U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONNIE GONZALEZ and U.S. POSTAL SERVICE,
POST OFFICE, Oxford, Mich.

Docket No. 94-1867; Submitted on the Record;
Issued April 3, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for employment-related disability; and (2) whether appellant has established that she sustained a permanent impairment for schedule award purposes causally related to her employment injury.

On February 27, 1989 appellant, then a 37-year-old postal carrier, filed a claim for compensation based on an injury to her foot noting that she was first aware of the condition in January, 1988. Appellant was out of work between February and April 11, 1989.

In support of her claim, appellant submitted a February 7, 1989 medical report, from Dr. Harvey Rose, a podiatrist, who stated that appellant had undergone a successful bunionectomy with metatarsal osteotomy that day. In a February 17, 1989 medical report, Dr. Rose noted treating appellant since January 16, 1989, when she first complained of pain and swelling on the first metatarsophalangeal joint, left foot. The doctor noted that appellant stated that she had felt pain for the last six to eight months with increasing severity. On the basis of a physical examination and x-ray readings, Dr. Rose determined that appellant had hallux abducto valgus, left foot and indicated that he "did not think it realistic [for appellant] to return to a mail route," and that "standing for long periods of time would cause pain and swelling."

On March 9, 1989 an x-ray revealed stress fracture second metatarsal, left foot.

On April 10, 1989 an Office medical adviser stated that appellant had a bunion which was "definitely not caused by work but … the walking at work caused a temporary aggravation of these symptoms and made surgery necessary."

On June 30, 1989 appellant agreed to accept a limited-duty position of distribution clerk consistent with medical restrictions which limited her to standing for 20 minutes at time.

On July 17, 1989 the Office accepted her claim for temporary aggravation of a left foot bunion from February 4 through April 10, 1989, and her February 7, 1989 corrective surgery.

In an October 24, 1989 medical report, Dr. Rose stated that appellant developed a stress fracture of the second metatarsal bone, left foot, 3 to 4 weeks after surgery and that, therefore, she was restricted from lifting any weight over 15 pounds for any length of time. He stated that appellant was able to do "sitting work," but, if required to carry weight over 15 pounds, "further stress fractures can be anticipated." In an attachment, Dr. Rose stated that appellant "is peremptorily disabled to perform the duties she did [after] undergoing surgery for the correction of a severe bunion."

In a November 13, 1989 medical report, the Office medical adviser repeated his opinion that appellant's preexisting bunion condition was traumatized by employment-related walking which led to the need for surgery. However, he noted that appellant might be able to return to work with a preference noted for light duty. The Office medical adviser recommended that the issue of appellant's ability to return to her original job be referred to a Board-certified orthopedic surgeon.

In a May 1, 1990 medical report, Dr. Rose stated that appellant's medical condition, hallux abducto valgus, was an inherited trait. He also noted that "the time factor at which the bunion may become symptomatic is very often determined by an individual's work. It is my opinion that, since [appellant] did not have a bunion when she was hired into the postal service, the trauma of walking several miles a day carrying a 20- to 30-pound mail pouch exacerbated the situation very rapidly," and that it "would be unreasonable to expect [appellant] to return to her postal carrier responsibilities because her other foot could develop the same condition just as rapidly as well as aggravate the foot which had already been corrected." Dr. Rose stated that "this is a permanent condition that will only be relieved by the cession of the type of work that caused it in the first place." He indicated that he could not account for the stress factor of the second metatarsal bone, left foot, revealed through x-rays taken on March 9, 1989, but thought there may be a cause and effect relationship with the surgery.

On April 29, 1991 the Office notified appellant that it accepted her condition of hallux abducto valgus of the left foot as an ongoing condition due to factors of her employment, and advised appellant to submit medical evidence that would support her disability from work.

In a May 7, 1991 attending physician's report, Dr. Rose stated that appellant had employment-related pain and swelling on her left foot, and that she would have permanent restrictions on activity. He indicated that she had been able to work within restrictions since April 28, 1989.

In a May 19, 1991 medical report, Dr. Robert C. Nestor, a Board-certified orthopedic surgeon, to whom appellant was referred by the employing establishment, examined appellant that day, reviewed a preoperative x-ray and determined that appellant had a mild bunion which did not require surgery, opining that appellant may have benefited from more comfortable shoes. Dr. Nestor stated that appellant could return to work with an initial restriction on walking, noting that most patients after surgery of this kind are able to return to normal work and sporting activities.

On June 7, 1991 appellant filed a claim for compensation benefits claiming lost wages for intermittent periods from October 1989 through June 1991, as a result of her employment-related injury.

On September 17, 1991 appellant received compensation for lost wages for intermittent periods from February 7 through April 28, 1989 and from October 12, 1989 through June 21, 1991.

On April 2, 1992 the Office notified appellant that she "may be entitled to a [s]chedule [a]ward for the permanent partial impairment of the member of the body shown above [hallux abducto valgus] due to the effects of your work injury." The Office recommended that appellant make arrangements with her treating physician to evaluate her condition pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[1]

In a May 5, 1992 medical report, Dr. Michael J. Fugle, a Board-certified orthopedic surgeon, stated that he examined appellant on April 28, 1992 and reviewed x-rays from 1989 and x-rays taken that day. Dr. Fugle noted that appellant had undergone a bunionectomy with osteotomy with screw fixation. He listed the results of his examination, noting that appellant had reached maximum medical improvement and that there was no evidence of bunion. Dr. Fugle noted "some calluses at the base of the metatarsals; more prominent on the left side. Small bunion on the right side." He added that appellant was able to flex the interphalangeal joint 30 degrees and was able to return it to neutral and was able to bend the metatarsophalangeal joint backward 40 degrees, and noted plantar flexion of 10 degrees. Dr. Fugle stated that appellant's x-rays showed her osteotomy to be well healed with no evidence of traumatic arthritis. He did not provide a specific opinion regarding whether appellant had a permanent impairment due to her employment-related injury or surgery.[2]

On July 22, 1992 the Office referred the case record to Dr. Arthur K. Cieslak, an Office medical adviser and a Board-certified surgeon, to determine appellant's date of maximum medical improvement and the degree to which she had a permanent functional loss of her left foot and left leg.

On July 24, 1992 Dr. Cieslak reviewed Dr. Fugle's report and indicated that, due to the lack of correlation between his findings to the A.M.A., *Guides* and Dr. Nestor's findings that appellant was not disabled and that her surgery was not employment related, there was insufficient data upon which an impairment determination could be made. Dr. Cieslak, therefore, recommended that the case be referred to an orthopedic surgeon. The statement of accepted facts forwarded to the Office medical adviser stated that appellant underwent surgery in February 1989, but failed to indicate that the Office had authorized that procedure.

On December 30, 1992 the Office referred appellant, her medical records and the statement of accepted facts to Dr. Edward Trachtman, an osteopath who was Board-certified in

[1] The Office's review was part of a "Second Opinion/Intervention Project."

[2] Although the record is not clear, it appears that appellant, in reaction to the Office's April 2, 1992 letter, contacted Dr. Fugle for the purposes of filing a claim for a schedule award.

physical, medicine and rehabilitation, for a second opinion regarding appellant's date of maximum medical improvement, an objective description of his findings, and an estimate of appellant's percentage of permanent partial impairment of her left foot, if appropriate.

In a January 12, 1993 medical report, Dr. Trachtman stated that he had examined appellant that day and had reviewed her medical records including x-rays taken before and after surgery. Dr. Trachtman questioned the need for surgery, noting however that appellant stated that she had significant pain immediately prior to and after surgery and that the pain worsened after approximately ten minutes of walking. He stated that appellant had reached maximum medical improvement and opined that she should have "no difficulty doing the job she is currently doing."

On March 10, 1993 Dr. Cieslak stated that, on the basis of Dr. Trachtman's report as well as his own review of the medical record, appellant did not have a "permanent partial disability due to work."

On April 16, 1993 the Office referred appellant to Dr. Michael Krieg, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion concerning whether appellant had medical residuals as a result of her accepted employment-related condition, and whether appellant had a permanent partial impairment due to her employment.

In an April 29, 1993 medical report, Dr. Krieg stated that, on the basis of his review of appellant's medical record and the results of a physical examination, appellant had no significant residual other than a shortening of the first metatarsal bone as a result of improper surgery. He also noted that appellant had a nonemployment-related permanent partial impairment of the left foot. Dr. Krieg noted further that appellant had reached maximum medical improvement and that she could return to her normal duties as a letter carrier "but with an orthotic devise built into her shoe."

In a June 7, 1993 medical report, Dr. Cieslak reviewed Dr. Krieg's report and determined that appellant "had zero percent disability due to work factors." Dr. Cieslak noted that appellant's date of maximum medical improvement was April 29, 1993, "but since this was not [a] work-related [condition], the date does not apply."

In a decision dated June 21, 1993, the Office denied appellant's claim for a permanent partial impairment of her left foot. In an accompanying memorandum, the Office stated that it accorded Dr. Krieg's opinion the most probative weight inasmuch as he was the impartial medical examiner and provided a rationalized medical opinion which was supported by Drs. Trachtman, Cieslak and Nestor.

On June 25, 1993 appellant requested an oral hearing on the June 21, 1993 decision denying benefits.

In a December 13, 1993 decision, a hearing representative determined that the case was not in posture for review and remanded the case to the Office to secure a supplemental medical report from Dr. Krieg, regarding why he believed that appellant's left foot condition was not causally related to factors of her federal employment. In the decision, the hearing representative

determined that the opinion of Dr. Krieg was that of a "second opinion" medical specialist, because there was no medical opinion conflict at the time of the referral in the case. Following receipt of Dr. Krieg's supplemental report and any farther development as it may deem necessary, the Office was instructed to issue a *de novo* decision concerning claimant's entitlement to benefits.

In a January 27, 1994 supplemental medical report, Dr. Krieg stated that appellant had a "congenital abnormality in both feet noted as 'a combination lash foot,'" and that appellant "would have had a problem whether she was at the workplace or had wear on her foot as a result of her daily active shoe wear, irritating her foot which came to having an elective bunionectomy." Dr. Krieg stated that as a result of her surgery, appellant appeared to not be improving.

On March 8, 1994 the Office determined that a conflict in medical opinion between Dr. Rose and Dr. Krieg existed and referred appellant, a statement of accepted facts and a copy of her medical records to Dr. Zachary Endress, a Board-certified orthopedic surgeon, as an impartial medical specialist, to resolve the conflict in opinion. Dr. Endress was asked to determine whether appellant had a left foot condition related to her duties as a letter carrier on or prior to January 1, 1988 and that, if any medical relationship were found, to provide medical reasons for his opinion regarding "proximate causation or aggravation (temporary or permanent), acceleration or perception." The Office did not ask Dr. Endress to address whether appellant had any permanent impairment due to her accepted condition, nor did the Office indicate that appellant's surgery had been authorized.

In a March 29, 1994 medical report, Dr. Endress stated that, on the basis of his physical examination of appellant that day, a review of the medical records and x-rays taken by Dr. Rose, he could find no objective medical evidence of a foot condition or of any bunion. Dr. Endress stated that bunions are congenital or caused by shoes rubbing against the medial aspects of the foot but that the walking requirement in appellant's job did not cause her bunion, and that she could perform prolonged walking if her overall health situation permitted this.

In a decision dated April 14, 1994, the Office denied appellant's claim for benefits on the grounds that the weight of the medical evidence failed to establish that appellant had a medical condition or permanent partial impairment causally related to factors of her federal employment. In an accompanying memorandum, the Office stated that Dr. Endress, as an impartial medical examiner, resolved the conflict in medical opinion between Drs. Rose and Krieg by finding that appellant's condition was not related to her duties as a letter carrier.

The Board finds that the Office did not meet its burden in rescinding acceptance of appellant's claim**.**

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation.[3] This holds true where the Office later decides that it erroneously

[3] *Mary E. Jones*, 40 ECAB 1125 (1989).

accepted the claim. To justify a rescission of acceptance, the Office must establish that its prior acceptance was erroneous through new or different evidence.[4]

In the present case, the Office, in its April 14, 1994 decision, denied appellant's compensation benefits on the grounds that she failed to submit sufficient medical evidence to establish that she had a medical condition or permanent partial impairment of her left foot arising from factors of federal employment. However, since the Office had previously accepted appellant's claim temporary aggravation of left foot bunion, the February 7, 1989 corrective surgery and hallux abducto valgus, left foot, the Office's decision amounted to a rescission of acceptance of the claim. Thus the burden of proof in this case rested with the Office to establish, by new rationalized medical opinion, that its earlier acceptance was in error. However, the Office improperly relied on the medical report of Dr. Endress, an impartial medical examiner. The Office, on July 17, 1989, accepted appellant's temporary aggravation of her left foot bunion resulting in corrective surgery. In his report, Dr. Endress stated that appellant's bunion was not causally related to her job. However, the statement of accepted facts accepted that appellant's employment caused a temporary aggravation of the preexisting left foot bunion and caused ongoing hallux abducto valgus. As the Office rescinded the acceptance of this claim, the Office bore the burden of proof to establish that the accepted conditions were in fact erroneously accepted. Dr. Endress, however, did not address whether the temporary aggravation of the bunion was erroneously accepted nor did he address whether the Office erred in its acceptance of the required February 7, 1989 surgery. Furthermore, the statement of accepted facts failed to reflect that appellant's surgery was authorized and thus Dr. Endress erroneously relied on incorrect facts relating to appellant's history of injury. As Dr. Endress' opinion is based on a factually incorrect history and failed to provide a rationalized medical opinion through new and relevant evidence that the Office's initial acceptance was in error, it is of diminished probative value and therefore cannot constitute medical evidence of any significant weight.[5] The Board finds that the Office did not meet its burden of proof in its June 21, 1993 decision in rescinding appellant's compensation benefits.

Regarding the issue as to whether appellant has established that she sustained a permanent impairment for schedule award purposes causally related to her employment injury, the Board finds that the case is not in posture for decision.

In this case, the Office notified appellant that she may have grounds for a schedule award and proceeded to refer her case to a consultant with an inaccurate statement of accepted facts. The Board finds, therefore, that the Office failed to properly develop the case record with respect to appellant's claim for a schedule award.[6] The Board notes that the record does not contain a

[4] *Laura J. Womack*, 42 ECAB 528 (1991).

[5] *See James A. Wyrich*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete); *see generally Melvina Jackson*, 38 ECAB 443 (1987) (addressing factors that bear on the probative value of medical opinions).

[6] The Board notes that the record does not contain a formal filing of a schedule award from claimant, but that the Office referred Dr. Fugle's report to an Office medical adviser on July 22, 1992 for the purposes of determining appellant's schedule award.

formal filing of a schedule award from claimant, but that the Office referred Dr. Fugle's report to an Office medical adviser on July 22, 1992 for the purposes of determining appellant's schedule award. On remand, the Office should refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a detailed, rationalized medical opinion to determine, according to the A.M.A., *Guides*, the percentage of permanent impairment attributable to the accepted hallux abducto valgus. Following such development as the Office deems necessary, the Office shall issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated April 14, 1994 is hereby reversed with respect to its effective rescission of the accepted condition of employment-related left foot hallux abducto valgus and is set aside with respect to the issue of whether appellant's medical condition is related to factors of federal employment. The case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
April 3, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member