

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM R. DIBONA and DEPARTMENT OF AGRICULTURE,
MEAT QUALITY DIVISION, Minneapolis, MN

*Docket No. 02-2272; Submitted on the Record;
Issued July 15, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has met his burden of proof to establish that he sustained a recurrence of total disability on or after April 16, 2001 causally related to factors of his federal employment.

On September 3, 1992 appellant, then a 39-year-old agricultural commodity grader (meat), filed an occupational disease claim (Form CA-2) alleging that on June 25, 1992 he first realized his carpal tunnel syndrome was employment related and reported the condition to his supervisor on July 24, 1992.¹ The Office of Workers' Compensation Programs accepted the claim for bilateral carpal tunnel syndrome and right long trigger finger. Appellant stopped work on August 7, 1995 and filed a recurrence claim, which the Office accepted. Appellant was placed on the automatic rolls for temporary total disability effective December 16, 1995 and returned to work on October 27, 1997 in a modified position. Appellant worked three days and then stopped work on the basis that the job was unsuitable. By decision dated March 5, 1999, a hearing representative reversed a March 19, 1998 Office decision, which terminated appellant's compensation for abandoning suitable work.²

In a work ability report dated April 29, 1999, Dr. Jon H. Engelking, an attending Board-certified orthopedic surgeon, related appellant's restrictions as mild for the shoulder, hand and forearm and that he was waiting for the results of the functional capacity evaluation (FCE). Restrictions included working with a splint if necessary; moderate force between 2 and 6 pounds; repetition up to 33 percent of the time; resting every 5 to 10 minutes every hour; lifting up to 11 to 50 pounds and occasional reaching.

¹ This was assigned claim number 10-0416872.

² The hearing representative noted that the Office had accepted a left shoulder condition in claim number A10-484045.

In a report dated July 1, 1999, Dr. Joel S. Stoeckeler, an attending family practitioner, diagnosed cervical disc disease, mild foraminal stenosis, left shoulder impingement syndrome, rotator cuff tendinitis and chronic carpal tunnel syndrome. Restrictions for appellant's shoulders included no twisting or bending of the neck, no lifting, no using hands at or above chest level and no repetitive motions of the hands or shoulders particularly the left shoulder. Dr. Stoeckeler indicated appellant's hand restrictions as "including splints and force of less than 2 [pounds] for repetitive jobs," repetitive work limited to 33 percent of the time and occasional lifting of less than 10 pounds. Lastly, appellant was to rest 10 minutes every hour.

An FCE report dated December 22, 1999, concluded that appellant was not to have "repetition of crawling, stair climbing or overhead work," he was to limit any repetitive forward neck flexion movements and was to "avoid firm grasping activities and activities, which involve horizontal abduction with shoulder rotation." Lifting restrictions included no lifting more than 40 pounds from floor to waist and no lifting more than 5 pounds from waist to overhead.

On January 7, 2000 appellant was offered the position of modified livestock market news reporter, which he accepted on January 31, 2000. The job offer noted that appellant's primary office would be at the New Livestock Exchange Building, but that some duties would be performed at the Minnesota Grain Exchange. Physical demands were listed as sedentary, repetition was "limited to less 33 percent of the time," floor to waist lifting less than 10 pounds less than 25 percent of the time, no overhead lifting and reaching was limited to 24 inches from waist to shoulder. It was also noted that "incumbents (sic) work station will be modified to accommodate any work[-]related physical disabilities."

Dr. Engelking, in a February 4, 2000 treatment note, noted "We were trying to make a differentiation as to whether he had had recurrence of the carpal tunnel or whether some of his symptoms were cervical radicular symptoms." He stated that appellant's examination was unchanged and that he was "currently tolerating his new employment well without any significant problems."

Appellant filed a claim for a schedule award on May 15, 2000. By decision dated January 31, 2001, the Office awarded appellant a schedule award for a 10 percent loss of his use of his right upper extremity and a 17 percent loss of use of his left upper extremity.

Dr. Engelking in a June 22, 2000 treatment note, related symptoms of "some episodic numbness and tingling in the hands, which comes and goes" with the left affected more than the right. A physical examination revealed a positive Phalen's test on both the right and left with the left being more symptomatic.

In an August 3, 2000 treatment note, Dr. Engelking diagnosed "new early trigger finger on left long finger." He related that appellant "continued to have some episodic numbness and tingling in both of his hands status post his carpal tunnel releases."

On January 31, 2001 the Office issued a loss of wage-earning capacity decision finding that appellant had no wage-loss compensation in his current position as grain exchange news reporter (modified) and, therefore, such position fairly and reasonably represented his wage-earning capacity. The Office noted that appellant was reemployed as a livestock news reporter

(modified) effective January 31, 2000, but was transferred to his current position six months later.³

In a treatment note dated February 1, 2001, Dr. Engelking noted:

“[Appellant] started a new job where he [has] to do more typing and writing. As a result of that, over the last few couple weeks, he has been having some increasing problems with achiness and pain and some numbness and tingling.”

Dr. Engelking diagnosed “chronic carpal tunnel syndrome status postbilateral carpal tunnel release.”

In a February 22, 2001 treatment note, Dr. Engelking noted that appellant had increased problems with his right hand. A physical examination revealed positive Phalen’s sign and Tinel’s sign on the right and a negative Tinel’s sign on the left. He indicated that appellant was “going to start using the computer program so he will not have to do as much writing and typing and will see if that helps.”

In clinic notes dated March 21, 2001, Dr. Stoeckeler diagnosed carpal tunnel syndrome. He noted that appellant was required to do “a lot of writing at work. His hands are going numb” and that appellant was attempting to perform the duties of his job “but the repetitive writing causes him a great deal of discomfort.” Dr. Stoeckeler related positive Tinel’s and Phalen’s signs. He restricted appellant from writing for one week and referred him for physical therapy.

Dr. Stoeckeler in April 4, 2001, clinic notes related that appellant was doing well and that both the Tinel’s and Phalen’s signs were still positive. He diagnosed carpal tunnel syndrome and recommended appellant “Continue with mild work restrictions” which included no writing and avoiding gripping, squeezing and bending motions with his hands.

In an April 5, 2001 treatment note, Dr. Engelking noted:

“He reports that over the last couple of weeks he has been having some increasing problems with symptoms in his left hand, a little bit in the right. It seems to be activity related. He has evidently had some restrictions by Dr. Stoeckeler as well. He has been having problems with his employer following the FCE.”

Appellant stopped work on April 16, 2001 and filed a recurrence claim alleging a recurrence of disability beginning January 24, 2001, due to his accepted July 24, 1992 employment injury. On the form he stated that his bilateral carpal tunnel syndrome was aggravated by his work, which resulted in an inability to use his hands as well as numbness and pain.

³ In a letter dated February 24, 2001, appellant requested an oral hearing on the January 31, 2001 decisions regarding the decisions issued for his schedule award and loss of wage-earning capacity. The Board notes that a review of the record does not indicate that the Office has responded to appellant’s request for an oral hearing on these issues.

Appellant noted that he was required to prepare more reports and had shorter deadlines at the secondary work site working at the Minnesota Grain Exchange. He also noted that his primary work site had two clerks to help with preparing reports and there were none at the secondary work site. Appellant also noted that he was required to do excessive handwriting in the grain reporting position, which was contrary to his medical restrictions. Appellant contended that the Minneapolis Grain Exchange was “a very high profile assignment where much skill and experience is needed in reporting millions of dollars of trade” and he did not have this expertise due to his trainee status. He also alleged that “the report load and deadlines far exceeded that of South St. Paul and many other locations on a per person basis.”

By decision dated October 31, 2001, the Office denied appellant’s claim for a recurrence of disability. In support of this decision, the Office found the medical evidence insufficient to establish a change in the extent or nature of appellant’s accepted condition. The Office also found the evidence failed to establish “any real change in the nature and extent of his light-duty job requirements.”

Appellant requested an oral hearing on the denial of his recurrence claim in a letter dated November 26, 2001.⁴ A hearing was held on April 24, 2002. Appellant submitted a description of daily duties at the Minneapolis Grain Exchange, duties at the New Livestock Exchange Building and his training schedule starting December 18, 2000.

In a report dated December 5, 2001, Dr. Clemma J. Nash, a Board-certified family practitioner, noted symptoms of tingling in his right hand and diagnosed carpal tunnel exacerbation. The physician noted that appellant stated that he had “started training at a different work site for his current job and at this site there are no clerical personnel, so he has to do a lot more writing and typing than he had to do previously.”

By decision dated August 15, 2002, the hearing representative found the evidence supported a change in appellant’s work duties. Specifically, she found:

“[T]he evidence shows that there was a change in the claimant’s duties when he was transferred to the Grain Exchange worksite in December 2000. The evidence also includes ample evidence of the claimant’s complaints of increased symptoms and an inability to perform the activities at that facility. The case file record also contains documentation of the agency’s efforts to accommodate the claimant’s physical limitations by providing voice activated software and speed dialing for his telephone.”

However, the hearing representative found medical evidence insufficient to support how appellant’s total disability was causally related to his accepted employment injury. She found the evidence submitted by appellant failed to contain a rationalized medical report explaining how appellant’s disability was employment related. The hearing representative concluded that appellant failed to meet his burden of proof in establishing a recurrence of disability causally related to factors of his federal employment.

⁴ In a letter dated December 2, 2001, appellant requested consolidation of his two requests for oral argument for decisions dated January 31 and October 31, 2001.

The Board finds that this case is not in posture for a decision.

When an employee, who is disabled from the job held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁵

In this case, appellant indicated on his recurrence of disability statement that he had bilateral carpal tunnel syndrome that was aggravated by his work, which resulted in an inability to use his hands as well as numbness and pain. He submitted treatment notes dated February 1 and 22, 2001 by Dr. Engelking and a December 5, 2001 treatment note by Dr. Nash. In his February 1, 2001 treatment report, Dr. Engelking indicated that appellant's symptoms had increased since he had started working at the secondary work site. Dr. Engelking noted that appellant had increased pain, achiness, numbness and tingling in his hands. He diagnosed "chronic carpal tunnel syndrome status postbilateral carpal tunnel release." Dr. Engelking, in his February 22, 2001 treatment note, related that appellant had increased problems with his right hand. He stated that appellant was "going to start using the computer program so he will not have to do so much writing and typing and will see if that helps." Dr. Engelking did not provide any opinion as to whether appellant's work duties had aggravated his accepted work injuries. Dr. Nash, in a December 5, 2001 treatment noted, related that appellant's symptoms of tingling in his right hand and that "started training at a different work site for his current job and at this site there are no clerical personnel, so he has to do a lot more writing and typing than he had to do previously." She then diagnosed exacerbation of his carpal tunnel syndrome. Appellant did not submit any other medical evidence dated after April 5, 2001 discussing his alleged recurrence and how it was related to his accepted work injuries. It is appellant's burden to establish by the weight of the substantial, reliable and probative evidence that the nature and extent of his accepted conditions has changed. Since appellant did not submit rationalized medical opinion evidence showing that his conditions had expanded or changed, he did not meet his burden of proof.

Appellant also indicated that his limited-job duties had changed. When he returned to full-duty work in January 2000, his job title was modified livestock exchange news reporter, his duty station was the New Livestock Exchange Building and his job restrictions consisted of restricting repetitive work "to less 33 percent of the time," floor to waist lifting less than 10 pounds **less than 25 percent of the time**, no overhead lifting and reaching was limited to 24 inches from waist to shoulder. Appellant testified at the April 24, 2002 oral hearing that when his position description changed to modified Grain Exchange News Reporter and his duty station was at the Minnesota Grain Exchange he was required to do more typing and that he was forced to do more repetitive work due to the number of reports and the deadlines. Appellant related that at his first duty station he had clerical support to assist in his preparation of his reports.

⁵ *Roberta L. Kaaumoana*, 54 ECAB ____ (Docket No. 02-891, issued October 9, 2002); *Laurie S. Swanson*, 53 ECAB ____ (Docket Nos. 01-1406 & 02-765, issued May 2, 2002).

However, at the Minnesota Grain duty station, there was no clerical support and he had to do all his typing. He also noted that he had more reports to file and more deadlines, which violated his restrictions. Appellant also submitted evidence detailing the duties and reports he had to complete as modified livestock market news reporter and as a modified grain exchange news reporter.

While the record does not contain an official document from appellant's employing establishment detailing the exact duties of his initial limited job as a modified livestock exchange news reporter or his current duties as a modified Grain Exchange News Reporter, other than stating his duty station had changed in December 2000, the Board finds that appellant's statements, given the absence of evidence to the contrary, are sufficient to require further development of the evidence. It is well established that proceedings under the Federal Employees' Compensation Act,⁶ are not adversarial in nature⁷ and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.⁸ On remand the Office should obtain a report from appellant's employing establishment addressing how his limited-job duties changed on December 2000, especially in regard to the amount of typing and writing appellant was required to perform in the grain exchange reporter position. After such development as the Office deems necessary, a *de novo* decision shall be issued.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Horace L. Fuller*, 53 ECAB ____ (Docket No. 02-1181, issued September 6, 2002); *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

⁸ *Ann Buckmaster*, 53 ECAB ____ (Docket No. 00-2480, issued March 15, 2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

The August 15, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with the above opinion.⁹

Dated, Washington, DC
July 15, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁹ The Board notes that on November 27, 2001 appellant filed an occupational disease claim (Form CA-2) alleging that on March 1, 2000 he first realized his depression was employment related. As there is no final decision the Board has no jurisdiction to review the matter. 20 C.F.R. § 501.2(c).