

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. GLOCKSEN and DEPARTMENT OF VETERANS AFFAIRS,
EMPLOYEES HEALTH SERVICES, Brooklyn, NY

*Docket No. 97-2441; Submitted on the Record;
Issued October 18, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on May 25, 1997.

On May 10, 1990 appellant, then a 45-year-old nursing assistant, filed a claim alleging that on that date, a stretcher on which she was placing a patient, went over her right foot. The Office accepted appellant's claim for a contusion, swelling and tarsal tunnel syndrome of the right foot. Appellant underwent a tarsal tunnel release on March 7, 1991 and excisions of Morton's neuroma on January 11, 1993 and July 15, 1994. Appellant stopped working on May 15, 1990. The Office commenced payment of total disability benefits.

In a report dated June 28, 1995, Dr. Irwin J. Nelson, a Board-certified orthopedic surgeon and a second opinion physician, reviewed appellant's history of injury, performed a physical examination and opined that appellant had severe subjective complaints, but except for three scars, there were no objective findings. He opined that there were no objective findings of an orthopedic impairment or physical disability but stated that appellant could not work eight hours a day or return to work as a nursing assistant. In a report dated September 11, 1995, he explained that he believed appellant could work and perform all her normal duties but she was emphatic that she was unable to work.

In a report dated June 6, 1995, Dr. Joseph P. D'Angelo, a Board-certified orthopedic surgeon and appellant's treating physician, opined that appellant was totally disabled until she could begin wearing the orthotic devices that had been ordered. In a work capacity evaluation dated August 1, 1995, Dr. D'Angelo opined that appellant could work four hours a day and appellant should limit her standing, kneeling and squatting and not lift more than 20 pounds. On a form dated January 2, 1997, Dr. D'Angelo noted pain and swelling in appellant's right foot and diagnosed painful chronic neuroma at the foot and tarsal tunnel syndrome. He stated that appellant was totally disabled and was on restricted physical activity. In a work restriction form

dated March 13, 1997, Dr. D'Angelo reiterated appellant's working restrictions and stated that appellant could work two to three hours.

To resolve the conflict between Dr. D'Angelo's opinion that appellant was totally disabled due to the May 10, 1990 employment injury and Dr. Nelson's opinion that appellant was able to work, the Office referred appellant to Dr. Hubert S. Pearlman, a Board-certified orthopedic surgeon and an impartial medical specialist for another evaluation. In his report dated September 13, 1995, Dr. Pearlman reviewed appellant's history of injury and performed a physical examination. He stated that objectively, appellant did not have weakness in her foot or weakness of inversion although there was insensitivity along the medial scar of the right foot. Dr. Pearlman recommended that an electromyogram be performed to determine if appellant had any persistent impairment of nerve conduction. He also stated that appellant had an addiction to Vicodin and until that was corrected, it would not be reasonable for appellant to work in a nursing capacity. Dr. Pearlman opined that an orthotic device might be of some value in the right foot and ankle, which would help her work for a six-hour day. He further opined that "[t]here was a causal relationship, if there was a preexisting problem, which [he was] not aware of, certainly there was an aggravating factor in the accident of 1990 and the right foot problem." Dr. Pearlman stated that "most of appellant's current complaints" were subjective. He stated that an attempt should be made for appellant to return to work. Dr. Pearlman recommended no prolonged standing. By letter dated September 5, 1996, Dr. Pearlman stated that "considering the failure to find much in the way of objective findings," he believed appellant could work eight hours.

In an Office memorandum dated September 24, 1996, the Office noted that Dr. Pearlman's September 13, 1995 report, was over one year old and further, his opinion was not fully rationalized because he did not explain why appellant required restrictions if there were no objective findings. The Office, therefore, referred appellant to another impartial medical specialist, Dr. Sanford R. Wert, a Board-certified orthopedic surgeon.

In his report dated March 3, 1997, Dr. Wert reviewed appellant's history of injury, performed a physical examination and diagnosed right tarsal tunnel syndrome and Morton's neuroma of the right foot. He stated that despite appellant's subjective complaints, he found no objective findings on physical examination of any orthopedic-related disability. Dr. Wert stated that appellant's complaints were subjective and that, according to appellant, she was unable to stand for any length of time and therefore it was not likely that she would be returning to work as a nursing assistant. He stated that appellant could work full time in a sedentary position and would be capable of light-duty employment where intermittent standing of up to four hours a day was required. Dr. Wert further stated that the cause and relationship of a tarsal tunnel syndrome from a gurney running over the foot was questionable and surgery did not benefit appellant.

In a report dated April 15, 1997, Dr. D'Angelo noted that appellant's right foot pain persisted, that the soft-innersole shoes diminished her discomfort and that surgery was contemplated at the present time.

In a note dated April 25, 1997, Dr. Eric W. Kenworthy, a Board-certified internist, stated that appellant was being treated for asthma and peptic ulcer disease and that he had been treating her for those conditions since 1995.

By decision dated May 8, 1997, the Office terminated benefits, finding that appellant's injury-related disability ceased on May 25, 1997 based on Dr. Wert's medical opinion that appellant could return to work.

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits on May 25, 1997.

Once the Office has accepted a claim, it 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.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³ In the present case, to resolve the conflict between Dr. D'Angelo's opinion that appellant was totally disabled and Dr. Nelson's opinion that appellant was able to work, the Office referred appellant to Dr. Pearlman, an impartial medical specialist. Because, however, in his September 13, 1995 and September 5, 1996 reports, Dr. Pearlman did not explain why he placed restrictions on appellant if there were no objective findings, the Office found his report was not well rationalized and referred appellant to another impartial medical specialist, Dr. Wert. In his March 3, 1997 opinion, Dr. Wert also found no objective findings of an orthopedic disability. He diagnosed right tarsal tunnel syndrome and Morton's neuroma of the right foot and stated that appellant could work full time in a sedentary position and perform light duty with intermittent standing of up to four hours a day. He stated that it was questionable whether the stretcher running over appellant's foot caused her tarsal tunnel syndrome.

The Board finds that Dr. Wert's opinion is not well rationalized. Dr. Wert did not opine that appellant's accepted condition of tarsal tunnel syndrome resolved but in fact diagnosed that she still had that condition. Although he found no objective evidence of an orthopedic condition, Dr. Wert nonetheless prescribed a sedentary position and light-duty work with intermittent standing four hours a day. He did not fully explain why, if there were no objective findings, appellant still had tarsal tunnel syndrome and required restrictions nor why appellant's tarsal tunnel syndrome was no longer disabling. Further, since the Office accepted that appellant sustained tarsal tunnel syndrome due to the May 10, 1990 employment injury, Dr. Wert's opinion that it was questionable whether the injury caused that condition is inaccurate. Inasmuch as Dr. Wert's opinion is not well rationalized, his opinion does not support the Office's termination of appellant's compensation benefits.

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 42 ECAB 1027, 1032 (1994); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

The decision of the Office of Workers' Compensation Programs dated May 8, 1997 is hereby reversed.

Dated, Washington, D.C.
October 18, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member