U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE A. DENT and DEPARTMENT OF THE AIR FORCE, McCHORD AIR FORCE BASE, WA

Docket No. 02-610; Submitted on the Record;
Issued July 15, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded acceptance of appellant's disability after May 18, 1994 and terminated his compensation benefits effective August 14, 1999.

This is the second appeal of this claim. By decision dated July 9, 1999, the Board affirmed a determination that appellant received an overpayment of compensation in the amount of $6,577.25 as he returned to work on February 21, 1994 until his retirement on May 19, 1994 and received compensation for total disability during this period.[1] The Board found appellant to be at fault in the creation of the overpayment and that the Office of Workers' Compensation Programs did not abuse its discretion in requiring repayment by making deductions from appellant's continuing compensation.

Appellant sustained injury to his right upper extremity on December 21, 1993 and his claim was accepted by the Office for a rupture of the long head biceps tendon. Appellant underwent surgery on January 5, 1994, following which he received a course of physical therapy. Appellant's attending orthopedic surgeon, Dr. Stephen W. Snow, advised on February 15, 1994 that appellant could return to light-duty work, with lifting limited to five pounds maximum on an infrequent basis. He noted that if light duty was not available, appellant should remain off work. Dr. Snow stated that appellant was not ready to lift over five pounds and required continued physical therapy. He noted appellant would be precluded from moving heavy equipment in an auto body shop or from engaging in overhead lifting.

The record reflects that, at the time of injury, appellant was working on an administrative detail in the employing establishment's wood hobby shop as a woodworking training instructor from his position as an automotive mechanic, a detail not to exceed May 31, 1994. On

[1] Docket No. 97-2739 (issued July 9, 1999). The facts pertaining to the overpayment are hereby incorporated by reference.

March 10, 1994 the employing establishment advised the Office that the auto body shop to which appellant had been assigned as a mechanic had been closed for renovation since the prior August. It noted that, under reduction-in-force (RIF) regulations, the auto mechanic position had been abolished. Based on Dr. Snow's medical restrictions, appellant was examined by an employing establishment physician who advised that appellant was not able to perform the alternative duties of a motor vehicle operator.[2] The employing establishment advised that, due to the inability to place appellant in another position, he would be terminated.

Appellant filed a Form CA-7, claim for compensation, commencing May 20, 1994. On May 23, 1994 the employing establishment advised the Office that appellant resigned effective May 19, 1994. Appellant's attached personnel records listed the reason for resignation as the RIF and his inability to qualify for other jobs due to his physical limitations. By letter dated July 18, 1994, the Office advised appellant that his claim was accepted and paid wage loss beginning February 11, 1994.[3] On November 10, 1994 appellant received a schedule award for a 15 percent permanent impairment to his right arm. The period of the award ran from September 18, 1994 to August 11, 1995. The record reflects that, following the schedule award, appellant was placed back on the periodic roll in receipt of compensation for temporary total disability.

In a June 28, 1995 letter, the employing establishment objected to appellant's receipt of disability compensation benefits. It noted that appellant had resigned because of the RIF, even though the letter of RIF had been withdrawn and appellant's position was not in jeopardy at the time of his separation. Appellant's condition was accepted for a right shoulder condition, and it was maintained that he was "fully capable of continuing to work in the position to which he was assigned at the time of his resignation." It noted that appellant had a cardiac condition which was not connected with his federal employment and that the employing establishment would make every effort to identify a position for appellant in order that he could return to work.[4] By letter dated July 10, 1995, the Office responded that appellant's accepted right arm injury resulted in permanent limitations, including a 10-pound lifting restriction which would preclude his return to work in any position with a 50-pound lifting requirement. The Office noted that it had to consider appellant's preexisting heart attack and work limitations in considering his capacity for employment.[5] The Office noted that the employing establishment had previously indicated that it had no work to offer appellant within his physical restrictions.

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[2] On March 2, 1994 appellant was evaluated by Dr. LeRoy C. White, an Air Force physician, for a position change to motor vehicle operator. Dr. White advised that, due to appellant's limitations from employment and nonemployment-related injuries, he would recommend another limited-duty position be found.

[3] *See supra* note 1. The overpayment of compensation for the period February 11 to May 19, 1994 is not presently before the Board.

[4] On March 12, 1995 appellant's attending internist, Dr. Michael D. Herring, noted appellant's physical limitations due to angina pectoris. He also indicated that appellant could not raise his right arm above shoulder level or reach behind his back and had a lifting restriction of 10 pounds.

[5] *See John A. Zibutis*, 33 ECAB 1879 (1982) (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; physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from any wage-earning capacity determination).

On August 2, 1995 Pat Huddy, the employing establishment injury compensation liaison, advised that appellant had a 15-pound lifting restriction as an automotive mechanic since January 23, 1991 due to his coronary condition and this restriction was continued while he worked on detail in the wood hobby shop. The employing establishment contended that payment of compensation for total disability was unwarranted, stating that on February 21, 1994 Dr. Snow released appellant with no restrictions. It noted that appellant had voluntarily resigned on May 19, 1994 and that he could have continued working in the auto body shop. The employing establishment submitted additional evidence, including a 1989 physical restriction (OWCP-5) form which listed appellant's cardiac condition and limitations on lifting 20 to 50 pounds intermittently for four hours a day and noting no inability to work above the shoulder level. In a June 14, 1994 memorandum, George T. (Lee) Galt, Director of the Skills Development Center advised the employing establishment personnel office that, because appellant had been limited to 15 pounds lifting, his work was accommodated and was carried into his detail in the wood shop. The position descriptions for automotive mechanic and woodworking training instructor were also submitted. On August 30, 1995 the Office advised the employing establishment as to problems concerning the lifting requirements found in the submitted position descriptions and statements. The Office clarified that, while Dr. Michael D. Harring, appellant's internist, had indicated on July 18, 1994 that appellant had no work restrictions, subsequent reports from the physician addressed permanent lifting restrictions of 10 pounds due to the accepted right arm condition and coronary condition. On June 26, 1997 Ms. Huddy again contacted the Office, advising there was only one position description for the position held on the date of injury which included a 50-pound lifting requirement. She described a 15-pound lifting restriction imposed in 1989 based on appellant's cardiac limitations.

On September 2, 1997 the Office issued a notice of proposed termination of compensation, advising appellant that his wage-loss compensation would be terminated as the medical evidence of record failed to establish a recurrence of disability at the time of his resignation on May 19, 1994 or that appellant could not continue working in the position of training instructor in the woodworking shop.

On September 20, 1997 appellant responded, noting that at the time of his resignation he was reassigned to the auto body shop as a mechanic, the position from which the RIF notice was effective. Appellant indicated that he was offered an alternate position as a cargo handler; however, two physical examinations determined that he was not qualified for the position. Appellant indicated that he resigned for medical reasons and had been advised that he would not be offered a position at the employing establishment due to the RIF. On September 26, 1997 appellant noted that the position from which he resigned exceeded his work tolerance limitations.[6]

By decision dated August 6, 1999, the Office terminated appellant's wage-loss compensation effective August 14, 1999. The Office noted that appellant's detail to the woodworking shop was terminated the day prior to his resignation, a normal personnel action "as

[6] Appellant submitted a notice of personnel action, terminating his detail as a training instructor in the woodworking shop effective May 18, 1994 and his return to the position of an automotive mechanic. The document contains an annotation that appellant had been back as an automotive mechanic for over two weeks prior to the effective date.

the resignation must be from the position the employee holds. [Appellant] had been sent a RIF notification, but there is no evidence that the employing agency was not continuing to accommodate his limitations at the time of his voluntary resignation." The Office rescinded its acceptance of appellant's disability after May 18, 1994.

Appellant requested a hearing before an Office hearing representative, which was held on March 8, 2000. Appellant appeared and testified as to his employment duties, noting generally that he refused to do any lifting over his 15-pound restriction.[7]

By decision dated May 22, 2000, the Office hearing representative found that the Office properly rescinded its acceptance of appellant's claim and affirmed the August 14, 1999 termination of compensation.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of appellant's disability after May 18, 1994 or to terminate compensation as of August 14, 1999.

The Board has held that the power to annul an award is not an arbitrary one and that an award of compensation can only be set aside in the manner provided by the compensation statute. Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits. This holds true where the Office decides that it erroneously accepted the claim.[8]

The Office characterized the issue in this case as one of a recurrence of disability because appellant returned to light duty on February 21, 1994 in the woodworking shop. The Office therefore placed the burden of proof on appellant to establish a spontaneous change in the nature and extent of his injury-related condition or a change in the nature and extent of the light-duty job requirements.[9] The Office found that appellant returned to his date-of-injury position with the same accommodations that existed before the injury occurred, but the facts in evidence do support this conclusion.

The record reflects that, prior to his December 21, 1993 right biceps tendon injury, appellant was restricted to modified duties based on a cardiac condition which included a lifting restriction of no more than 15 pounds. At the time of the 1993 employment injury, appellant was not working his regular position as an automotive mechanic; rather, he was detailed to the wood hobby shop as a training instructor apparently performing limited duties. With the acceptance of his right upper extremity claim, appellant underwent surgery and received continuation of pay through February 10, 1994. He filed a claim for wage loss beginning February 11, 1994 as he

[7] In an April 5, 2000 memorandum following the hearing, the employing establishment personnel office advised that there was no information in appellant's official folder "which reflects that he was formally assigned to modified duties during his employment as an automotive mechanic in the Auto Body Shop." Past statements from his supervisors, however, indicated that he worked under a 15-pound lifting restriction.

[8] *See Sharyn D. Bannick*, 54 ECAB ___ (Docket No. 03-567, issued April 18, 2003); *Stephen N. Elliot*, 53 ECAB ___ (Docket No. 01-363, issued July 12, 2002. *See generally* 20 C.F.R. § 10.610 (1999).

[9] *Terry R. Hedman*, 38 ECAB 222, 227 (1986); *see* 20 C.F.R. § 10.5(x) (1999) ("recurrence of disability" defined).

had not returned to work. On February 15, 1994 Dr. Snow, the attending orthopedic surgeon, advised that appellant could return to limited-duty work but noted a lifting restriction of five pounds maximum on an infrequent basis. Dr. Snow stated that appellant was not yet ready to lift over five pounds, required additional physical therapy and would be precluded from moving heavy equipment or doing overhead lifting. He advised that, for the immediate postoperative period, appellant's degree of disability could not be accurately assessed.

The employing establishment has contended that appellant was released to return to work without restriction. The record contains a February 21, 1994 return to work certificate from Dr. Snow's office indicating no physical restrictions for appellant's return to work. However, the Board finds that this certificate is not reliable or supported by the narrative opinions from the physician addressing appellant's postoperative course of treatment. Appellant's return to work on February 21, 1994 was followed by Dr. Snow, who noted on a March 31, 1994 examination that appellant's condition, while improving, resulted in permanent impairment based on loss of motion and strength to the right upper extremity. He indicated that appellant could return to work but, due to multiple other old injuries, it was doubtful he could return to his full lifting capacity. Dr. Snow advised appellant would work "to his tolerance." This evidence does not support the contention that appellant was released for work without physical limitations commencing February 21, 1994.

The Office paid wage-loss compensation beginning February 11, 1994, resulting in an overpayment of compensation for the period appellant worked from February 21 through May 18, 1994. The Board previously affirmed that an overpayment occurred during this period because appellant was not entitled to compensation for wage loss while he was in receipt of wages. This issue is not before the Board. The issue on appeal is whether the Office met its burden of proof to rescind its acceptance of appellant's injury-related disability after May 18, 1994 and in terminating compensation effective August 14, 1999. In this regard, the Office hearing representative's May 22, 2000 decision focuses on two contentions of the employing establishment: that light duty was made available which accommodated appellant's work restrictions up to the date of his retirement and that appellant retired voluntarily. These arguments are not supported by the evidence of record.

Appellant reported to the wood hobby shop on February 21, 1994 under the physical limitations imposed by Dr. Snow, which included minimal lifting with the right upper extremity on an infrequent basis not to exceed five pounds. Although the employing establishment notes that it accommodated the previously imposed 15-pound lifting restriction during this period, the medical evidence does not support appellant's capacity to do such work. On February 15, 1994, six days before his return to work, Dr. Snow reported that appellant was just at the point where he could begin active flexion of the shoulder and elbow but was not ready to lift anything over five pounds "MAX infrequently." If such duty was not available, Dr. Snow reported, "then he is off work completely." On March 2, 1994 Dr. White, the employing establishment physician, advised a lifting restriction of 5 to 10 pounds for 6 to 12 months. Noting an accumulation of injuries, he recommended that appellant not work as a motor vehicle operator, a position that was to be offered to appellant under the RIF. On March 31, 1994 Dr. Snow cleared appellant to work "to his tolerance," a release that does not specifically allow for work above 5 to 10 pounds. Dr. Snow noted the accumulation of injuries and doubted that appellant would ever be able to return to a full lifting capacity. On October 20, 1994 Dr. Herring reported that appellant could

not raise his right shoulder above 45 degrees and was permanently restricted against lifting greater than 10 pounds above 30 degrees.

The weight of the medical evidence establishes that residuals of appellant's employment injury prevented him from lifting over 5 to 10 pounds, precluding him from returning to his date-of-injury position as a limited-duty training instructor (woodworking) or his permanent position as an automotive mechanic, both of which, the employing establishment has noted, require lifting up to 15 pounds. The Office, which bears the burden of proof, has not developed the medical evidence to establish a greater lifting capacity.

The weight of the evidence also establishes that the employing establishment had no work for appellant beyond May 18, 1994. Although he reported to work on February 21, 1994, appellant testified at the March 8, 2000 hearing that he was no longer needed in the wood hobby shop. On March 10, 1994 the employing establishment advised appellant that his mechanic position in the auto body shop had been abolished under a RIF. Appellant had been examined by Dr. White of the employing establishment, who advised that appellant would not be able to perform alternate duties as a motor vehicle operator due to his physical limitations. On March 10, 1994 the employing establishment advised the Office that appellant's experience, education and training limited consideration to positions for which he was also physically disqualified. Moreover, his permanent position as an automotive mechanic was subject to a RIF "and has been abolished." Because appellant could not be kept in his automotive mechanic position, the employing establishment planned to place him into a wage position under the RIF rules and terminate him for the inability to perform the duties of the job. Appellant resigned effective May 19, 1994.

The Board finds the contemporaneous evidence more convincing than the subsequent argument from the employing establishment that appellant was fully capable of continuing to work in the position to which he was assigned at the time of his resignation. Appellant's detail to the position of training instructor (woodworking) was not to exceed May 31, 1994. Absent credible evidence to the contrary, appellant would not have continued in this position beyond May 31, 1994. Moreover, appellant was advised that his permanent position as an automotive mechanic was being abolished, and he was found medically disqualified by an employing establishment physician from performing alternative duties as a motor vehicle operator. Although the employing establishment has maintained that the RIF letter was withdrawn and appellant's position was never in jeopardy, the record on appeal does not support this contention. Appellant introduced a May 18, 1994 notification of personnel action that terminated his detail in the wood hobby shop and reassigned him to the position of automotive mechanic that date. Appellant's resignation was effective May 19, 1994, because of the RIF and his inability to qualify for other positions. The evidence of record does not support the employing establishment's contention that the RIF letter was ever withdrawn. While the employing establishment acknowledged informally accommodating appellant's lifting restrictions, the automotive mechanic and woodworking position descriptions of record require lifting of up to 50 pounds. This requirement is well above the 15-pound restriction first imposed in 1989 for appellant's cardiac condition or the 5- to 10-pound lifting restriction imposed due to the accepted 1993 right arm injury. The record, therefore, does not establish that the employing establishment had limited duty which conformed to appellant's work restrictions on or after May 18, 1994. For

this reason, the Office has not met its burden of proof to rescind acceptance of appellant's disability after May 18, 1994 or to terminate compensation as of August 14, 1999.

The May 22, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
July 15, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member