

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERLETHA KENNEDY and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, Calif.

*Docket No. 97-1065; Submitted on the Record;
Issued March 19, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of establishing a recurrence of disability on or after January 10, 1996 causally related to her March 29, 1993 work injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On March 29, 1993 appellant, then a 38-year-old general clerk, filed a notice of traumatic injury and claim for compensation alleging that she was injured at work that same day when a file cabinet lid fell on the front of her right foot. The Office accepted the claim for right foot contusion. Appellant returned to limited duty on April 28, 1993 but she was suspended from work for prior unscheduled absences from April 29 through May 4, 1993. She subsequently returned to limited duty on May 22, 1993.

On October 22, 1993 appellant filed a claim alleging a recurrence of disability commencing October 4, 1993. Appellant noted on her claim form that her foot pain had never stopped since the March 29, 1993 work injury. Appellant filed a second claim for recurrence of disability on February 9, 1994 alleging total disability for the period of January 4 through February 9, 1994.

Appellant underwent a fitness-for-duty examination at the request of the employing establishment. Appellant was examined by Dr. Melton E. Ashby, a Board-certified orthopedic surgeon. In a May 27, 1993 report, Dr. Ashby noted appellant's complaints of constant right foot pain. He noted normal x-rays and findings of only vague tenderness in the metatarsal neck regions of the first, second and third digits. Dr. Ashby diagnosed probable malingering and opined that appellant was fully capable of performing all of her official duties.

In support of her claims for recurrence, appellant submitted a July 29, 1993 progress note from Dr. Diane Barry, a podiatrist. She noted appellant's March 29, 1993 injury and appellant's continuing complaints of pain which were described as a pins and needles feeling in the right

foot. Dr. Barry diagnosed metatarsalgia of the right third metatarsophalangeal joint (MPJ) which she attributed to a job change that required appellant to walk on a hard concrete floor.

In an August 23, 1993 report, Dr. Barry attributed appellant's diagnosed condition of metatarsalgia of the right third MPJ to the March 29, 1993 work injury and extended her light duty until August 30, 1993.

Appellant also submitted various treatment notes from Dr. Barry. In an October 6, 1993 note, Dr. Barry indicated that appellant had a right foot injury and was disabled from October 4 to 11, 1993. In a December 13, 1993 note, she noted appellant's right foot injury and her complaints of forefoot pain "especially in the heels." Dr. Barry diagnosed "pes planus with metatarsalgia right foot" and opined that appellant could perform light duty with restrictions. In a January 18, 1994 note, Dr. Barry indicated that appellant complained of increasing pain. Her impression was neuritis versus arthritis of the right foot. Dr. Barry prescribed medication, warm soaks and issued an off-work order until February 4, 1994 with limited duty thereafter.

A nerve conduction study performed on March 21, 1994 was interpreted as normal. The physical therapist noted pain in the posterior aspect of appellant's right foot, probably aggravated by her being overweight and by a pes planus, although a neuroma could not be entirely ruled out. It was recommended that appellant wear air-cushion shoes as her shoes did not provide adequate support. Appellant was instructed to begin an exercise program.

In a May 17, 1994 report, Dr. Hong S. Shin, a Board-certified neurologist, noted appellant's work injury and that appellant had tenderness in the mid shaft of the metatarsal bones of the second and third toes. He specifically stated that "it is obvious that [appellant] does not have any peripheral nerve injury from this accident." Dr. Shin advised that there was no reason why appellant could not go back to her regular duty.

By letter dated August 3, 1994, the Office requested that appellant submit a rationalized physician's opinion explaining the causal relationship between her current medical condition and her prior work injury.

In a September 13, 1994 decision, the Office denied the October 1993 and February 1994 claims for compensation, finding that appellant failed to establish that she had a recurrence of disability causally related to her accepted employment injury.

On October 11, 1994 appellant requested a hearing. A hearing was held on April 5, 1995. An Office hearing representative advised appellant of the type of medical evidence needed to support her claim.

Subsequent to the hearing, new medical evidence was submitted. In an April 4, 1995 report, Dr. J. Scott Rosenthal, a podiatrist, noted appellant's complaints of pain, mainly in the ball of her foot. He diagnosed traumatic neuroma which he opined was "likely due to" appellant's March 29, 1993 work injury. Dr. Rosenthal noted, however, that the close proximity of the metatarsals could also exacerbate the condition. He recommended several cortisone injections and possibly excision of the neuroma. Dr. Rosenthal placed appellant on light duty with limited standing and walking.

In an April 20, 1995 report, Dr. Malrie Brown, a family practitioner and employing establishment physician, noted that she first examined appellant on April 15, 1994 for complaints of persistent foot pain. She prescribed cortisone injections and physical therapy but came to the conclusion that there was no organic cause for appellant's symptoms. Dr. Brown suggested that appellant transfer to a job that did not require prolonged standing or excessive ambulation. She concluded that appellant did not have a recurrence of her disability as the pain has been ongoing since the 1993 injury. Dr. Brown also advised that she saw no reason why the original injury would have caused prolonged foot pain and suggested that appellant was malingering in order to avoid work.

In a May 17, 1995 report, Dr. Barry noted that she first examined appellant on July 29, 1993 for treatment of an injury of a metal cabinet falling on appellant's right foot. At the time of the 1993 examination, Dr. Barry indicated that she felt that appellant's metatarsal pain in the ball of the third and fourth toes was secondary to a job change which required appellant to walk more on cement floors than she usually did. According to Dr. Barry, appellant's neurological examination for a pins and needles feeling in the foot was inconclusive and there was some suggestion that appellant had embellished her examination. She noted that appellant refused to undergo epidural steroids or similar treatment and kept coming back with continuing complaints of pain and requests for off work orders. Dr. Barry also prescribed cortisone injections, noting that it was unusual that the cortisone injections, containing a local anesthetic, should have eased appellant's pain immediately upon injection, but appellant noticed no relief. She concluded that she was unaware of a recurrence of disability as appellant has complained of foot pain since the work injury, but she suspected that appellant was malingering.¹

In a decision dated and finalized on June 1, 1995, an Office hearing representative affirmed the Office's September 13, 1994 decision denying the 1993 and 1994 claims for recurrence of disability.

On January 17, 1996 appellant filed a claim alleging a recurrence of disability beginning January 10, 1996.

In support of her claim for recurrence of disability, appellant submitted a January 11, 1996 disability slip signed by Dr. Rosenthal. He indicated that appellant was unable to work for six days due to a recurrence of symptoms beginning January 10, 1996. Dr. Rosenthal diagnosed right foot neuroma, right foot plantar-flexed metatarsal and right foot capsulitis. In a January 16, 1996 disability slip, he noted identical diagnoses, advised that appellant was unable to work for seven days and listed work restrictions.

On May 26, 1996 appellant filed a request for reconsideration of the hearing representative's June 1, 1995 decision denying her 1993 and 1994 claims for recurrence of disability.

¹ Dr. Barry noted that appellant would consistently call on Thursday afternoons, when he was in the operating room performing surgery and request an off-work order starting that afternoon through the weekend. Dr. Barry indicated that when she would attempt to call appellant, she was repeatedly told by appellant's son that appellant was in the shower or not available.

In an August 13, 1996 decision, the Office denied appellant's 1996 claim for recurrence of disability on the grounds that the medical evidence was insufficient to establish that her claimed medical condition beginning January 10, 1996 was causally related to the March 29, 1993 work injury. The Office specifically noted that appellant failed to provide a rationalized medical opinion, based on a complete factual and medical background explaining the causal relationship between her original employment injury and her claimed recurrence of disability.

Appellant subsequently requested a hearing in a letter postmarked September 13, 1996, which was received by the Office on September 19, 1996.

In a November 6, 1996 decision, the Office informed appellant that his hearing request was untimely because it was not filed within 30 days of the August 13, 1996 decision. The Office, however, advised that appellant's request for further review could be equally well addressed through the reconsideration process.

Appellant also filed a request for reconsideration with the Office on January 27, 1997.

In a February 19, 1997 decision, the Office denied appellant's request for a merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on February 4, 1997, the only decisions properly before the Board are the Office's August 13, 1996 decision denying appellant's 1996 claim for recurrence of disability and the Office's November 6, 1996 decision denying appellant's hearing request as untimely filed.³

The Board finds that appellant did not meet her burden of proof in establishing that she sustained a recurrence of disability on or after January 10, 1996 causally related to her March 29, 1993 injury.

When an employee, who is disabled from the job he or she held when injured on the account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁴

² See 20 C.F.R. § 501.3(d)(2).

³ The Board notes that the Office issued a decision on February 19, 1997 after an appeal was filed at the Board. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990). As the February 19, 1997 decision was a denial of a request for reconsideration of the August 13, 1996 decision, the February 19, 1997 decision is therefore null and void.

⁴ *Gus N. Rhodes*, 46 ECAB 518 (1995); *Terry R. Hedman*, 38 ECAB 222 (1986).

In the instant case, the Office accepted that appellant sustained a right foot contusion on March 28, 1993. Appellant has remained on light duty since May 22, 1993. In her most recent claim for recurrence of disability, appellant seeks compensation for total disability for the period of January 10 through 16, 1996. Appellant, however, has failed to provide, as requested by the Office, a rationalized medical opinion supported by medical reasoning that she sustained a recurrence of total disability causally related to her accepted employment injury.

The only evidence appellant has submitted in support of her 1996 claim is a January 11, 1996 disability slip signed by Dr. Rosenthal indicating that appellant had sustained a “recurrence of symptoms” on January 10, 1996. His opinion is not well rationalized to support a finding of recurrence of disability as Dr. Rosenthal does not elaborate on the nature of appellant’s symptoms, nor does he mention appellant’s March 28, 1993 work injury. Moreover, although he indicated that appellant had right foot neuroma, right foot plantar-flexed metatarsal and right foot capsulitis, Dr. Rosenthal offers no clinical or physical findings to support his diagnoses. He also provides no explanation as to how the diagnosed conditions are related to appellant’s 1993 work-related injury. Dr. Rosenthal’s opinion, therefore, is insufficiently rationalized to support appellant’s burden of proving a recurrence of disability.⁵ Thus, to the extent that the record is devoid of rationalized medical opinion evidence, supported by medical rationale, from which to conclude that appellant sustained a recurrence of disability on January 10, 1996 causally related to the March 28, 1993 injury, the Office properly denied compensation.

⁵ See *Margarette B. Rogler*, 43 ECAB 1034, 1039 (1992) (finding that a physician’s opinion that provides no medical rationale for its conclusion on causation is of diminished probative value).

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides:

"Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁶

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.⁷ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.⁸ In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁹

Appellant's request for an oral hearing was postmarked September 13, 1996 and received by the Office on September 17, 1996, more than 30 days after the Office's August 13, 1996 decision. For this reason, appellant is not entitled to a hearing as a matter of right. The Office properly found appellant's request to be untimely, but nonetheless considered the matter in relation to the issue involved and correctly advised appellant that he could pursue the issue involved through the reconsideration process. As appellant may in fact pursue his claim by submitting to the appropriate regional Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.¹⁰

⁶ 5 U.S.C. § 8124(b)(1).

⁷ 20 C.F.R. § 10.131(a)-(b).

⁸ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁹ *Rudolph Bermann*, 26 ECAB 354 (1975).

¹⁰ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. E.g., *Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Program dated August 13 and November 6, 1996 are affirmed.

Dated, Washington, D.C.
March 19, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member