United States Department of Labor
Employees' Compensation Appeals Board

C.F., Appellant	)	
and	)	**Docket No. 06-1521**
	)	**Issued: December 28, 2006**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Reston, VA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated July 27 and December 15, 2005 and June 6, 2006, which denied appellant's recurrence of disability claim and her request for change of treating physicians. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on February 4, 2004 causally related to the accepted February 24, 2003 employment injury; and (2) whether the Office properly denied appellant's request for change of physician.

FACTUAL HISTORY

On February 24, 2003 appellant, then a 38-year-old transportation security screener, filed a traumatic injury claim alleging that on that date she injured her left knee and right ankle when she tripped taking bins to the front of the line.

Appellant received treatment from Dr. Stephen Dawkins from March 3 through June 9, 2003. Dr. Dawkins treated appellant for a right ankle sprain. On March 31, 2003 he indicated that appellant could return to work with no restrictions. An April 4, 2003 x-ray was interpreted by Dr. Dawkins as showing mildly asymmetric tracer activity within the mid foot region of both ankles, slightly more tracer uptake within the right ankle than the left. However, the uptake appeared relatively diffuse. Dr. Dawkins noted no definite acute findings.

On July 8, 2003 Dr. Laurel R. LeMasters, a Board-certified radiologist, interpreted a magnetic resonance imaging (MRI) scan of appellant's right ankle. She found "no evidence of fracture of [avascular necrosis], no osteochandral defect." Dr. LeMasters stated:

> "There is some minimal fluid in the subtalar joint. The coronal sequence suggests that there may be some irregularity to the undersurface of the talus anteriorly and laterally. This cannot be confirmed on any other imaging sequence and is probably due to volume averaging."

In a medical report dated July 22, 2003, Dr. Howard M. Berkowitz, a treating Board-certified orthopedic surgeon, listed his assessment as sprained right ankle. He noted that he saw appellant two weeks earlier and gave her an intra-artricular injection with lidocaine. Dr. Berkowitz noted that appellant showed him an MRI scan which he found to be "entirely normal, showing no signs of osteochandral defects or synovitis." He indicated that appellant was now "allowed regular-duty work, having reached maximal medical improvement and she is discharged."

By letter dated November 20, 2003, the Office accepted appellant's claim for right ankle sprain and left knee contusion.

In a letter dated June 3, 2004, appellant stated that she still experienced pain and walked with a limp. She noted her prior treatment with Dr. W. Kevin Pearson, a podiatrist. On August 14, 2003 Dr. Pearson noted that appellant was complaining of an ankle sprain that has been going on for about six months. He reviewed the MRI scan findings which revealed some slight inflammation in the ankle joint and lateral sinus tarsi area. Dr. Pearson gave her a corticosteroid injection. On September 4, 2003 a repeat injection was given. In an October 2, 2003 progress note, Dr. Pearson indicated that appellant was no better and he gave her an equalizer boot for six weeks. In a November 13, 2003 note, he indicated that the equalizer boot was not stabilizing her foot, so he put her in a "real below-knee synthetic cast as well as a cast boot." Dr. Pearson noted in a December 22, 2003 progress report that appellant had been immobilized in the cast with no improvement. Appellant was instructed to use the cast as needed. On February 4, 2004 Dr. Pearson performed a delayed primary right ankle repair. On February 12, 2004 appellant indicated to Dr. Pearson that she slipped and fell and that her foot

was "a little bit sore." On February 16, 2004 Dr. Pearson removed her cast and released her to go back to work. In a March 15, 2004 note, he indicated that appellant was to start partial weight bearing with two crutches and then to gradually go to one. Dr. Pearson found that she should remain on light duty for six weeks. In an April 5, 2004 report, he stated that appellant has been a patient of his "for almost three years with various foot problems. Most recently she underwent a delayed primary repair of some ankle ligaments secondary to a fall that she suffered back on February 24, 2003." Dr. Pearson noted:

> "We did not originally start treating [appellant for the February 24, 2003 injury] until sometime around August 2003. During the lapse of time, she had tried conservative treatment of some over-the-counter bracing, anti-inflammatories, compression therapy, and rest with elevation. This gave her little improvement of her symptoms. The symptoms continued to become worse, and she eventually sought treatment here. We tried corticosteroid injection, physical therapy, an immobilization without any improvement of her symptoms.
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> "After that it was decided to go ahead and proceed with a delayed primary ankle repair. During the surgery, it was shown that the anterior talofibular ligament actually was ruptured and the calcaneal fibular ligament was strained. These both were repaired and the patient has been progressing through her postoperative period without significant [incidents] other than some swelling due to her having to be on her foot quite a bit at work with inability to elevate it accordingly.
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> "It is my understanding, through [appellant's] history and notes, that the fall occurred on February 24[, 2003] did happen while [appellant] was at work. We do expect her to have a full recovery, although, again, it is being slightly delayed because of some of the chronic swelling."

On July 6, 2004 appellant wrote to Dr. Berkowitz. She enclosed her medical reports from Dr. Pearson and asked that Dr. Berkowitz review the notes and write a letter correlating Dr. Pearson's findings to the fall that she sustained on February 24, 2003.

On August 23, 2004 appellant filed a recurrence of disability claim commencing February 4, 2004. In an accompanying statement dated August 22, 2004, appellant stated that she was not given time off after the original injury. She still had pain and discomfort in her right ankle and used her left foot to compensate.

By letter dated October 18, 2004, appellant asked that her case be reopened and that her treating physician be changed to Dr. Pearson. She indicated that she would not go back to Dr. Berkowitz due to alleged mistreatment. Appellant also noted that three months has passed and Dr. Berkowitz has not responded to her requests to get in touch with her.

By decision dated April 20, 2005, the Office denied appellant's recurrence of disability claim.

By letter dated May 25, 2005, appellant requested reconsideration.

On July 27, 2005 the Office denied appellant's request to change physicians.

On August 3, 2005 appellant requested review of the written record.

By decision dated December 15, 2005, the hearing representative affirmed the prior decisions, finding that appellant did not establish a recurrence of disability and denying her request to change physicians.

By letter dated April 12, 2006, appellant requested reconsideration and submitted an April 12, 2006 report from Dr. Dawkins who noted:

> "[Appellant] originally injured her left knee and right ankle in the work-related accident on February 24, 2003. Caduceus Occupational Medicine [for which Dr. Dawkins is the medical director] provided the initial care for [appellant]. I have reviewed all of her medical file for continuity.
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> "Based on my review of our medical records, supplemented by medical interview of [appellant], it is my opinion that her right ankle pain, subsequent sprain and damage, is thus related to her original injury."

Appellant also submitted an October 11, 2005 report from Dr. Pearson, who discussed his treatment of appellant from March 2001. Dr. Pearson noted that she saw him in August 2003 to assist her with the care of her painful ankle. Appellant noted:

> "Dr. Howard Berkowitz had an MRI [scan] performed July of 2003, which was read with no evidence of fracture, avascular necrosis or osteochondral defect. The MRI [scan], however, did show some fluid in the subtalar joint and possibly some irregularities at the anterior lateral aspect of the talar surface. Both of these would be consistent with inflammation associated with the above-mentioned ankle injury."

By decision dated June 6, 2006, the Office found that the evidence submitted was not sufficient to warrant modification of the prior decisions.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of the Office's regulations defines recurrence of disability to be an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury without an intervening injury or new exposure to the work environment that caused the illness.[1]

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[1] 20 C.F.R. § 10.5(x).

Section 10.5(y) of the Office's regulations[2] defines recurrence of medical condition as a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a need for further medical treatment after release from treatment, nor is an examination without treatment. Appellant has the burden of establishing that the need for further medical treatment is causally related to the employment injury.[3]

ANALYSIS -- ISSUE 1

Appellant sustained injury on February 24, 2003, accepted by the Office for a right ankle sprain and left knee contusion. She alleged a recurrence of her February 24, 2003 employment injury on February 4, 2004. However, appellant has not submitted sufficient rationalized medical evidence to support her claim.

Dr. Berkowitz, appellant's treating physician, stated in a July 22, 2003 report, that appellant had reached maximum medical improvement, that her MRI scan was "entirely normal" and that appellant was returned to regular-duty work. Appellant started seeing Dr. Pearson on August 14, 2003. On February 4, 2004 Dr. Pearson performed a delayed primary right ankle repair. In a March 14, 2004 note, he indicated that appellant should be on light duty for six weeks. On April 5, 2004 Dr. Pearson indicated that he started treating appellant in August 2003. He stated that it was his understanding, through appellant's history and notes, that her fall occurred on February 24, 2003 while she was at work. However, Dr. Pearson did not provide rationalized opinion explaining why appellant's right ankle condition as of February 4, 2004 was related to the accepted injury. Dr. Dawkins, in his April 12, 2006 report, stated his conclusion that appellant's right ankle sprain and subsequent damage was related to her original injury. However, other than mentioning the initial injury on February 24, 2003, he provided no explanation of how her right ankle condition or need for surgery was caused or aggravated by the accepted injury. The remaining reports of Dr. Dawkins are dated prior to the alleged recurrence and are therefore irrelevant to the issue of recurrence.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that claimant's condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[4]

Appellant has not submitted rationalized medical evidence reflecting recurrence of disability to her accepted work-related condition. She has not established a recurrence of disability.

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[2] 20 C.F.R. § 10.5(y).

[3] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[4] *Walter D. Morehead*, 31 ECAB 188 (1979).

LEGAL PRECEDENT -- ISSUE 2

The payment of medical expenses incident to securing medical care is provided for under section 8103 of the Act.[5] The pertinent part provides that an employee "may initially select a physician to provide medical services, appliances and supplies, in accordance with such regulations and instruction as the Secretary considers necessary." Further section 10.316(a) of the Office's federal regulations provides that an employee only has an initial choice of physicians and thereafter must submit a written request to the Office containing his or her reasons for desiring a change of physician.[6] Section 10.316(b) provides:

> "The Office will approve the request if it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician who specializes in treating conditions like the work related one or the need for a new physician when an employee has moved."[7]

In interpreting section 8103(a), the Board has recognized that the Office has broad discretion in approving services provided under the Act to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[8] The Office has administration discretion in choosing the means to achieve this goal and the only limitation on the Office's authority is that of reasonableness.[9]

In order to change treating physicians, an appellant must demonstrate in writing reasons for the request to change his or her treating physician.[10]

ANALYSIS -- ISSUE 2

In the instant case, appellant submitted several letters requesting to change physicians from Dr. Berkowitz to Dr. Pearson. However, appellant's dislike of Dr. Berkowitz is not a sufficient reason for the Office to determine that a change of physician is warranted. Appellant failed to provide medical evidence that treatment by Dr. Berkowitz was unprofessional or inadequate. Accordingly, appellant has not demonstrated that the Office's decision to deny the change in physicians was unreasonable. She has failed to establish that the Office abused its discretion by refusing to authorize a change of physicians on the basis of inadequate treatment or

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[5] 5 U.S.C. § 8103.

[6] 20 C.F.R. § 10.316(a); *see Billy W. Forbes*, 45 ECAB 742, 744 (1994) (Board hold that the Office should have employed a "reasonable and necessary" standard in determining whether a change of physician should be authorized when appellant did not obtain authorization prior to changing physicians); *see also Elizabeth J. Davis-Wright*, 39 ECAB 1232, 1237 (1988).

[7] 20 C.F.R. § 10.316.

[8] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[9] *Id.*

[10] 20 C.F.R. § 10.410(b)

improper care. Based on the evidence of record, the Office acted reasonably in determining that a change in physicians was not necessary to treat appellant's accepted condition.[11]

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability on February 4, 2004 causally related to the accepted February 24, 2003 employment injury. The Board also finds that the Office properly denied appellant's request for a change in physicians.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 6, 2006 and December 15 and July 27, 2005 are affirmed.

Issued: December 28, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[11] *Rosa Lee Jones*, 36 ECAB 679 (1985).