

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY IKERD and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, NORTH CASCADES NATIONAL PARK,
Stehekin, WA

*Docket No. 99-1536; Submitted on the Record;
Issued May 1, 2001*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective September 29, 1998 on the grounds that appellant no longer had any residuals of his September 19, 1991 employment injury.

The Board has duly reviewed the case record in this appeal and finds that the Office improperly terminated appellant's compensation benefits effective September 29, 1998 on the grounds that appellant no longer had any residuals of his September 19, 1991 employment injury.

On September 19, 1991 appellant, then a 49-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on that date he bruised his left shoulder and right foot, and fractured two toes when he was hit by a log while loading logs onto a loader. He stopped work on September 20, 1991. Appellant has not returned to work.

In a November 7, 1991 letter, the Office accepted appellant's claim for right numbers three and four metatarsal fracture and soft tissue injury to the right lower extremity. Subsequently, the Office expanded the acceptance of appellant's claim to include reflex sympathetic dystrophy.

By letter dated December 11, 1996, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Warren Adams, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Adams of the referral.

Dr. Adams submitted a January 7, 1997 medical report finding that appellant had no impairment of his right foot due to his September 19, 1991 employment injury.

In a notice of proposed termination of compensation dated August 12, 1998, the Office advised appellant that it proposed to terminate his compensation based on Dr. Adams' medical report. The Office also advised appellant to submit medical evidence supportive of his continued disability within 30 days.

By decision dated September 29, 1998, the Office terminated appellant's compensation effective that date on the grounds that Dr. Adams' medical report established that appellant was no longer disabled due to his September 19, 1991 employment injury.¹

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁴

In terminating appellant's benefits, the Office relied on the January 7, 1997 medical report of Dr. Adams. In this report, he provided a history of appellant's September 19, 1991 employment injury and medical treatment, and a review of medical records. Dr. Adams further provided his findings on physical and objective examination. He stated that probable arthritic changes were observed about the right foot at the great toe level, interphalangeal joint and the first metatarsophalangeal joint. He opined:

“[Appellant's] current disability is not the result of the injury on September 19, 1991. The original diagnosed injury was fracture of the right distal third and fourth metatarsal bones. There are no objective findings of pathology with respect to his right foot except for the incidental finding with respect to his right great toe. Incidental finding of his right great toe is not related to the

¹ In a February 9, 1999 letter, appellant requested reconsideration of the Office's September 29, 1998 decision. By decision dated February 26, 1999, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence, and thus it was insufficient to warrant modification of the prior decision. The Board finds that the February 26, 1999 decision of the Office is null and void. The Board and the Office cannot have jurisdiction over the same issue in the same case at the same time. 20 C.F.R. § 501.2(c); *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993). Appellant's application for review of the September 29, 1998 decision terminating his compensation was docketed by the Board on November 9, 1998. As noted above, appellant requested reconsideration of this decision on February 9, 1999. Inasmuch as the issue of whether the Office properly terminated appellant's benefits is the same in both requests, the Office had no jurisdiction to issue the February 26, 1999 decision denying merit review of appellant's request. That decision is, therefore, deemed null and void. *Cf. Douglas E. Billings*, 41 ECAB 880, 893 (1990) (finding that the Office had jurisdiction to issue a decision on a matter unrelated to the issue on appeal before the Board).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

incident of September 19, 1991. The etiology of his subjective complaints is not clear given the physical examination, bone scan and recent x-rays of his right foot. [Appellant], with respect to the injury of September 19, 1991, has reached maximum improvement. From an objective point of view, this probably occurred within a few months of the accepted injury. As there are no objective findings that correlate with his subjective complaints, [appellant] is capable of performing his date-of-injury position. No surgery for his right ankle is recommended. There is no objective pathology of his right ankle or subtalar joint. No specific treatment is recommended with respect to his subjective complaints. The [American Medical Association], *Guides to [the] Evaluation of Permanent Impairment*, [f]ourth [e]dition revised was used. He has no objective findings of impairment of his right foot due to the injury of September 19, 1991.

“[Appellant] relates left shoulder symptoms, however, his left shoulder has not been accepted as a result of the incident of September 19, 1991 as when the statement of accepted facts is reviewed.”

Dr. Adams did not note that appellant sustained compensable reflex sympathetic dystrophy of the right foot as a result of his September 19, 1991 employment injury. Dr. Adams noted that the original diagnosed injury was a fracture of the right distal third and fourth metatarsal bones. The Board has held that medical opinions based upon an incomplete history have little probative value. Dr. Adams’ conclusion regarding appellant’s right foot condition was based upon an inaccurate medical history. While Dr. Adams noted the condition originally accepted by the Office, he did not indicate an awareness of appellant’s accepted reflex sympathetic dystrophy of the right foot. Dr. Adams’ report is therefore not based upon a proper factual background and his opinion that appellant had no impairment of his right foot due to his September 19, 1991 employment injury is of diminished probative value.

Inasmuch as Dr. Adams’ opinion was not based upon appellant’s accepted medical history, it is of limited probative value and cannot constitute the weight of the medical opinion evidence. Therefore, the Office has not met its burden of proof.

The September 29, 1998 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
May 1, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member