joint disease with joint effusion, soft tissue changes around the medical epicondyle adjacent to the ulnar nerve, postoperative fibrosis and possible ulnar nerve entrapment. He reported that an electromyogram (EMG) and nerve conduction studies showed right ulnar nerve irritation at the elbow and bilateral carpal tunnel syndrome. Dr. Paolino diagnosed cervical and lumbar strain, myofascitis, tendinitis, epicondylitis and effusion of the right elbow and degenerative joint disease of the right elbow. He noted appellant had undergone surgery for decompression of the right ulnar nerve at the elbow in February 1989.

In a November 30, 1993 report, Dr. Evelyn Witkin, an attending Board-certified orthopedic surgeon, reported that appellant had a herniated cervical disc, marked by pain radiating down the ulnar nerve in the right arm and numbness in the third and fourth fingers in the right hand. She also diagnosed ulnar nerve entrapment. In a March 18, 1994 report, Dr. Witkin stated appellant had a ganglion cyst of the left wrist adjacent to the radial styloid.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard Bennett, a Board-certified neurologist, for an examination. In a September 21, 1994 report, Dr. Bennett indicated that he had found a ganglion cyst and related that in certain situations a cyst could develop after trauma. He added that he found nothing

[2] *See generally,* 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

[3] *Phillip S. Deering,* 47 ECAB 692 (1998).

wrong with appellant neurologically, noting that there was no evidence of carpal tunnel syndrome, ulnar neuropathy or focal compressive neuropathy.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Erwin Schmidt, a Board-certified orthopedic surgeon, for an examination and opinion on his ability to work. In an August 31, 1995 report, Dr. Schmidt stated that on examination appellant had normal strength in both arms with no evidence of sensory abnormality in either arm. He detected tenderness over the transposed ulnar nerve on the right but noted the ulnar nerve function within normal limits. Dr. Schmidt indicated appellant had tenderness over the left elbow but had no restrictions on movement. He reported that lumbosacral testing and sacroiliac testing showed referred pain to the left paraspinal region. Dr. Schmidt summarized that appellant had subjective evidence of tenderness in the right elbow and evidence of a mild lumbar scoliosis on the left. He noted that appellant's cervical motion was subjectively limited. Dr. Schmidt stated that appellant, for a right-handed individual, had discomfort related to the use and placement to his right elbow, secondary to the transposition of the ulnar nerve. He concluded that the transposition of the nerve precluded appellant from returning to his position as a marine machinist. Dr. Schmidt stated that appellant was capable of performing light duty. In a November 10, 1995 work restriction evaluation form, he indicated appellant could lift up to 20 pounds and noted that he should restrict bending and twisting. Dr, Schmidt reported appellant could work eight hours a day. He noted appellant might have pain with pressure over the right elbow.

In a September 11, 1995 report, Dr. Mark Kohn, a Board-certified radiologist, reported that an MRI scan of the lumbar spine showed degenerative discogenic changes in the lumbar region, particularly at L1-2, L4-5 and L5-S1. He indicated that there was evidence of a small central herniated disc at L1-2, which indented the thecal sac but did not cause significant spinal stenosis. Dr. Kohn stated that L4-5 disc space bulged prominently and encroached upon the spinal canal indenting the ventral aspect of the thecal sac. He noted the L5-S1 disc space was almost obliterated and demonstrated small osteophytes and disc bulging.

In a December 6, 1995 report, Dr. Paolino stated appellant could not perform his former position of marine machinist. He indicated appellant could work 4 hours a day, 20 hours a week, in a sedentary position.

In an October 31, 1996 report, Dr. Kathleen Standiford, a radiologist, reported that an MRI scan of the cervical spine did not show a disc herniation. She noted that the MRI scan did show mild narrowing at C4-5, several bilateral foraminal narrowing from C5 through T1, mild disc bulging at C5-6 and C6-7 and mild narrowing of the spinal canal at C5-6 primarily related to bony spurring.

The Office concluded appellant could perform the duties of an office clerk, a light-duty position requiring the ability to lift up to 25 pounds and to reach, handle, finger and feel. The Office noted that the job description of an office clerk included duties such as writing or typing bills, statements, receipts, checks or other documents, weighing and measuring material, sorting and filing records, addressing and stuffing envelopes and answering the telephone. The Office indicated that the position could be performed after a short demonstration period of up to 30 days. The Office noted that the job currently available required no prior experience. The Office

reported the job was being performed in sufficient numbers within appellant's commuting area so as to be reasonably available.

The Office concluded appellant could perform the duties of an office clerk based on the findings contained in Dr. Schmidt's August 31, 1995 report. Dr. Schmidt, in describing appellant's ability to work, took into account appellant's preexisting ulnar nerve transposition, which was performed in the February 1988 surgery. Appellant submitted reports from MRI scans that showed extensive degenerative disc disease in the cervical and lumbar regions of the spine. Neither Dr. Schmidt nor the Office discussed whether the degenerative disc disease in these locations preexisted appellant's employment injuries of March 11, 1993 and April 11, 1994. In determining a loss of wage-earning capacity where residuals of an accepted employment-related condition prevent an employee from performing his regular duties, physical ailments which preexisted the accepted condition must be taken into consideration when selecting a job for the purpose of determining wage-earning capacity. Physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from consideration.[4] The Office did not fully develop the record to determine whether the degenerative disc disease of the cervical and lumbar regions were preexisting conditions and affected appellant's ability to work, particularly his ability to perform a light-duty position such as office clerk. The Office, therefore, has not met its burden of establishing, that appellant could perform the duties of an office clerk.

Appellant submitted medical reports after the hearing to further demonstrate that he was unable to perform the duties of an office clerk position. In a January 28, 1998 report, Dr. Witkin stated appellant had chronic cervical radiculopathy, ulnar nerve injury at the elbow, arthritis in the elbow, bilateral carpal tunnel syndrome and a left carpal tunnel ganglionic cyst. She concluded appellant could not perform any sedentary functions. Dr. Witkin warned that if appellant returned to work, he might require future surgery. In a March 25, 1998 report, Dr. Sherry Landes, a psychologist, stated that appellant had depression because the employment injuries had left him unable to work. She noted appellant had to deal with ongoing physical pain, difficulty concentrating and social withdrawal, as well as fear for the future due to being out of work at his age and having a reduced capacity for works. She concluded that appellant's depression was directly related to his April 11, 1995 employment injury.

In a June 26, 1998 report, Dr. Witkin noted Dr. Schmidt's statement that appellant had normal strength in both arms. She disagreed with this statement, indicating that appellant's dominant side, his right arm, should be stronger than the left arm. Dr. Witkin commented that neither of appellant's arms was normal, so normal strength could not be gauged. She reported appellant was exquisitely tender in the right elbow, not the left elbow as reported by Dr. Schmidt. Dr. Witkin indicated that appellant's cervical motion was restricted in all ranges of motion. She added that appellant had radiculopathy, even while sitting. Dr. Witkin stated that the job of office clerk would require answering telephones and taking shorthand messages which could require considerable writing. She indicated that this would cause pain in appellant's right elbow and increasing numbness in the fingertips, as well as more pain in the back and lower neck. Dr. Witkin also pointed out that appellant had never been trained on a computer or

[4] *Harold S. McGough*, 36 ECAB 332 (1984); *Henry R. West*, 30 ECAB 1478 (1979).

typewriter. She stated that appellant's difficulty with concentration would make it difficult for him to learn to use computers. Dr. Witkin commented that copying of various materials would vary in difficulty, depending on which arm bothered him. She concluded appellant could not perform the sedentary functions of an office clerk for eight hours a day. Dr. Witkin's report, therefore, contradicts Dr. Schmidt's report in its findings on appellant's physical condition and his ability to work. There exists a conflict in medical opinion between Drs. Schmidt and Witkin as to whether appellant could perform the duties of an office clerk.[5]

The decisions of the Office of Workers' Compensation Programs, dated December 9 and July 20, 1998, are hereby reversed.

Dated, Washington, DC
March 12, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[5] *See* 5 U.S.C. § 8123(a).