

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE M. GIBSON and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

*Docket No. 99-389; Submitted on the Record;
Issued September 27, 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 terminated appellant's compensation benefits because she refused an offer of suitable employment.

In 1992 appellant, a mail carrier, filed a notice of occupational disease alleging that she suffered plantar fasciitis in her feet as a result of her federal employment. Appellant stopped working on June 22, 1992. The Office accepted the claim for bilateral plantar fasciitis and bilateral capsulitis of the feet. Appellant returned to limited duty on September 23, 1992. Appellant stopped working on March 23, 1993. On April 7, 1993 appellant filed a claim for a recurrence of disability. The Office subsequently awarded appellant compensation for total temporary disability on June 7, 1993. By decision dated December 15, 1993, the Office rejected appellant's claim because the medical evidence established that appellant was capable of performing a modified position which she refused. By decision dated March 4, 1994, the Office vacated the decision terminating appellant's compensation benefits.

In a letter dated September 17, 1996, the Office referred appellant to Dr. Carol Frey, a Board-certified orthopedic surgeon, for a second opinion examination. On October 17, 1996 Dr. Frey reviewed the history of the injury and the treatment received. She diagnosed bilateral plantar fasciitis, abnormal weight bearing on the lateral border of the foot and overuse on the lateral side of the leg and peroneal tendon area secondary to patellofemoral tracking problems.

On November 5, 1996 Dr. Cuthbert Pyne, appellant's treating physician and a general practitioner, completed a work restriction evaluation. He stated that appellant should limit standing, bending, kneeling, lifting and twisting. Dr. Pyne stated that appellant should not stand, lift or sit for over ten minutes. He stated that appellant should not work and that the disability was permanent. On November 14, 1996 Dr. Pyne stated that appellant was totally disabled from her usual work and stated that she had a reduced ability to walk, stand or run due to pain in her feet. Dr. Pyne indicated on December 15, 1996 that appellant's condition prevented her from

returning to work in any capacity due to an inability to sit or stand for prolonged periods. Dr. Pyne again found appellant totally disabled on February 11, 1997.

Pursuant to the Office's request, Dr. Frey clarified her opinion on March 18, 1997. Dr. Frey indicated that appellant could work eight hours per day of modified duty. In this regard, Dr. Frey stated that appellant could not walk or stand for greater than four hours total during the workday. She stated that appellant could not climb for more than 30 minutes total during the workday or climb more than two flights of stairs at a time. She indicated that appellant could not squat, crawl, kneel or use ladders. Dr. Frey indicated that appellant could lift up to 10 pounds during the day for continuous carrying or lifting and up to 20 pounds of intermittent lifting for no more than 30 minutes total during the day.

On April 15, 1997 Dr. Pyne diagnosed plantar fasciitis and ligamentous strain of both knees. He indicated that appellant had reached maximum improvement. He stated that appellant was precluded from walking with mailbags weighing 35 to 40 pounds or walking over two hours daily. Dr. Pyne further indicated that appellant was precluded from a clerical position due to feet swelling which occurred if she sat for over one half hour. On November 27, 1997 Dr. Pyne indicated that appellant's work restriction precluded her from accepting a clerical position due to swelling of her feet which occurred if she sat for over a half hour.

On December 8, 1997 the employing establishment offered appellant a limited-duty position based on Dr. Frey's work restrictions. The position description stated that appellant would work eight hours per day. It stated that appellant would not walk or stand for greater than four hours total during the day. It stated that appellant would not climb for more than 30 minutes total during the day and that he would not climb more than two flights of stairs at one time. It stated that appellant would not squat, crawl, kneel or use ladders. It stated that appellant would limit continuous carrying to 10 pounds and intermittent carrying to 20 pounds for no more than 30 minutes during the day.

In a letter dated December 8, 1997, the Office indicated that the limited-duty position was suitable to appellant's work capabilities. The Office allowed appellant 30 days to accept the position or provide an explanation for her refusal.

By decision dated January 8, 1998, the Office terminated appellant's compensation for wage loss and a schedule award because appellant refused suitable employment.

On February 19, 1998 appellant requested reconsideration.

By decision dated March 12, 1998, the Office denied modification of its previous decision. In an accompanying memorandum, the Office indicated that Dr. Frey's well-rationalized opinion providing work restrictions identical to those of the limited-duty position carried the weight of the medical evidence.

On April 10, 1998 Dr. Pyne stated that appellant's bilateral plantar fasciitis caused arthritis in appellant's ankle and knees. He stated that appellant could not perform the modified duties offered due to chronic pain in both legs, swelling in both feet, constant pain and numbness in the feet. Dr. Pyne further stated that appellant's legs must be elevated and that long periods of

sitting aggravated her condition. He indicated that he disagreed that appellant could perform modified duties for eight hours each day as appellant was taking medication and being treated for arthritis.

On April 24, 1998 appellant requested reconsideration.

On May 11, 1998 the Office found that a conflict existed in the medical evidence between Dr. Pyne, the treating physician and Dr. Frey, the second opinion examiner. The Office, therefore, referred appellant to Dr. Alvin Turken, a Board-certified orthopedic surgeon, for a referee examination. Dr. Turken was advised that he could not perform the referee examination if he had any previous connection with any physician associated with the case.

On August 13, 1998 appellant objected to the selection of Dr. Turken as the referee examiner on the basis that Dr. Frey treated Dr. Turken's wife and because Dr. Turken lost the findings of his initial examination.

On July 15, 1998 Dr. Turken provided his referee opinion. Dr. Turken noted that he initially examined appellant on June 2, 1998 but that his notes from that examination were lost. Consequently, he reexamined appellant on July 7, 1998. Dr. Turken reviewed appellant's work history and the history of her present illness. He conducted a complete examination and diagnosed bilateral plantar fasciitis; chondromalacia patellofemoral, bilateral; and possible other internal derangement of the knee. He found no specific evidence of arthritis of the feet, ankles or knees. Dr. Turken indicated that appellant was capable of performing the limited-duty position offered as indicated by Dr. Frey. He stated that he disagreed with Dr. Pyne's conclusion that appellant was extensively disabled from the plantar fasciitis or any possible associated conditions. He stated that, based on many years of practice, plantar fasciitis did not produce other pathologies.

Dr. Turken subsequently completed an Office questionnaire indicating that neither he nor his wife had any previous relationship with Dr. Frey.

By decision dated September 17, 1998, the Office reviewed the merits of the case and denied modification of its prior decision. In an accompanying memorandum, the Office indicated that it relied on the well-rationalized opinion of Dr. Turken, the impartial referee examiner, in reaching its decision.

The Board finds that the Office properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that she refused suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ This burden of proof is applicable if the Office terminates compensation pursuant to 5 U.S.C. § 8106(c) for refusal to accept suitable work.

¹ *Frederick Justiniano*, 45 ECAB 491 (1994).

Under section 8106(c)(2) of the Federal Employees' Compensation Act,² the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.³ Section 10.124(c) of the Code of Federal Regulations⁴ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁵ To justify termination of compensation, the Office must show that the work offered was suitable⁶ and must inform appellant of the consequences of refusal to accept such employment.⁷

In this case, the Office hearing representative properly determined that a conflict existed between the opinion of Dr. Pyne, appellant's treating physician and a general practitioner and the opinion of Dr. Frey, a Board-certified orthopedic surgeon, regarding whether appellant could perform the limited-duty job offered by the employing establishment on December 8, 1997. Dr. Pyne opined that appellant could not accept any clerical position due to the swelling in her feet which occurred if she sat for more than a half hour. He indicated that this disability stemmed from arthritis in her ankles and knees which was secondary to her plantar fasciitis. In contrast, Dr. Frey opined that appellant could perform the limited-duty position which included working eight hours per day; no walking or standing for greater than 4 hours per day; no climbing for more than 30 minutes total during the day or climbing more than two flights of stairs at one time; no squatting, crawling, kneeling or using ladders; and limited continuous carrying to 10 pounds and intermittent carrying to 20 pounds for no more than 30 minutes per day. Due to the conflict, the Office referred appellant to Dr. Turken, a Board-certified orthopedic surgeon, for an impartial medical examination pursuant to section 8123 of the Act.⁸

Dr. Turken reviewed appellant's history, her course of treatment, her objective tests and he conducted a physical examination. He agreed with Dr. Frey's assessment of appellant's work restrictions and, therefore, found appellant capable of performing the modified position duties. Dr. Turken based his opinion on a complete review of the medical records and on a thorough examination. He explained that Dr. Pyne's conclusion that appellant could not perform the duties depended on his finding that appellant had an arthritic condition related to her accepted condition of plantar fasciitis. Dr. Turken indicated that years of practice informed him that

² 5 U.S.C. § 8106(2).

³ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁴ 20 C.F.R. § 10.124(c).

⁵ *Camillo R. DeArcangelis*, *supra* note 2; *see* 20 C.F.R. § 10.124(e).

⁶ *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

⁷ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.11(c) (December 1991).

⁸ 5 U.S.C. § 8128 *et seq.*

plantar fasciitis did not produce other pathologies. He therefore rationally discounted Dr. Pyne's opinion. Dr. Turken's well-rationalized and factually supported opinion is entitled to special weight based on his status as the impartial specialist.⁹ Moreover, contrary to appellant's assertion, Dr. Turken denied that he or his wife had any previous relationship with Dr. Frey. Accordingly, the Office properly terminated appellant's compensation benefits upon her refusal to accept suitable employment after informing her of the consequences of her refusal of that employment.

The decisions of the Office of Workers' Compensation Programs dated September 17, March 12 and January 8, 1998 are affirmed.

Dated, Washington, D.C.
September 27, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁹ See *Jack R. Smith*, 41 ECAB 691 (1990).