

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JONATHAN M. MARTIN and U.S. POSTAL SERVICE,  
POST OFFICE, Austin, Tex.

*Docket No. 95-2191; Submitted on the Record;  
Issued May 27, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied reconsideration of appellant's recurrence of disability claim on the grounds that it was untimely filed and failed to establish clear evidence of error; and (2) whether appellant's disability for work commencing February 6, 1993 is causally related to his federal employment.

On June 8, 1989 appellant, then a 31-year-old letter carrier, sustained injury to his right ankle in a nonemployment-related accident in which he jumped into a lake feet first.<sup>1</sup> The record reflects that he returned to regular duty on August 14, 1989. Appellant subsequently stopped work and underwent arthroscopic surgery on November 1, 1989. Surgery revealed no articular defect or any loose bodies in the anterior aspect of the ankle joint. Posterior examination of the tibia and talus revealed a softened area of the tibia, but no evidence of chondral fracture, loose bodies or of any other defect. Appellant returned to work in a light-duty status on November 22, 1989.

On March 11, 1990 appellant filed an occupational disease claim, contending that his work casing mail and walking aggravated his right ankle condition. On August 17, 1990 the Office accepted appellant's claim for a right ankle sprain and temporary aggravation of his preexisting condition. Appellant received compensation for the period August 9 to November 23, 1989.

Appellant continued under light duty and received medical treatment for his right ankle condition. Dr. Ted Spears, a Board-certified orthopedic surgeon and appellant's treating physician, examined appellant for continuing symptoms of right ankle pain. He noted that x-rays and bone scans did not demonstrate evidence of fracture or dislocation. On February 4, 1992 Dr. Spears performed a diagnostic arthroscopy, which revealed a small area of loose articular

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<sup>1</sup> A June 8, 1989 radiology report noted that multiple right foot and calcaneus x-rays were negative for an acute fracture or dislocation. Soft tissue shadows were reported as unremarkable.

cartilage over the distal tibial plafond. Dr. Spears performed an open excision of the posterior process of the talus. Following a period of physical therapy, appellant was returned to limited duty. Appellant received compensation for total disability for the period February 3 to March 16, 1992.

On February 8, 1993 appellant stopped work and on February 15, 1993 he filed a claim for a recurrence of disability. Appellant attributed his recurrence of disability to carrying mail routes on February 5 and 6, 1993, which required walking up steep gradients. He submitted several notes signed by Dr. Michael Rutledge, who examined appellant on February 8, 1993 for persistent right heel and ankle pain. Dr. Rutledge indicated that appellant should be placed on light duty until seen by Dr. Spears. An x-ray was obtained that date which showed no bony or soft tissue abnormality. On March 23, 1993 appellant was seen by Dr. Spears, who noted his complaints appeared to be in the distal tarsal tunnel, over the distribution of the tibial nerve. He recommended further bone scan to rule out a possible stress fracture.

By decision dated April 20, 1993, the Office denied appellant's recurrence of disability claim. It was noted that the incidents of February 5 and 6, 1993 would constitute a possible new injury and that the medical evidence of record related appellant's disability to the June 8, 1989 nonemployment-related injury.

The Office referred the case record and a statement of accepted facts to Dr. Lewis R. Thompson, an Office medical consultant Board-certified in orthopedic surgery. In a June 12, 1993 report, Dr. Thompson stated that he had reviewed the medical evidence and opined that the diagnosis concerning the June 8, 1989 nonwork injury, was a compression injury to the articular cartilage of the right distal tibia. He noted that appellant's return to regular duty after June 13, 1989 resulted in a temporary aggravation of the compression injury, but that appellant's limited-duty work after November 22, 1989 did not directly affect the injury to the cartilage, except for one instance when appellant was required to carry mail. Dr. Thompson opined that appellant's work activities caused only a temporary exacerbation of the preexisting ankle injury and that appellant's subsequent problems with his ankle was the direct result of the nonemployment-related injury.

On August 4, 1993 appellant was referred by the Office for examination by Dr. J. Clark Race, a Board-certified orthopedic surgeon. In a September 7, 1993 report, Dr. Race reviewed appellant's history of right ankle injury and subsequent medical treatment. Dr. Race noted complaint of persistent pain in the anterior medial aspect of the right ankle and of a neuritic-type discomfort with radiation into the heel pad on the right side. He noted his findings on physical examination and diagnosed chronic right ankle joint pain, secondary to previous high impact injury with the result of chondromalacia and damage to the articular focus of the ankle joint. Dr. Race opined that appellant's limited-duty work would not have any significant aggravating effect on his ankle injury, indicating that appellant's work related activities would produce only transient effect. He based his opinion on noting that the surgical findings made in 1989 and 1992 did not reveal any significant change in the condition of the articular surface of the joint, stating: "This would lead one to assume that the stress and strain of his job did not cause any significant worsening or damage to the interior of his ankle joint." Dr. Race concluded that appellant could work subject to physical limitations.

By decision dated October 22, 1993, the Office denied appellant's claim for compensation benefits. The Office found that the weight of medical opinion was represented by the report of Dr. Race.

By letter dated November 22, 1993, appellant requested a hearing before the Office Branch of Hearings and Review. He submitted the November 1, 1993 office note of Dr. Spears, who stated that the chondromalacia of appellant's ankle joint occurred as a result of some preexisting injury and not his work responsibilities as a letter carrier. He opined, however, that appellant's work contributed to an exacerbation of his symptoms of continuing pain.

By decision dated January 6, 1994, the Office denied appellant's hearing request as untimely. It was noted appellant could submit additional evidence in support of his claim with a request for reconsideration.

On October 17, 1994 appellant requested reconsideration and submitted the March 23, 1994 report of Dr. Robert W. Schoen, Jr., a Board-certified orthopedic surgeon. Dr. Schoen stated that he examined appellant on February 23, 1994 and attached his office notes of that date. He listed his findings on examination and noted that x-rays obtained of the right ankle showed the posterior aspect of the talus removed surgically and that the overall ankle and remaining subtalar joint appeared smooth with a normal joint space. Dr. Schoen did not find any obvious degenerative signs or signs of malposition of the hindfoot or subtalar joint. He recommended another bone scan. A bone scan was obtained on July 12, 1994, which Dr. Schoen stated, in an October 13, 1994 report, revealed no increased uptake in the region of appellant's posterior talar surgery. He stated that appellant's symptoms were "secondary to scarring in and about the tarsal tunnel area of the right ankle secondary to the surgery that was required to remove the posterior process of his talus originally injured in his original accident." Dr. Schoen concluded that appellant's continued symptoms were directly related to his original injury.

By decision dated October 27, 1994, the Office denied modification of its April 20 and October 22, 1993 decisions. With reference to the recurrence of disability claim, the Office noted that as appellant attributed his disability to work activities on February 5 and 6, 1993, the claim involved a new occupational injury rather than a recurrence of disability.<sup>2</sup> The Office found that as appellant's October 17, 1994 reconsideration request was made more than one year following the April 20, 1993 decision it was untimely. The Office also found that the evidence submitted with appellant's reconsideration request was not sufficient to establish clear evidence of error in the denial of his recurrence of disability claim. With regard to the October 22, 1993 decision rejecting appellant's claim for compensation, the Office found that the weight of medical opinion evidence related appellant's continuing right ankle symptoms to his June 8,

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<sup>2</sup> The Office advised appellant that he could submit a claim for a new occupational injury pertaining to his work stoppage after February 6, 1993. The Board notes, however, that subsequent correspondence in amplification of a claim is as much a part of the claim as the claim form itself. *John T. Ratliff*, 8 ECAB 223 (1955). The medical evidence of record was developed to determine whether appellant's disability as of February 6, 1993 was due to his work-related activities.

1989 nonemployment-related injury and did not establish that his disability for work was causally related to his federal employment.<sup>3</sup>

By letter dated January 11, 1995, appellant requested reconsideration of the October 27, 1994 decision. By decision dated February 16, 1995 the Office denied appellant's request for reconsideration.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends to those decisions issued within one year prior to the filing of the appeal.<sup>4</sup> As appellant filed his appeal with the Board on May 18, 1995, the only decisions properly before the Board are the October 27, 1994 and February 16, 1995 decisions of the Office.

The Board finds that the Office properly denied reconsideration of appellant's recurrence of disability claim on the basis that the request was untimely and failed to establish clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> The Office, through its federal regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.<sup>6</sup> In those cases where a request for reconsideration is not timely filed, the Board had held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error.<sup>7</sup>

In the present case, appellant stopped work on or about February 8, 1993 and filed a notice of recurrence of disability. Appellant noted, however, that he attributed his disability to work performed on February 5 and 6, 1993, in which he was required to walk up steep gradients. By decision dated April 20, 1993, the Office denied appellant's recurrence of disability claim, noting that the incidents of walking up steep gradients on February 5 and 6, 1993 would

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<sup>3</sup> While the Office noted that there was no evidence to support employment-related disability after appellant's return to limited-duty work on November 22, 1989, the Board notes that the period February 2 to March 16, 1992 was found compensable by the Office. For this reason, the Board has restated the issue to address whether appellant has established his disability for work on or after February 6, 1993 is casually related to his federal employment.

<sup>4</sup> 20 C.F.R. § 501.2(c).

<sup>5</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 20 C.F.R. § 10.138(b)(2).

<sup>7</sup> *Charles J. Prudencio*, 41 ECAB 449 (1990). To show clear evidence of error, the evidence submitted must not only be of sufficient probative value as would create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision. *Thankamma Mathews*, 44 ECAB 765 (1993).

constitute the basis for a new occupational injury claim rather than a recurrence of disability.<sup>8</sup> Following this decision, appellant requested a hearing before an Office hearing representative on November 22, 1993, but the request was denied as untimely on January 6, 1994.

The Board finds that appellant's October 17, 1994 request for reconsideration of the April 20, 1993 decision was untimely. Appellant contends that the period, in which he could file for review of the April 20, 1993 decision was extended by the Office's January 6, 1994 denial of his hearing request. The Board notes, however, that the one-year period for requesting reconsideration following the April 20, 1993 merit decision on the denial of appellant's recurrence of disability claim began to run with issuance of that decision.<sup>9</sup> The Office's denial of appellant's hearing request on January 6, 1994, while noting appellant could file an application for reconsideration, did not in any way extend the one-year period following the April 20, 1993 decision.<sup>10</sup> For this reason, appellant's contentions are without merit and his October 17, 1994 request was untimely for review of the April 20, 1993 decision.

Further, the Board finds the evidence of record is insufficient to establish clear error in the Office's April 20, 1993 decision. In this regard, with the submission of his recurrence of disability claim form, appellant attributed his disability to the incidents occurring on February 5 and 6, 1993 when he was required in his employment to walk up steep gradients. As appellant attributed his work stoppage to these activities in his federal employment, rather than to the initial aggravation of his right ankle condition as accepted by the Office in 1989, his 1993 claim for a recurrence of disability was properly denied. Appellant has not submitted any evidence establishing error in the Office's April 20, 1993 decision.

The Board also finds that appellant has not established that his disability for work commencing February 6, 1993 is casually related to his federal employment.

The record establishes appellant sustained a nonemployment-related injury on June 8, 1989, when he dove feet first into a lake. He subsequently returned to work and it was accepted by the Office that his federal employment as a letter carrier aggravated his right ankle condition. Appellant was compensated for two periods of aggravation, August 9 to November 23, 1989 and February 3 to March 16, 1992.

Appellant has alleged disability commencing on or about February 6, 1993 causally related to his federal employment. In this regard, Appellant submitted several notes from Dr. Rutledge, who noted only that appellant should continue on light duty until seen by Dr. Spears. On March 23, 1993 appellant was treated by Dr. Spears, but the physician noted only that appellant should have a further bone scan to rule out a stress factor. Neither

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<sup>8</sup> The Office's regulations define "occupational disease or illness" as a condition produced in the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(a)(16). In a recurrence of disability situation, generally no event or incident other than the prior injury accounts for the disability; *see William R. Lance*, 18 ECAB 422, 428 (1967).

<sup>9</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

<sup>10</sup> *Id.* The denial of appellant's hearing request did not constitute a merit decision by the Office's Branch of Hearings and Review.

Dr. Rutledge nor Dr. Spears provided any opinion relating appellant's disability to the February 5 or 6, 1993 incidents in which he walked up steep gradients during the course of his federal employment.

The claim was submitted to Dr. Thompson, an Office medical consultant, who reviewed the record and noted that appellant's return to his employment had resulted in only a temporary aggravation of his right ankle condition. He attributed appellant's continuing medical problems to the nonemployment-related compression injury of June 8, 1989 and not to any factor of appellant's federal employment. Similarly, Dr. Race, a referral physician, attributed appellant's right ankle condition to the high impact injury of June 8, 1989. He compared the surgical findings of 1989 and 1992 to conclude that the stress and strain of appellant's employment did not cause any additional damage to the interior of appellant's ankle joint. Further, Dr. Race concluded that appellant could continue in his limited-duty position. The reports of Dr. Schoen noted that a new bone scan was obtained which did not reveal any increased uptake in the region of the posterior talar surgery. Dr. Schoen attributed appellant's complaints of pain to scarring in the area of the tarsal tunnel which he stated was secondary to the surgery necessitated by the June 8, 1989 nonemployment accident. The physician did not address how appellant's employment activities of February 5 or 6, 1993 would cause or contribute to appellant's disability after February 6, 1993, nor did he fully discuss how appellant's disability commencing in 1993 was otherwise caused by the periods of temporary aggravation accepted in this case. Based on this medical evidence, the Board finds that appellant has failed to establish that his disability for work on or after February 6, 1993 is causally related to his federal employment.

The October 27, 1994 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Dated, Washington, D.C.  
May 27, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member