United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM S. BRAASCH, Appellant	)	
and	)	**Docket No. 04-843**
	)	**Issued: April 14, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer	)	

Appearances:
William S. Braasch, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 11, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated January 28, 2004 terminating his compensation benefits effective that date on the grounds that he had no disability after May 13, 1997, the date that the employing establishment ended his employment because of unacceptable conduct. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to rescind its erroneous payment of compensation to appellant for the period July 19, 1997 through January 28, 2004.

FACTUAL HISTORY

On October 12, 1994 appellant, then a 38-year-old letter carrier, filed a traumatic injury claim alleging that he sustained severe right foot pain when he slipped off of a curb in the performance of duty on August 4, 1994. Appellant underwent surgery consisting of release of

the nerve to abductor digiti quinti and plantar fasciotomy, right foot, on December 5, 1994. By decision dated March 6, 1995, the Office denied appellant's claim on the grounds that he failed to establish fact of injury.

Appellant filed an occupational disease claim on November 2, 1995 alleging that he developed plantar fasciitis due to long periods of standing and walking over uneven terrain in the performance of duty.

On December 15, 1995 appellant, through his attorney, requested reconsideration of the August 4, 1994 traumatic injury claim. By decision dated January 8, 1996, the Office vacated the March 6, 1995 decision and accepted appellant's claim for aggravated chronic plantar fasciitis and partial plantar fasciotomy on December 5, 1994.

Appellant's attending physician, Dr. David E. Strom, a Board-certified orthopedic surgeon, released him to return to limited-duty work on January 3, 1996. Appellant sustained multiple stab wounds on March 22, 1996 unrelated to his employment. He was totally disabled due to these injuries until June 19, 1996.

By decision dated April 23, 1996, the Office denied appellant's claim for wage loss beginning January 3, 1995. Appellant requested an oral hearing on April 30, 1996. By decision dated December 6, 1996, the hearing representative reversed the April 23, 1996 decision finding that appellant was entitled to five and a half hours of compensation from January 3, 1995 to April 18, 1996 and then four hours daily.

Dr. Strom completed a note on May 2, 1996 stating that appellant could work two and a half hours a day, standing and "then leave it to his discretion based on pain level so that he could work more hours than that if his pain allowed." On December 10, 1996 Dr. Strom stated that appellant could stand for two and a half hours per day and that on certain days he might be able to stand for four hours depending on his pain level. He concluded, "I believe this should be at the patient's discretion." Dr. Strom completed a work restrictions evaluation on the same date and stated that appellant could work inside up to eight hours a day at appellant's discretion. In a report dated January 21, 1997, Dr. Strom stated that appellant could sit for eight hours a day and that he could stand and walk for two and a half to four hours each as well as lift and carry up to 10 pounds. He restricted appellant to indoor work only.

Appellant accepted light-duty work on January 17, 1997 casing mail for two and a half hours to four hours a day as well as answering the telephone and performing other miscellaneous office duties within his medical restrictions. He did not work from January 4 to 17, 1997 and worked six hours on January 19, 1997. Appellant worked between two and five hours a day from February 1 through 14, 1997.

Dr. Strom referred appellant to Dr. Greg Reichhardt, a physician Board-certified in physical medicine and rehabilitation, on February 11, 1997. In a report dated February 27, 1997, Dr. Reichhardt noted appellant's history of injury and provided his findings on physical examination including an antalgic gait favoring the right leg and avoiding full contact with the heel. He noted that appellant's description of his heel pain as at worse 7/10 and at best 3/10. Appellant stated that his heel pain was aggravated by all activities including putting weight on

his foot and putting pressure on it. Dr. Reichhardt diagnosed right heel pain and stated that appellant's inability to carry more than 10 pounds was surprising. He recommended a functional capacity evaluation.

During the period March 1 to April 25, 1997, appellant worked two hours a day.

In a note dated March 4, 1997, Dr. Strom stated that appellant should work two and a half to four hours a day and more if appellant felt his foot could tolerate additional hours. He stated that appellant reported that he could not work more than two and a half to four hours as there was no "sit-down" work available and as he needed to alternate the application of ice and heat to his foot, which was not possible at the employing establishment.

On March 14, 1997 Dr. Reichhardt noted that postal inspectors had asked that he review a surveillance video of appellant. He noted that on January 30, 1997 appellant walked with a less pronounced limp than demonstrated in the February 27, 1997 examination. Appellant also demonstrated a good heel to toe gait on the tape, whereas he was unable to walk with a heel to toe gait on February 27, 1997. Dr. Reichhardt noted that the portion of the tape dated February 27, 1997, immediately prior to his examination of appellant, revealed a heel to toe gait with a slight limp. He stated, "This was much less pronounced than he demonstrated with me only a short time later. It is noted that this clearly is inconsistent with his physical exam[ination]. This inconsistency is consistent with conscious symptom magnification." Dr. Reichhardt further stated:

> "The next segment of video is from February 27, 1997 with the time as 10:18 to 10:19. This is shortly after [appellant's] medical evaluation with me. [Appellant] is seen walking with a minimal limp. He is able to step upon a curb with his right foot. He steps on the ball of his foot putting significant pressure and stretch on the plantar fascia. There was no apparent discomfort with this and no apparent hesitancy in the placement of his foot. Again, this is inconsistent with the degree of pain behavior demonstrated by [appellant] during his independent medical evaluation.
>
> "In summary, the above footage is inconsistent with what he demonstrated on his physical examination of February 27, 1997. The inconsistencies are of a magnitude which is consistent with conscious symptom magnification."

On March 18, 1997 Dr. Strom deferred to Dr. Reichhardt's opinion regarding appellant's work restrictions.

Appellant underwent a functional capacity evaluation on March 27, 1997. The occupational therapist noted that appellant demonstrated a very slight limp upon entering the clinic and that appellant's gait fluctuated in the evaluation during weight bearing as well as the walking component of the evaluation. She stated, "[Appellant] appeared to start the walk with an almost normal gait pattern and then became quite antalgic as the walking progressed."

Dr. Reichhardt submitted a report dated March 31, 1997, reviewing the results of appellant's functional capacity evaluation. He stated that appellant's gait seemed to fluctuate in the evaluation with a more pronounced limp when appellant carried weight or descended stairs.

Dr. Reichhardt further noted that the test results suggested that appellant did not put forth consistent effort. He also reviewed further surveillance tapes. Throughout the day on March 26, 1997 appellant demonstrated minimal limp and heel to toe gait, despite standing and walking for much of the time as well as ascending stairs. On March 27, 1997 the date of the functional capacity evaluation prior to the examination appellant demonstrated a minimal gait deviation. During the walking portion of the evaluation, appellant initially demonstrated minimally, more obvious gait deviation, which eventually became a more pronounced limp. However, the tape became blurry at that point. Following the examination, appellant again appeared to be ambulating comfortably. Dr. Reichhardt concluded, "The results of the videotape and the [functional capacity evaluation] do seriously raise the question of conscious symptom magnification." He provided appellant's work restrictions based on the clinical presentation, the functional capacity evaluation and the videotape noting that appellant could work 8 hours a day with a position change every 50 minutes of standing and walking. Dr. Reichhardt recommended limiting lifting to 30 pounds on an occasional basis as well as stair climbing.

During the period April 26 through May 9, 1997, appellant worked 20 hours and utilized 58 hours of leave without pay. Appellant worked two hours on May 10, 1997 and three and three quarters hours on May 13, 1997.

On May 13, 1997 Dr. Strom approved the job offer of eight hours a day with restrictions. Appellant accepted this position on May 13, 1997 subject to the approval of Dr. Floyd H. Pohlman, a Board-certified orthopedic surgeon. On the same date, the employing establishment placed appellant in an emergency off-duty status on the grounds that "Retaining you in an on-duty status may result in injury to yourself or others."

Appellant worked two hours a day from May 14 through 17 and on May 19, 21, 22 and 23, 1997.

The Office approved Dr. Pohlman as appellant's attending physician on May 21, 1997.

On May 22, 1997 the postmaster instructed appellant not to report to work for an eight-hour rehabilitation assignment on May 24, 1997. The postmaster stated, "This assignment which you signed was sent by certified mail directly from the [i]njury [c]ompensation [o]ffice and circumvented the [p]ostmaster…. I consider this offer invalid because it was not sent and offered by this office."

In a letter dated May 23, 1997, the employing establishment proposed to remove appellant from service in 30 days, due to unacceptable conduct and misrepresentation of his physical condition. The employing establishment alleged that when appellant returned to light-duty work in January 1997, he misrepresented his ability to work by submitting a claim for six hours of leave without pay due to foot pain to the employing establishment and the Office. The employing establishment noted various activities appellant performed while under surveillance and concluded that appellant had violated several sections of the *Employee and Labor Relations Manual*. On July 1, 1997 the employing establishment informed the Office that appellant had been totally off work since May 27, 1997 and was in a paid administrative status pending disciplinary actions. By decision dated July 9, 1997, the employing establishment removed

appellant effective July 18, 1997 due to the charge of unacceptable conduct and misrepresentation of a physical condition.

Appellant requested leave without pay effective July 19, 1997. In a letter dated August 12, 1997, the Office noted that appellant's attending physician indicated that appellant was capable of working two hours a day and stated that appellant was not entitled to compensation benefits for two of the eight hours a day.

The Office referred appellant for a second opinion evaluation on March 27, 1998 with Dr. Arnold Heller, a Board-certified orthopedic surgeon. In a report dated April 20, 1998, Dr. Heller noted appellant's history of injury, performed a physical examination and concluded that appellant could perform lighter sedentary work allowing him to sit or stand.

The Office entered appellant on the periodic rolls on July 1, 1998 and referred him for vocational rehabilitation counseling on July 2, 1998.

In a decision dated October 14, 1998, an arbitrator found that the employing establishment had just cause to remove appellant and denied and dismissed appellant's grievance. The arbitrator found that appellant reported to work, spent two hours casing mail and then left when the employing establishment had eight hours of work that appellant could perform.

The Office referred appellant for a second opinion evaluation on March 23, 1999. In a report dated April 16, 1999, Dr. Gareth E. Shemesh, a Board-certified internist and Office referral physician, found that appellant could work eight hours a day with restrictions. He stated that appellant should avoid prolonged standing and walking long distances. Dr. Shemesh stated that appellant should be allowed to alternate sitting and standing. In a supplemental report dated April 18, 1999, Dr. Shemesh stated that appellant could not return to his date-of-injury position.

Appellant graduated from junior college on December 15, 2000. On March 26, 2001 appellant's vocational rehabilitation services ended.

In a letter dated June 15, 2001, the Office proposed to reduce appellant's compensation based on the constructed position of claims adjustor/accounting clerk. By decision dated July 16, 2001, the Office reduced appellant's compensation benefits based on his wage-earning capacity as a claims adjuster working 40 hours a week.

On November 21, 2002 the Office requested additional medical evidence from Dr. Pohlman. He completed a work restriction evaluation on December 6, 2002. In a narrative report dated December 13, 2002, Dr. Pohlman diagnosed plantar fasciitis, chronic and stated that appellant could stand for 30 minutes.

On September 15, 2003 the employing establishment requested that the Office terminate appellant's compensation benefits based on fraud and misconduct. The employing establishment alleged that appellant's removal for just cause rendered him ineligible for compensation benefits. The employing establishment noted appellant's January 1997 light-duty position and stated, "The job offer would still have been available to him if he would not have misrepresented his medical condition and provided an honest days work." The employing establishment further stated,

"[T]he opportunity to receive suitable job offers and employment within his restrictions would still be available to [appellant] had he not voided or forfeited those opportunities by actions, not related to his job-caused injuries, that precipitated removal proceedings."

The Office issued a notice of proposed termination of compensation benefits on December 5, 2003 informing appellant that his benefits would be terminated under sections 8128(a)(1) and 8145 of the Federal Employees' Compensation Act[1] on the grounds that there was no evidence in the record that appellant was terminated from his federal employment due to his physical inability to perform his assigned duties nor that appellant stopped work due to his physical condition. The Office stated:

> "Because the claimant was dismissed because of disciplinary actions and not because of injury-related condition, there is no entitlement to continuing compensation benefits. Additionally, there is no evidence in the record that the claimant was terminated due to his physical inability to perform his assigned duties, nor is there evidence that the claimant stopped work due to his physical condition. As there is no evidence in the record to establish that the claimant was not capable of performing his assigned duties after May 14, 1997, he had no disability with[in] the meaning of the Act."

The Office concluded, "It is recommended that your entitlement to compensation for wage loss be terminated, because the evidence of record clearly establishes that the employing establishment would have accommodated your work restrictions were it not for the disciplinary action of removal." By decision dated January 28, 2004, the Office terminated appellant's compensation benefits effective January 28, 2004.

LEGAL PRECEDENT

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[2] It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[3] This holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[4]

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[1] 5 U.S.C. §§ 8101-8193; 8128(a)(1); 8145.

[2] *Andrew Wolfgang-Masters*, 56 ECAB ___ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

[3] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[4] *Andrew Wolfgang-Masters*, *supra* note 2.

The Board has held that if the record establishes that limited-duty work within a claimant's work restrictions would still be available to him if his behavior was acceptable and there is no evidence in the record that the claimant was terminated due to his physical inability to perform his assigned duty and no evidence that the claimant stopped work due to his physical condition, then the claimant has no disability within the meaning of the Act.[5]

ANALYSIS

Although the Office characterized the January 28, 2004 decision as a termination of appellant's compensation benefits, upon review of the Office's decision, the Board finds that rather than terminating appellant's compensation benefits, the Office effectively rescinded its prior acceptance of appellant's claims for partial disability and a loss of wage-earning capacity. The Board reached this decision based on a review of the evidence as well as a review of the legal precedent cited by the Office in reaching the January 28, 2004 decision which dealt with rescinding acceptance of a claim due to a finding of no disability within the meaning of the Act.[6]

In this case, there is no medical evidence establishing that appellant's employment-related disability due to his accepted condition of aggravation of chronic plantar fasciitis and resulting surgery has ceased. Therefore, in order to rescind its prior acceptance of appellant's claim for partial disability compensation and its payment of compensation for a loss of wage-earning capacity, the Office must establish that his inability to earn wages is not due to his employment injury.

Appellant returned to work in a limited-duty position on January 17, 1997. On May 13, 1997 appellant accepted a different limited-duty position. The postmaster informed appellant on May 22, 1997 that he should not report to work on May 24, 1997 as his limited-duty job offer was invalid. On May 23, 1997 the employing establishment informed appellant that it planned to remove him for cause due to unacceptable conduct and misrepresentation of his physical condition. The employing establishment advised appellant on July 9, 1997 that he would be removed from his employment effective July 18, 1997.

The Office effectively rescinded payment of appellant's compensation benefits on January 28, 2004 finding that, but for appellant's unacceptable conduct, limited-duty work within his physical restrictions would have been available for him at the employing establishment with no loss of earnings. The evidence in the record establishes that appellant worked in a limited-duty capacity through May 23, 1997.[7] The record further establishes that the employing establishment offered and appellant had accepted a new limited-duty position working eight hours a day, which was to begin on May 24, 1997. The postmaster instructed appellant not to report to work in this position on May 22, 1997. In the September 15, 2003 letter, the employing establishment further stated, "[T]he opportunity to receive suitable job

[5] *Janice Green*, 49 ECAB 307, 308 (1998); *Lester Covington*, 47 ECAB 539, 542 (1996); *Major W. Jefferson*, 47 ECAB 295, 298 (1996); *John W. Normand*, 39 ECAB 1378, 1381 (1988).

[6] *Major W. Jefferson*, 47 ECAB 295, 298 (1996); *John W. Normand*, 39 ECAB 1378, 1381 (1988).

[7] The Office improperly noted that on May 13, 1997 appellant was placed in an off-duty status. The record establishes that appellant continued to work through May 23, 1997.

offers and employment within his restrictions would still be available to [appellant] had he not voided or forfeited those opportunities by actions, not related to his job-caused injuries, that precipitated removal proceedings."

In this case, the record before the Board establishes that appellant's work stoppage on May 23, 1997 was due to the employing establishment's finding of inappropriate conduct which ultimately resulted in the termination of his employment. The record further establishes that the appropriate light-duty work position offered on May 13, 1997 would have remained available to appellant or another appropriate light-duty work position would have been offered to appellant, but for the disciplinary action instituted by the employing establishment on May 23, 1997, the date his existing light-duty position ended. The Board finds that, in effectively rescinding acceptance of the claims for compensation for partial disability and for a resulting loss of wage-earning capacity, the Office provided reasons for the decision and properly explained that appellant had no employment-related disability entitling him to such compensation benefits.

CONCLUSION

The Board finds that the evidence establishes that but for appellant's inappropriate conduct he could have continued to work in an appropriate light-duty position at the employing establishment. Therefore, the Office met its burden of proof to rescind appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2004 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: April 14, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member