U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLOYD D. BIRDSONG and DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, Tex.

Docket No. 97-1273; Submitted on the Record;
Issued January 25, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was not entitled to compensation beginning August 4, 1996.

The Office accepted that appellant, a pipefitter, sustained a right calf muscle strain on July 31, 1996 by pulling equipment. At the time of this injury, appellant had applied for and been approved for voluntary retirement effective August 3, 1996. On August 1 and 2, 1996 appellant cleaned out his work station, with the assistance of another employee assigned by the employing establishment to assist him. Appellant filed a claim for compensation for the period beginning August 4, 1996.

The Office denied appellant's claim by decision dated January 17, 1997. The Office found that appellant had retired on August 3, 1996 and that the medical evidence failed to establish appellant was disabled for work due to his July 31, 1996 injury. Appellant requested reconsideration and the Office by decision dated February 24, 1997 refused to modify its prior decision.

The Board finds that appellant was disabled from August 4 to November 13, 1996 due to his July 31, 1996 employment injury.

Appellant's July 31, 1996 injury was initially diagnosed as an acute right gastrocnemius muscle strain by Dr. Michael Jarrard, a physician at the employing establishment, who is Board-certified in preventive medicine and who examined appellant on the date of the injury. In a report dated August 9, 1996, Dr. Marvin R. Brown, a Board-certified orthopedic surgeon, noted that appellant had "experienced severe pain and swelling since" his July 31, 1996 employment injury. Dr. Brown placed appellant in a short-leg splint and on crutches and had appellant undergo a MRI of the right calf, which, according to Dr. Brown's August 15, 1996 report, "confirms a tear of the medial head of the gastroc at the musculocutaneous junction." Dr. Brown

placed appellant in a fracture walker and stated that in one week he "may progressively weight bear as tolerated" for the following two weeks.

These reports clearly establish that appellant was disabled beginning August 4, 1996 for the position of pipefitter that he held when injured. The position description states that requirements include working from ladders and scaffolding and frequent carrying and setting up of parts and equipment weighing up to 50 pounds. Light duty was not made available to appellant after August 2, 1996. As appellant's condition related to his July 31, 1996 employment injury prevented him from performing the job he held when injured, it was improper for the Office to find that appellant was not entitled to compensation for disability because he had voluntarily retired.[1] Appellant elected benefits under the Federal Employees' Compensation Act effective August 4, 1996 in preference to those under the Civil Service Retirement Act or the Federal Employees' Retirement System Act.

The evidence establishes that appellant sustained a tear of his right gastrocnemius muscle on July 31, 1996 and that this condition caused him to be disabled for work beginning August 4, 1996.[2]

In this case, the earliest evidence that appellant was no longer disabled due to his July 31, 1996 employment injury is a November 13, 1996 report from Dr. Brown stating that appellant had completed physical therapy, that his motion was full and his strength 5/5 and that he could return to full duty with no restrictions. This report shows appellant's employment-related disability ended by November 13, 1996. The Office should pay appellant compensation from August 4 to November 13, 1996.

[1] *Lawrence Duncan*, 37 ECAB 854 (1986); *George J. Kemble*, 35 ECAB 370 (1983).

[2] The Office has the burden of proof to establish that accepted employment-related disability has ended. Once a claim is accepted, the Office has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The decisions of the Office of Workers' Compensation Programs dated February 24 and January 17, 1997 are set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, D.C.
January 25, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member