

**United States Department of Labor
Employees' Compensation Appeals Board**

TODD C. PRICE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Glassboro, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-706
Issued: July 12, 2005**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 28, 2005 appellant filed a timely appeal of an October 14, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs' that affirmed a January 20, 2004 decision, finding that appellant did not have any permanent impairment of the legs related to his accepted conditions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case. However, as the Office issued its schedule award for a five percent impairment of each leg on June 18, 2002 more than one year before the present appeal was filed, the Board does not have jurisdiction to review the schedule award. Its jurisdiction is limited to review of the October 14, 2004 Office decision, finding that appellant does not have a permanent impairment of the legs related to his accepted conditions.

ISSUE

The issue is whether appellant has a permanent impairment of his lower extremities.

FACTUAL HISTORY

On May 10, 1996 appellant, then a 30-year-old letter carrier, filed a claim for an occupational disease of chronic plantar fasciitis, which he attributed to walking and standing in his employment. The Office accepted that appellant sustained an aggravation of plantar fasciitis and bilateral heel spurs and paid compensation for temporary total disability from November 20, 1996, the date he underwent excision of bilateral heel spurs and bilateral plantar fasciotomies, until he returned to limited duty on February 3, 1997.

In an August 14, 1997 report, Dr. Richard M. Jay, a podiatrist, stated that a magnetic resonance imaging (MRI) scan demonstrated entrapment neuropathy of the medial calcaneal and medial plantar nerves of both feet and recommended surgical release of the plantar fascia and neurolysis. The Office approved this surgery and on September 15, 1997 Dr. Jay performed a neurolysis of the posterior tibial nerve and a plantar fasciectomy of the left foot. On February 23, 1998 Dr. Jay performed a tarsal tunnel release, neurolysis of the posterior tibial nerve and plantar fasciotomy of the right foot. The Office accepted appellant's claim for a recurrence of disability and paid compensation for temporary total disability beginning September 8, 1997.

In a September 11, 1998 report, Dr. Terry D. Heiman-Patterson, a Board-certified neurologist, stated that sensory examination showed a decrease bilaterally in the feet and diagnosed "bilateral lower extremity involvement with a painful neuropathic type syndrome." In a February 12, 1999 report, Dr. Heiman-Patterson stated that appellant's neuropathic pain syndrome was "exacerbated and aggravated by a work[-]related injury in which he developed bone spurs in his feet bilaterally. His job kept him standing at all times and between the bone spurs and standing, his peripheral neuropathy was aggravated." In an April 7, 1999 report, Dr. S. Rao Pasupulati, a Board-certified neurologist, to whom the Office referred appellant for a second opinion, noted that he had pain and decreased sensation in both feet, and that his symptoms did not improve with nonsurgical and surgical treatment. Dr. Pasupulati then stated that appellant had "evidence of peripheral neuropathy, which appears to be due to involvement of small fibers." In a July 27, 1999 report, Dr. Heiman-Patterson stated: "At this point in time within a reasonable degree of medical certainty, [appellant] has a small fiber neuropathy that has been exacerbated by the bone spurs and fasciitis that were produced by his occupation as a postal worker. The continued ambulation clearly caused the podiatric problems which exacerbated his small fiber neuropathy now causing the pain syndrome." In a February 2, 2000 report, Dr. Narni Giri, a Board-certified neurosurgeon, to whom the Office referred appellant for a second opinion, stated that appellant's clinical picture was consistent with chronic sensory neuropathy involving both feet, which appeared to be permanent and that "the neuropathy that resulted from the treatment of the fasciitis is causing disability in the patient at this time."

On July 27, 2000 appellant elected to receive, effective September 10, 2000, retirement benefits from the Office of Personnel Management in preference to benefits under the Federal Employees' Compensation Act. On January 3, 2001 the Office terminated appellant's compensation for refusing an offer of suitable work. This decision was reversed on May 21, 2001 by an Office hearing representative on the basis that there was a conflict of medical opinion on appellant's ability to work.

On May 20, 2001 appellant filed a claim for a schedule award. He submitted a February 7, 2001 report from Dr. Nicholas P. Diamond, an osteopath, who diagnosed complex regional pain syndrome and small fiber neuropathy and stated that sensory examination revealed decreased sensation to pinprick and light touch of both lower extremities involving the sciatic nerve and a grade of 4+/5 for gross motor strength involving the right anterior tibialis, gastrocnemius and soleus (sciatic) nerves and the left sciatic nerve. Dr. Diamond stated that application of the tables of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) showed a 19 percent impairment of each leg for motor strength deficit and a 14 percent impairment for sensory deficit of each leg, for a total of 30 percent impairment of each leg.

On February 1, 2002 the Office referred appellant, the case record and a statement of accepted facts to Dr. Ronald Brisman, a Board-certified neurosurgeon, to resolve a conflict of medical opinion between Dr. Giri and Dr. Heiman-Patterson, on the issue of whether appellant had continuing disability due to the accepted work injury. In a February 22, 2002 report, Dr. Brisman concluded that appellant was “not suffering from any disabling residuals as a result of his injury of August 31, 1993. [Appellant] has chronic pain in his feet probably secondary to peripheral neuropathy and unrelated to any injury.”

On June 13, 2002 an Office medical adviser reviewed the medical evidence and stated that at most there was a 10 percent impairment for each leg for decreased sensation of the posterior tibial nerve as it enters the foot, as this nerve underwent neurolysis at the time of the removal of the plantar spurs. The medical adviser stated that Table 17-37 of the fifth edition of the A.M.A., *Guides* gave 5 percent for sensory loss of the medial and lateral plantar nerves for a total of 10 percent, that Table 16-10 was used to get the grade of impairment and that even using Grade 3 for each foot gave 50 percent of 10 percent or a 5 percent impairment of each leg. He then stated that the motor losses addressed by Dr. Diamond involved the sciatic nerve and muscles well above the foot and had nothing to do with the plantar fasciitis and heel spurs or with neurolysis of the posterior tibial nerves at the ankle level.

On June 18, 2002 the Office issued a schedule award for a five percent permanent impairment of each lower extremity. Appellant requested a hearing and later submitted a July 29, 2003 report from Dr. Heiman-Patterson, stating that appellant had “complex regional pain syndrome with significant neuropathic component that is associated with a small fiber involvement in what looks to be a stocking distribution of small fiber loss. This is all a result of the trauma to his feet and the resultant plantar fasciitis and bone spur formation.” In an October 28, 2003 decision, an Office hearing representative found that the case was not in posture for a hearing and remanded the case for a supplemental opinion from Dr. Brisman providing rationale for his opinion that appellant had no work-related residuals and also addressing the permanent impairment of his legs.

On January 9, 2004 the Office requested that Dr. Brisman provide medical reasons for his opinion that appellant had no residuals of his work-related condition and that he address whether

he had a five percent permanent impairment of his legs related to his work-related condition. In a January 13, 2004 report, Dr. Brisman stated:

“As indicated in my report dated February 22, 2002, the patient has chronic pains in his feet probably secondary to peripheral neuropathy. I found then and find now that there is no clear medical evidence to support this as being work related. The question posed again is whether or not these pains, which had persisted as of February 22, 2002, were related to a work[-]related injury on or before August 31, 1993. I believe that it is medically improbable that a chronic persistent disabling fasciitis would persist many (nine or more) years after termination of a possibly aggravating event. The patient, however, has a condition that does persist and that is peripheral neuropathy, which involves his hands as well as feet. In addition, the sensory impairment is mainly in the dorsum of the foot, which is very unlikely to result from fasciitis and is much more likely to result from peripheral neuropathy. Also, there is a strong impression that much of the patient’s apparent disability is unrelated to a definite organic illness in that this apparent disability and impairment in walking is much greater when he is aware of being observed than when he does not believe he is being observed. The five percent disability by [the Office medical adviser] was based on sensory loss. But the sensory loss is most likely due to peripheral neuropathy and is probably unrelated to fasciitis.”

By decision dated January 20, 2004, the Office found that the evidence failed to demonstrate a permanent impairment due to his work-related condition. Appellant requested a hearing, which was held on August 10, 2004 and submitted a January 22, 2004 report from Dr. Heiman-Patterson, stating that appellant’s “major discomfort is due to an evolving chronic regional pain syndrome with small fiber sensory changes secondary to the trauma from his surgical procedures for his bone spur and plantar fasciitis.”

By decision dated October 14, 2004, an Office hearing representative found that the report of Dr. Brisman constituted the weight of the medical evidence, as none of the reports from appellant’s physicians provided a well-reasoned opinion why his lower extremity impairment continued to be related to his employment.

LEGAL PRECEDENT

The schedule award provision of the Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Once the Office pays a schedule award, it has the burden of justifying reduction of the award by establishing that the impairment has ceased or lessened or that it is not related to appellant’s employment.³

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ *Leonard J. Khajet*, 41 ECAB 283 (1989).

ANALYSIS

The Office found that the opinion of Dr. Brisman, a Board-certified neurosurgeon to whom it referred appellant, established that appellant did not have a permanent impairment of the lower extremities related to his accepted conditions.⁴ The Board finds that Dr. Brisman's reports created a conflict of medical opinion with the reports of Dr. Heiman-Patterson, an attending Board-certified neurologist, on the question of whether the neuropathy affecting appellant's feet is related to his accepted conditions.

Both of these specialists agree that appellant has neuropathy that affects his feet. Dr. Brisman concluded in a February 22, 2002 report, that the chronic pain in appellant's feet was "probably secondary to a peripheral neuropathy and unrelated to any injury." In a January 13, 2004 report, he explained that the neuropathy involved appellant's hands as well as his feet and that the sensory impairment was mainly in the dorsum of the feet, which he stated was very unlikely to result from fasciitis. In a February 12, 1999 report, Dr. Heiman-Patterson stated that appellant's neuropathic pain syndrome was "exacerbated and aggravated by a work injury" and explained that between the standing required in his job and the bone spurs, an accepted condition, the neuropathy was aggravated. In a July 27, 1999 report, Dr. Heiman-Patterson stated that the ambulation in appellant's job "clearly caused the podiatric problems, which exacerbated his small fiber neuropathy now causing the pain syndrome."

In a January 22, 2004 report, Dr. Heiman-Patterson attributed appellant's sensory changes "to the trauma from his surgical procedures for his bone spur and plantar fasciitis." This opinion is consistent with that of Dr. Giri, a Board-certified neurosurgeon, to whom the Office referred appellant and who stated that "the neuropathy ... resulted from the treatment of the fasciitis." It is also consistent with the opinion of the Office medical adviser, who rated appellant's permanent impairment based on decreased sensation of the posterior tibial nerve, stating that this nerve underwent neurolysis, which was a procedure approved by the Office.⁵ Dr. Brisman did not address the effect of the surgery on the neuropathy affecting appellant's feet.

CONCLUSION

The Board finds that there is a conflict of medical opinion on the issue of whether appellant has a permanent impairment of the lower extremities related to his accepted conditions. For this reason, the Office did not meet its burden of justifying modification of appellant's schedule award.

⁴ The Board notes that the referral to Dr. Brisman was to resolve a conflict of medical opinion regarding appellant's ability to work, but that there was no conflict of medical opinion on appellant's permanent impairment at the time of this referral.

⁵ The opinions of Dr. Giri and the Office medical adviser are not part of the conflict of medical opinion with the opinion of Dr. Brisman, since a conflict under the Act is only between the employee's physician and the physician for the Office.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 12, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member