

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL M. ANDERSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH

*Docket No. 00-430; Submitted on the Record;
Issued March 21, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective January 21, 1999.

The Office accepted appellant's claim for permanent aggravation of a preexisting fracture of the metatarsal-tarsal joints one and two of the right foot and related foot surgery on February 13, 1973 and February 25, 1975.¹ Appellant stopped working for the employing establishment on March 2, 1975 and worked as a deputy sheriff jailer from August 31, 1982 through February 17, 1987.

By decision dated December 18, 1995, the Office reduced appellant's loss of wage-earning capacity to zero on the grounds that she had not cooperated with the Office's attempts at rehabilitation. On November 20, 1995 the Office provided appellant with 30 days to respond to the rehabilitation counselor's offer to meet with her. By letter dated November 26, 1995, appellant declined stating that she was unemployable due to serious back and neck problems, daily excruciating pain, arthritis in her knees and feet and "all over her body," hypertension, diabetes, a nervous condition and short memory retention.

On January 16, 1996 appellant requested an oral hearing before an Office hearing representative, which was held on December 5, 1996. She described the history of her injury, her medical treatment and surgeries. Her attorney stated that she refused rehabilitation because she was totally disabled.

In a report dated July 14, 1995, appellant's treating physician, Dr. Barry J. Greenberg, a Board-certified orthopedic surgeon, opined that appellant continued to be totally disabled in part due to her "leg." In a report dated April 7, 1995, the referral physician, Dr. Charles J. Paquelet, a

¹ Following an off-duty motor vehicle accident, appellant returned to work and sprained her right ankle while lifting a patient.

Board-certified orthopedic surgeon, opined that appellant was not totally disabled “solely” to her right ankle condition and that she had some residuals related to the January 6, 1973 employment injury which required restrictions consisting of no prolonged walking or standing in an eight-hour day. In a report dated June 17, 1995, Dr. Paquelet stated that appellant’s limitations were due to the January 6, 1973 employment injury and were “not prophylactic in nature.” He added that appellant could walk on her heels and toes and the range of motion in both feet and ankles were the same.

By decision dated March 13, 1997, the Office hearing representative found that there was a conflict in the medical evidence between the opinions of Drs. Greenburg and Paquelet as to whether appellant was totally disabled due to her foot condition. She therefore remanded the case for appellant to be referred to an impartial medical specialist to resolve the conflict.

In a report dated May 21, 1997, the impartial medical specialist, Dr. George A. Hunter, a Board-certified orthopedic surgeon, opined that appellant had no work-related residuals from the January 6, 1973 employment injury but had plantar fasciitis and possibly a Morton’s neuroma which were not work related. He found that appellant had no work limitations.

By decision dated July 18, 1997, the Office terminated benefits, finding that Dr. Hunter’s report that appellant was able to work without restriction constituted the weight of the evidence. On July 28, 1997 appellant requested an oral hearing, which was held on February 24, 1998. Appellant described some of her medical treatment and stated that her right foot hurt constantly, some days worse than others. She also submitted medical reports dated February 10 and April 7 1998 from her treating physician, Dr. Frederick L. Conti, a podiatrist, and a magnetic resonance imaging (MRI) scan dated April 1, 1998 which showed post-traumatic osteoarthritis of the right foot.

Dr. Conti reported that appellant had pain in her right foot for 20 years and diagnosed plantar fasciitis, diabetic neuropathy and a neuroma in her right foot. Based on the MRI scan, Dr. Conti opined that appellant’s injuries in 1973 involving a car accident and later falling on her foot aggravated her condition due to the osteoarthritis which “was caused by the degenerative changes in her midfoot which involve[d] the second and third tarso metatarsal joints.” He stated that the “end result of such injuries has caused the post-traumatic and postsurgical ankylosis of the [first] tarso metatarsal joint of [appellant’s] right foot causing persistent pain.”

By decision dated April 30, 1998, the Office hearing representative found that Dr. Hunter previously treated appellant in 1986 and therefore was unqualified to be an impartial medical specialist. She therefore remanded the case for appellant to be referred to another impartial medical specialist.

In a report dated July 12, 1998, the impartial medical specialist, Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon, considered appellant’s history of injury, performed a physical examination and reviewed an x-ray which showed, in part, successful fusion between the first and second metatarsal-tarsal joints and between the base of the first and second metatarsals. Based on the successful fusion, he found no evidence to substantiate active ongoing problems. Dr. Kovach opined that appellant was capable of working six to eight hours a day

provided that she could periodically rest and would not have to walk continuously during that time.

In a report dated November 16, 1998, Dr. Kovach reviewed the relevant documents pertaining to appellant's refusal to undergo vocational rehabilitation and concluded that she did not have good cause for not responding to the rehabilitation counselor. He stated that she could have undergone an interview and tests without aggravating her physical condition.

By decision dated January 21, 1999, the Office terminated benefits effective that date, stating that the weight of the medical evidence established that appellant's work-related disability had ceased.

On January 27, 1999 appellant requested an oral hearing, which was held on July 20, 1999. At the hearing, appellant testified that she was not working, described the nature of her income and stated that she continued to have problems with her foot. Appellant submitted progress notes dated November 10, 1975 through March 17, 1999, which documented treatment of her foot, leg, back, neck, shoulder, hand, arm, right foot, right knee and right middle finger. One note dated April 7, 1997 stated that appellant was totally disabled.

By decision dated September 2, 1999, the Office hearing representative affirmed the Office's January 21, 1999 decision.

The Board finds that the Office met its burden of proof to terminate compensation benefits.

Once the Office has accepted 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 without establishing that the disability has ceased or that it is no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.³

Section 8113(b) of the Federal Employees' Compensation Act⁴ provides as follows:

"If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage[-]earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."

² *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

³ *Larry Warner*, 43 ECAB 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ 5 U.S.C. § 8101 *et seq.*

In this case, to resolve the conflict in the medical evidence between appellant's treating physician, Dr. Greenberg, and the referral physician, Dr. Paquelet, as to whether appellant continued to be disabled due to her January 6, 1973 employment injury, the Office initially relied on Dr. Hunter, who opined that appellant had completely recovered from her work-related injury. The Office hearing representative subsequently found that Dr. Hunter was unqualified to be an impartial medical specialist because he had previously examined appellant in 1987. Pursuant to the Office hearing representative's April 30, 1998 decision remanding the case, the Office referred appellant to another impartial medical specialist, Dr. Kovach.

In his report dated July 12, 1998, Dr. Kovach considered appellant's history of injury, performed a physical examination and reviewed an x-ray which showed successful fusion between the first and second metatarsal-tarsal joints and between the base of the first and second metatarsals. He found no evidence to substantiate any active ongoing problems. Dr. Kovach opined that appellant could work six to eight hours a day provided she could periodically rest and avoided continuous walking. In his November 16, 1998 report, he opined, based on his review of the relevant correspondence and medical reports, that appellant could have undergone tests and interviews for rehabilitation counseling without aggravating her physical condition.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵ The Board finds that Dr. Kovach's opinion is well rationalized and constitutes the weight of the evidence. His opinion establishes that appellant sufficiently recovered from her January 6, 1973 employment injury so that she could work six to eight hours a day provided she could rest periodically and avoid continuous walking. His opinion also establishes that appellant did not show good cause for refusing to meet with the rehabilitation counselor as she was physically able to undergo an interview and vocational testing which the meeting with the counselor would involve.⁶

In his February 10 and April 7, 1998 reports, Dr. Conti diagnosed plantar fasciitis, diabetic neuropathy and a neuroma in appellant's right foot. He stated that the fall on her foot and the 1973 car accident aggravated her osteoarthritis which was caused by the degenerative changes in appellant's midfoot and concluded that appellant's injuries caused the post-traumatic and postsurgical ankylosis of the first tarso metatarsal joint, resulting in persistent pain.

Dr. Conti, however, did not provide a rationalized medical opinion explaining how appellant's present condition resulted from her January 6, 1973 employment injury. Therefore, his opinion is insufficient to counter Dr. Kovach's opinion.⁷ Moreover, the progress notes dated November 10, 1975 through March 17, 1999 described appellant's numerous medical conditions and indicated that appellant was totally disabled but did not explain how the disability in her right foot resulted from the January 6, 1973 employment injury. These notes therefore are also

⁵ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288, 294 (1990).

⁶ See 20 C.F.R. § 519(b) and (c).

⁷ See *Duane B. Harris*, 49 ECAB 170, 173 (1997).

insufficient to counter Dr. Kovach's opinion.⁸ Relying on Dr. Kovach's opinion, the Office properly terminated benefits.

The decisions of the Office of Workers' Compensation Programs dated September 2 and January 21, 1999 are hereby affirmed.

Dated, Washington, DC
March 21, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁸ *Id.*