

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RODNEY BROWN and U.S. POSTAL SERVICE,  
POST OFFICE, St. Louis, Mo.

*Docket No. 97-1886; Submitted on the Record;  
Issued April 20, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a recurrence of disability on August 9, 1994 causally related to his March 27, 1994 employment injury; (2) whether appellant has a permanent impairment due to his March 27, 1994 employment injury; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The Office accepted that appellant sustained a left ankle sprain and fracture due to a traumatic injury on March 27, 1994. Appellant returned to work on August 10, 1994 but continued to submit claims for intermittent periods of disability subsequent to that date. Appellant also submitted a claim for a schedule award.<sup>1</sup>

By decision dated November 2, 1995, the Office denied appellant's claim for a recurrence of disability after August 10, 1994 causally related to his accepted employment injury. The Office found that the opinion of Dr. Sherwyn Wayne, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion examination, constituted the weight of the medical evidence. He found that appellant had a sprain rather than a fracture of the ankle and that he could resume his regular employment.

By decision dated August 5, 1996, an Office hearing representative set aside the Office's November 2, 1995 decision. The hearing representative noted that an April 20, 1994 bone scan submitted to the Office on November 22, 1995 revealed that appellant sustained an occult fracture of the left ankle. The hearing representative instructed the Office to request an additional opinion from Dr. Wayne regarding the extent of any residual disability or impairment in view of the objective evidence of appellant's ankle fracture.

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<sup>1</sup> In a report dated May 2, 1995, Dr. Michael J. Spezia, an osteopath, opined that appellant had a 20 percent permanent impairment of his left lower extremity due to his ankle fracture.

After additional development, by decision dated October 4, 1996, the Office denied appellant's claim for compensation beyond August 9, 1994 due to his March 27, 1994 employment injury. The Office further found that appellant had no evidence of any permanent impairment resulting from his employment injury. By decision dated February 18, 1997, the Office declined review of its prior decision.

The Board finds that the case is not in posture for a decision due to a conflict in the medical evidence.

In a report dated June 5, 1995, Dr. Spezia, an osteopath and appellant's attending physician, discussed appellant's history of injury and noted that x-rays taken after his injury were interpreted as negative for a fracture. He indicated that due to appellant's continued complaints of pain he obtained a bone scan on April 20, 1994 which revealed an occult fracture of the left talus. Dr. Spezia diagnosed status post occult fracture, left talus and left ankle tenosynovitis and opined that appellant continued to lose intermittent time from work "due to chronic discomfort and pain within the left ankle region." He stated that appellant's medical condition was "related to injuries sustained on March 27, 1994." Dr. Spezia submitted various form reports and disability certificates finding that appellant was intermittently disabled from work due to problems with his ankle.

The Office referred appellant to Dr. Wayne who initially opined in a report dated September 5, 1995, that appellant sustained a sprain rather than a fracture of the ankle and found that he could resume his regular employment. In a report dated September 3, 1996, he noted that the April 20, 1994 bone scan revealed increased uptake but no fracture line and thus could represent a condition other than a fracture. Dr. Wayne further found that even if appellant had an occult fracture it should have healed within six to eight weeks. He concluded that appellant was capable of performing his usual employment.

The Board finds that there is a conflict in the medical evidence between Dr. Spezia, and Dr. Wayne. Section 8123(a) of the Federal Employees' Compensation Act,<sup>2</sup> provides in pertinent part: "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination."<sup>3</sup>

Consequently, this case is remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for a rationalized medical opinion regarding whether appellant had any disability after September 9, 1995 causally related to his March 27, 1994 employment injury or any permanent

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8123(a).

impairment to his left lower extremity. After such development as it deems necessary, the Office shall issue a *de novo* decision.<sup>4</sup>

The decisions of the Office of Workers' Compensation Programs dated February 18, 1997 and October 4, 1996 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
April 20, 1999

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>4</sup> In view of the Board's disposition of the merits of the case, the issue of whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 is moot.