

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES DELL and U.S. POSTAL SERVICE,  
POST OFFICE, Jersey City, N.J.

*Docket No. 96-1803; Submitted on the Record;  
Issued May 27, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error; and (2) whether appellant sustained a recurrence of disability commencing July 17, 1995 or sustained traumatic arthritis in his feet causally related to the March 31, 1992 employment injury.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Office accepted appellant's claim for aggravation of a right heel spur and surgery performed on June 24, 1993. After the original March 31, 1992 employment injury, appellant returned to light-duty work.

By decision dated November 22, 1993, the Office awarded appellant a schedule award for 5 percent of the left foot from September 20 to November 30, 1993. By letter dated January 17, 1994, appellant requested reconsideration of the decision. By decision dated February 10, 1994, the Office denied appellant's reconsideration request. Appellant subsequently requested reconsideration on August 12, 1994 and March 6, 1995 which the Office denied in decisions dated November 10, 1994 and June 6, 1995, respectively. In support of his request, appellant submitted a medical report dated February 27, 1995 from Dr. Wayne Epstein, a podiatrist. In his report, Dr. Epstein considered appellant's personal history, reviewed x-rays and diagnosed arthritis and sinus tarsi syndrome. He stated that excessive amounts of weight-bearing aggravate appellant's condition and he should either have a job that would not require him to be on his feet at all or be given some sort of disability.

On November 17, 1995 appellant filed a claim for a recurrence commencing July 17, 1995. He stopped working on that date and returned to work on September 5, 1995. In

a report dated October 2, 1995, Dr. Epstein placed restrictions on appellant and stated that appellant had chronic pain due to painful arthritic condition and walking aggravates his condition. In a report dated October 11, 1995, Dr. Epstein considered appellant's personal history, performed a physical examination, and diagnosed traumatic arthritis which was work related and sinus tarsi syndrome. He stated that appellant's being on his feet many hours each day "certainly played a large role in the formation of the arthritis." Dr. Epstein recommended that appellant not work. By letter dated December 6, 1995, the Office requested additional information from appellant including a statement from his doctor explaining how his present condition is causally related to the March 31, 1992 employment injury.

Appellant submitted additional evidence to support his claim. On November 15, 1995 Dr. Eugene J. Lind, a Board-certified urologist, stated that appellant had been in the hospital for urological surgery and could return to work on January 2, 1996. In a note dated November 20, 1995, Dr. Epstein stated that appellant continually experienced extreme pain and he recommended nonweight bearing with complete rest and that appellant take leave from work. In a note dated December 27, 1995, Dr. Epstein stated that appellant was being treated for painful traumatic arthritic condition in both feet and recommended nonweight bearing and complete bed rest. In another note dated January 26, 1996, Dr. Epstein stated that appellant was unable to bear weight on the right ankle due to chronic painful arthritis and recommended continued rest.

By decision dated February 23, 1996, the Office denied appellant's claim.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>1</sup> The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.<sup>2</sup> When an application for review is untimely, the Office takes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>3</sup>

The Board finds that, since more than one year had elapsed since the date of issuance of the Office's February 10, 1994 merit decision to the date that appellant's request for reconsideration was filed, March 6, 1995, appellant's request for reconsideration is untimely. Moreover, the Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's February 10, 1994 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, Dr. Epstein's February 27, 1995 report in which he diagnosed arthritis in both of appellant's feet and sinus tarsi syndrome and stated that excessive weight bearing on appellant's feet aggravates his condition and does not show clear evidence of error in the Office's schedule award of 5 percent to the left foot. As appellant has not, by the submission of medical evidence, raised a substantial question as to the correctness of

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.138(b)(2). See also *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>3</sup> *Thankamma Matthews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

the Office's February 10, 1994 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The Board also finds that the Office properly determined that appellant did not meet his burden of proof in establishing that he sustained a recurrence of disability or sustained arthritis in his feet commencing July 17, 1995 causally related to the March 31, 1992 employment injury.

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.<sup>5</sup>

An individual who claims a recurrence of disability, due to an accepted employment-related injury, has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>6</sup> When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty.<sup>7</sup> As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.<sup>8</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury, and supports that conclusion with sound medical reasoning.<sup>9</sup> An award of compensation may not be made on the basis of surmise, conjecture, or speculation or an appellant's unsupported belief of causal relation.<sup>10</sup>

In the present case, none of the medical evidence appellant submitted establishes that he sustained a recurrence of his heel spur on or after July 17, 1995 or that he developed arthritis in both his feet from his employment. Dr. Lind's November 15, 1995 note addresses appellant's urological surgery and therefore is not relevant. Dr. Epstein's October 11, 1995 report in which he diagnosed work-related traumatic arthritis and sinus tarsi syndrome and stated that appellant's

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<sup>4</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>5</sup> *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

<sup>6</sup> *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

<sup>7</sup> *George DePasquale*, 39 ECAB 295, 304; *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>8</sup> *Id.*

<sup>9</sup> *See Nicolea Brusco*, 33 ECAB 1138 (1982).

<sup>10</sup> *See William S. Wright*, 45 ECAB 498, 503 (1994).

being on his feet “certainly played a large role in the formation of the arthritis” does not provide a rationalized opinion explaining how appellant’s employment caused a recurrence of the accepted injury of a heel spur or caused appellant’s arthritis. Dr. Epstein’s disability notes dated October 2 and 11, November 20 and December 27, 1995 and January 26, 1996 do not provide a rationalized opinion explaining how appellant’s recurrence of disability occurred or how appellant’s current conditions of arthritis and sinus tarsi syndrome are causally related to his employment. The Office gave appellant the opportunity to submit the requisite evidence but appellant did not respond. Appellant has therefore failed to meet his burden to establish his claim.

Accordingly, the decisions of the Office of Workers’ Compensation Programs dated February 23, 1996 and June 6, 1995 are hereby affirmed.

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

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member