

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLADYS M. MENA and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HEALTH CARE SYSTEM, Palo Alto, CA

*Docket No. 99-738; Submitted on the Record;
Issued June 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof in establishing that she had intermittent recurrences of disability due to her employment-related condition.

On August 16, 1996 appellant, then a 65-year-old mail clerk, filed a claim for an injury to her right foot. In an accompanying statement appellant indicated that, prior to her employment with the employing establishment in 1990, she had undergone two operations on her right foot which included implanting a plastic pin in the second metatarsal. Appellant indicated that she was initially employed as a purchasing agent but, after six years, her position was terminated and she was transferred to a position as a mail clerk which required prolonged standing. She stated that on May 8, 1996 she had pain in her right foot. X-rays showed that the pin in her right foot had broken. Appellant underwent surgery on July 23, 1996 for removal of the broken pin. The Office of Workers' Compensation Programs accepted appellant's claim for aggravation of a preexisting foot condition and the subsequent surgery to repair the broken implant.

Appellant underwent further surgery on March 27, 1998 due to the nonunion of the implant. The surgery consisted of an open reduction and internal fixation of the right third metatarsal nonunion with a bone graft, first metatarsophalangeal arthrodesis, and treatment of a claw toe in the second right toe with proximal interphalangeal joint arthroplasty. Appellant used sick and annual leave for the period March 27 through May 22, 1998 and was on leave without pay from May 25 through June 5, 1998.¹ She returned to work on June 26, 1998. The Office authorized leave buy back for the leave used by appellant and paid temporary total disability compensation through June 5, 1998 for the period that appellant was on leave without pay.

In an August 6, 1998 report, Dr. Rabul Sanghvi, a Board-certified orthopedic surgeon, indicated that appellant had a healed arthrodesis of the right great toe and noted that the nonunion of the third metatarsal had healed. He noted appellant had sensitivity on the bottom of

¹ Appellant used annual leave on May 26, 1998.

her foot due to the need to adjust to the new configuration of her foot. Dr. Sanghvi reported that she also had relatively little fat pad beneath the foot and, as a result, had residual metatarsalgia. In a September 2, 1998 report, Dr. Sanghvi stated that appellant could work only four hours a day. He indicated that appellant could walk or stand 10 to 15 minutes at a time.

In a September 30, 1998 CA-7 form, appellant sought compensation for leave without pay used on July 10, July 16, July 31, August 21 and September 2, 1998. In an October 9, 1998 letter, the Office noted that the August 6, 1998 report made no mention of periods of temporary total disability for which appellant was seeking retroactively, as she was claiming wage loss for eight hours on July 10, 1998, one and a quarter hours on July 16, 1998, two hours on July 31, 1998 and eight hours on August 21, 1998. The Office noted that Dr. Sanghvi had indicated in an October 8, 1998 telephone message that appellant did not have doctor's visits on the days in question but would support appellant's claim for the intermittent absences from work on those days due to her right foot condition. The Office requested from Dr. Sanghvi a narrative report with medical rationale to support the hours of intermittent disability. The Office indicated that the report should clearly identify the disability factors, supported by objective factors which caused the intermittent disability on the days in question.

In an October 15, 1996 report, Dr. Sanghvi stated that, in regard to the dates in question, while he could not independently verify appellant was having unusual pain on those days since he did not see appellant on those days, he felt it was justifiable that appellant's foot was the source of pain that might have limited her ability to work on those days. He indicated that this was evidenced by appellant's continued pain and limited ability to ambulate in the September 1998 examination which occurred after the dates in question. Dr. Sanghvi commented that appellant's symptoms were likely related to increased activity and use and therefore intermittent disability would not be surprising. He related that, when he examined appellant in September, she still had a limp, was very tender in the foot to direct palpation and had mild swelling. Dr. Sanghvi concluded that all these findings supported appellant's statements that she was unable to work some of the time in the preceding two months.

In a November 13, 1998 decision, the Office denied appellant's claim for recurrences of disability on July 10, July 16, July 31 and August 21, 1998.

The Board finds that appellant has not met her burden of proof in establishing that she was disabled on the dates in question due to her accepted employment-related condition.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which she seeks compensation was causally related to her employment injury. As part of such burden of proof, rationalized medical evidence showing causal relationship must be submitted.²

The only medical report supporting appellant's claim for compensation of the dates is Dr. Sanghvi's October 15, 1998 report. He acknowledged that he did not examine appellant on the dates in question and could not independently verify that she could not work on those dates

² *Dominic M. DeScala*, 37 ECAB 369 (1986).

because of her right foot condition. He concluded that appellant was disabled on the dates she claimed because his findings in his September 2, 1998 report showed she had right foot symptoms related to the employment injury. However, this report is speculative and based on the unsupported supposition that appellant's condition on September 2, 1998 would have been the same on the dates for which she seeks compensation. Dr. Sanghvi's report therefore is of diminished probative value and is insufficient to establish that appellant was disabled on July 10, July 16, July 31 and August 21, 1998 due to her accepted employment injury.

The decision of the Office of Workers' Compensation Programs, dated November 13, 1998, is hereby affirmed.

Dated, Washington, D.C.
June 5, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member