

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALORIE A. ZINDREN and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, OH

*Docket No. 98-415; Submitted on the Record;
Issued September 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 23, 1997; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

On November 14, 1994 appellant, then a 27-year-old mail carrier, filed a claim for severe foot pain, which she related to the amount of time she spends on her feet at work. She indicated that she first became aware of her foot condition on October 3, 1994. The Office accepted appellant's claim for bilateral plantar fasciitis and bilateral capsulitis first interphalangeal joint. Appellant stopped work on October 14, 1994 and returned to limited duties on November 11, 1994 where she remains. The Office paid appropriate wage-loss compensation.

In an September 23, 1997 decision, the Office terminated appellant's compensation effective the same date on the grounds that appellant had no continuing disability or work-related residuals as a result of the accepted work-related conditions. In a December 1, 1997 decision, the Office denied appellant's request for a hearing before an Office hearing representative.¹

The Board finds that the Office has met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

¹ In a March 16, 1998 decision, the Office awarded appellant compensation for time lost May 5 and September 2, 1997.

without establishing that the disability has ceased or that it is no longer related to the employment.²

Appellant's treating physician, Dr. Ted H. Bowlus, a podiatrist, has constantly maintained conservative treatment and continuing restrictions in regards to appellant's care.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard Peoples, a Board-certified orthopedist, for a second opinion. In a May 2, 1996 report, Dr. Peoples stated that appellant was currently working on a restricted status, being allowed only to stand for two hours and to walk for one hour. He also noted that appellant has a lifting limit of seven pounds, which seemed somewhat redundant in regards to foot complaints. Dr. Peoples found her x-rays to be normal and, after performing an examination, diagnosed minimal hallux valgus with bunion formation and minimum forward varus bilaterally, predating federal employment and mild chronic foot strain bilaterally. He opined that there was no need for care or work restrictions.

In a letter dated May 16, 1996, the Office issued a notice of proposed termination of compensation whereby it found that the weight of the medical evidence, as represented by Dr. Peoples's report established that appellant could return to full and unrestricted duty as a mail carrier as of May 2, 1996.

In a June 4, 1996 letter, appellant expressed her disagreement with the Office's proposed termination of May 16, 1996 and submitted additional medical evidence. In a May 15, 1996 report, Dr. Glenn H. Carlson, a Board-certified orthopedist, stated that he examined appellant at the employing establishment's request. His physical examination revealed that the bilateral feet had classic findings for fasciitis with tight tender planar fascia bilaterally extending from the base of the great toe to the calcaneus. Dr. Carlson noted that appellant had a right lateral peroneal tendinitis due to positioning of the foot from the plantar pain. X-rays obtained of the foot and calcaneus in the past was without any particular bony abnormality. He gave an impression of bilateral plantar fasciitis and recommended the continuation of conservative treatment.

The Office found a conflict in the medical opinion evidence and, therefore, referred appellant, together with the statement of accepted facts and the case record, to an impartial examiner to examine appellant and resolve the conflict in the medical evidence. The first impartial examiner, Dr. Nabil Ebraheim, a Board-certified orthopedist, examined appellant on July 29, 1996 but the Office did not receive his report until January 28, 1997. The Office set aside Dr. Ebraheim's report as subsequent requests for the return of the file and an addendum report went unanswered. Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the impartial specialist for the purpose of correcting the defect in the original report.³ However, when the impartial specialist's statement of clarification or

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *Nancy Lackner*, 40 ECAB 232 (1988).

elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial specialist for a rationalized medical report on the issue in question.⁴ As it appears that the Office tried unsuccessfully to obtain a supplemental report from Dr. Ebraheim, they properly could set aside his report and refer appellant to a new impartial examiner.

The Office arranged for an impartial examination with Dr. Carlson, but properly set aside his opinion of February 12, 1997, when the Office learned that Dr. Carlson had a relationship with the employing establishment and had previously seen appellant on May 15, 1996.⁵

The Office then referred appellant, together with the statement of accepted facts and the case record, to Dr. Lynn Boynton, a Board-certified orthopedist, to examine appellant and resolve the conflict in the medical evidence. In a March 19, 1997 report, Dr. Boynton reported a normal range of motion of the digits and that the ankle range of motion and subtalar motion were equal bilaterally with no tender spots. She stated that “the plantar fasciitis was in remission and under control with the use of orthotics and work restrictions.... The patient does not appear to have any impairment at the present time on today’s examination.” In an April 10, 1997 letter, Dr. Boynton stated that she found no objective findings on her examination of appellant and that the continued restrictions and use of orthotics with soft shoes were preventative measures. Dr. Boynton stated that based on history and examination, appellant was not able to perform full and unrestricted duty required by her date-of-injury position. In an August 18, 1997 letter, she stated that appellant’s conditions had resolved and there were no clinical objective findings on the date of her independent medical evaluation of March 19, 1997. Dr. Boynton stated that, ignoring the likelihood of recurrence of symptoms, appellant could perform her date-of-injury job.

In a July 11, 1997 Form CA-20, attending physician’s report, Dr. Bowlus reported antalgic gait, increased soft tissue density on x-rays and edema of heels. He maintained that the accepted conditions were active, but did not indicate appellant’s work status.

In situations when there exists opposing medical reports, of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶ In this case, Dr. Boynton gave an accurate history of appellant’s condition and provided reasoning, based on her examination, in support of the conclusion that appellant’s condition had resolved. Dr. Boynton indicated that there were no objective findings on her examination of appellant and that the continued restrictions and use of orthotics were preventative measures. Dr. Boynton specifically found that, ignoring the likelihood of recurrence of symptoms, appellant could perform her date-of-injury job. Her report, therefore, is entitled to special weight and, in the circumstances of this case, constitutes

⁴ *James C. Talbert*, 42 ECAB 974 (1991); *Margaret Ann Connor*, 40 ECAB 214 (1988).

⁵ *Wallace B. Page*, 46 ECAB 227 (1994).

⁶ *James P. Roberts*, 31 ECAB 1010 (1980).

the weight of the medical evidence. The Office, therefore, has met its burden of proof in establishing that any disability causally related to appellant's employment injury has ceased.

Dr. Bowlus Form CA-20 dated July 7, 1997, is insufficient to overcome Dr. Boynton's well-rationalized report. It is noted that although Dr. Bowlus reported that there was increased soft-tissue density on the x-rays, Dr. Peoples, the second opinion physician, reviewed the same x-ray films as Dr. Bowlus and was unable to identify any areas of increased density. Moreover, Dr. Peoples, a Board-certified orthopedist, reviewed the case record, examined appellant and presented a report which showed an understanding of appellant's history. Although Dr. Bowlus has continued to maintain restrictions, the lack of objective findings diminishes the probative value of his medical reports.⁷ Additionally, the report by a specialist in the appropriate field of medicine, Drs. Boynton and Peoples, both Board-certified orthopedists, are entitled to more weight than that of one whose speciality is in a less appropriate field, Dr. Bowlus, a podiatrist.⁸ Therefore, Dr. Bowlus's reports are not of sufficient weight to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Boynton.

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act⁹ dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings..."¹⁰ In this case, appellant's request for a hearing was postmarked October 28, 1997, which is more than 30 days after the Office's September 23, 1997 decision and, therefore, was untimely. The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹¹

⁷ See *William E. Wright*, 31 ECAB 426 (1980).

⁸ *Mildred L. Cook*, 31 ECAB 1655 (1980).

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹¹ *Henry Moreno*, 39 ECAB 475 (1988).

The Office exercised its discretion in this case, by stating that appellant could seek further review of the case by submitting additional evidence and seeking reconsideration. The Office did not abuse its discretion in denying appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs, dated December 1 and September 23, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 16, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member