

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY M. THOMPSON and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 01-1021; Submitted on the Record;
Issued April 3, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

Appellant, 39-year-old clerk, filed an occupational disease claim on January 19, 1996, alleging that a preexisting hallux valgus (bunion) condition in his right foot had been aggravated by factors of his employment.¹ The Office accepted his claim for aggravation of right metacarpal dislocation. Appellant returned to work on March 18, 1996 on limited duty, although he missed work intermittently due to his work-related condition. The Office paid compensation for appropriate periods.²

In order to determine whether appellant continued to suffer residuals from his accepted right foot condition, the Office referred appellant for a second opinion examination with Dr. Roy M. Lerman, Board-certified in physical medicine and rehabilitation, for July 7, 1998.

In a report dated July 7, 1998, Dr. Lerman stated:

"I do not feel [appellant] has any disability incurred as a result of the stated work-related injuries. Even with his current symptomatology, his functional capacity evaluation demonstrated a capability of working in a medium to heavy work level. Nevertheless, any restrictions on [appellant's] ability to work at this time would not be as a result of the work-related injury.

¹ Appellant was wrestling in his home with a friend on August 10, 1995 when he ruptured a preexisting bunion on his right large toe. He underwent bunion surgery on September 21, 1995 and returned to light duty on October 21, 1995. He required a second surgery on his right big toe on December 14, 1995.

² Appellant filed a recurrence claim on June 3, 1996. The claim was initially denied by Office decision dated August 21, 1996. Appellant requested an oral hearing on September 25, 1996, which was held on May 21, 1996. By decision dated July 23, 1997, an Office hearing representative reversed the previous Office decision and awarded compensation beginning May 15, 1996 based on a recurrence of disability.

“In summary, based on the history obtained from [appellant] and review of extensive medical records as well as [his] films, I do not feel there is any residual symptomatology related to a work injury of October 1995 or May 1996. I feel that any residual symptomatology is a result of the initial injury and/or preexisting condition.”

By decision dated November 20, 1998, the Office terminated appellant’s compensation, finding that Dr. Lerman’s opinion represented the weight of the medical evidence.

By letter dated December 6, 1998, appellant requested an oral hearing, which was held on May 19, 1999. In support of his request, appellant submitted a December 21, 1998 report from Dr. James McGuire, a podiatrist and a February 11, 1999 report from Dr. Stephen D. Weissman, a podiatrist. In his report, Dr. McGuire expressed his disagreement with Dr. Lerman’s opinion that appellant had no residual symptoms or restrictions stemming from his work-related right foot condition. He stated:

“My understanding of the situation is that the work-related injury occurred as a result of [appellant’s] returning to work six weeks after his nonwork-related bunionectomy. While working [at the employing establishment] under medical restriction, he then suffered a dislocation of his capital fragment which has produced significant malalignment of the first metatarsophalangeal joint of his foot and will undoubtedly produce osteoarthritic changes and disability in the future. The fact that this joint is now functioning in a malaligned position with only two-thirds of the articular surface functioning at best, would, in my opinion, lead to further joint destruction in the future, increases in pain and discomfort and limitation of ambulation. I do not see how anybody could feel that the disability that [appellant] now suffers could be unrelated to the injury that occurred while he was working under those restrictions.”

In his February 11, 1999 report, Dr. Weissman stated:

“Following my examination and my review of all the radiographs, I am of the opinion that [appellant] is suffering from a hallux limitus condition. He originally had a hallux valgus of his right foot. This allowed [appellant] to work and have no pain until his first injury. As a result of his injury at work and the need for a second surgery [appellant] developed a hallux limitus condition. This is related to a number of factors including the increase in scar tissue from a second surgical intervention on his joint and arthritic degeneration from the second surgery which necessitated internal fixation in the joint area. There was a brief period when he was able to work and had reduced symptomatology. This was during the period when [appellant] recovered from his second surgery and was developing the hallux limitus. Since it developed he has been unable to work. This is definitely a result of the work[-]related injury. Had [appellant] been able to follow his surgeon’s postoperative orders and return to work in a sedentary position while he was healing in a case he would not have developed this arthritic condition and would consequently be an active worker today. I state this to reasonable degree of medical certainty.”

By decision dated August 9, 1999, an Office hearing representative set aside the November 20, 1998 termination decision, finding that the reports of Drs. McGuire and Weissman had created a conflict in the medical evidence. The hearing representative remanded the case for referral to a referee medical examiner to resolve the conflict in medical evidence regarding whether appellant still had residual disability stemming from his accepted right foot condition.

On November 1, 1999 the Office scheduled appellant for an independent medical examination with Dr. Mario Arena, a Board-certified orthopedic surgeon.

In a report dated November 29, 1999, Dr. Arena stated:

“[Appellant] currently has significant degenerative joint disease changes at the first [metatarsophalangeal] joint and this condition does preclude him from pushing and pulling the 1,000[-]pound mail containers. I believe he is capable of performing the other duties of a mailhandler including lifting of 70[-]pound sacs and driving tractors and/or forklifts. [Appellant] is capable of standing and walking intermittently throughout the day. [His] inability to perform all of the normal duties of a mailhandler is unrelated to [his] return to work in October 1995.”

By decision dated June 12, 2000, the Office terminated appellant’s compensation. The Office found that the weight of the medical evidence, as represented by Dr. Arena’s impartial opinion, established that all residuals from his employment-related disability had ceased and that his low back condition was not causally related to the accepted right foot condition. The Office therefore found that all compensation and medical benefits should be terminated.

By letter dated June 20, 2000, appellant requested an oral hearing, which was held on November 27, 2000. In support of his request, appellant submitted a July 10, 2000 report from Dr. Edward L. Chairman, a podiatrist and appellant’s treating physician; a September 6, 2000 report from Dr. Kenneth D’Ortone, a podiatrist; and a December 18, 2000 report from Dr. Steven F. Boc, a podiatrist.

Dr. Chairman, who performed foot surgery on appellant in October and December 1995, reviewed his records and reiterated his previously stated opinion that the injuries appellant sustained in 1995 were causally related to the work activities in which he engaged upon his return from his initial October 1995 surgery and necessitated his December 1995 surgery.

In his September 6, 2000 opinion, Dr. D’Ortone stated that there was a concern regarding whether appellant’s hallux limitus condition was caused by him doing too much during his early return to work and whether this excessive activity caused damage to his first metatarsophalangeal joint. He stated:

“It is my opinion to a reasonable degree of medical certainty that damage caused by increased activity that was performed at work during that time caused excess swelling and increased shifting of the metatarsal and irritation within the joint thus accelerated some of the condition associated with his limitation of the first [metatarsophalangeal joint]. It should be noted, however, that the osteotomy site

had shifted somewhere between him returning back to work and during his early return back to work days. It is still my opinion that if [appellant] was doing excess activity that he was not supposed to do during his early return back to work, that is a contributing factor to his current condition in that added inflammation and irritation could have caused increased shifting of the metatarsal and increased inflammation thus slower healing and further damage to the joint itself.”

Dr. Boc stated, in his December 18, 2000 report, that appellant’s current conditions resulted directly from his employment. He advised that appellant’s work duties and requirements, including lifting, carrying and walking for periods of time, caused the capital dislocation and subsequently the degenerative changes of the first metatarsal phalangeal joint. Dr. Boc asserted that the resultant problems he now experiences including the pain and crepitus and the degenerative changes are due to the trauma caused postoperatively to what was at the time a healing osteotomy.

By decision dated February 14, 2001, an Office hearing representative affirmed the June 12, 2000 termination decision.

The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ 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.⁴

In the present case, the Office based its decision to terminate appellant’s compensation on the November 29, 1999 report of Dr. Arena, the independent medical examiner. In his impartial medical opinion, Dr. Arena indicated that, although appellant currently has significant degenerative joint disease changes at the first metatarsophalangeal joint of his right foot which prevent him from pushing and pulling 1,000-pound mail containers, he is capable of performing the other duties of a mailhandler, including lifting of 70-pound sacs and driving tractors and forklifts. He stated that appellant is capable of standing and walking intermittently throughout the day and concluded that his current inability to perform all of the normal duties of a mailhandler is unrelated to his return to work in October 1995. The Office relied on Dr. Arena’s opinion in its June 12, 2000 termination decision, finding that all residual disability stemming from his accepted right foot condition had ceased and that appellant currently suffered from no condition or disability causally related to his accepted right foot condition.

The Board holds that the Office properly found that Dr. Arena’s impartial opinion negating a causal relationship between appellant’s claimed current conditions and disability and

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

his accepted right foot condition and that he no longer had any residuals from his employment injuries was sufficiently probative, rationalized and based upon a proper factual background and that, therefore, the Office acted correctly in according Dr. Arena's opinion the special weight of an independent medical examiner.⁵ Accordingly, the Board finds that Dr. Arena's opinion constituted sufficient medical rationale to support the Office's June 12, 2000 decision terminating appellant's compensation. The Board therefore affirms the Office's June 12, 2000 Office decision terminating compensation.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant, who requested a hearing and submitted reports from Drs. Chairman, D'Ortone and Boc. These reports, however, did not contain countervailing, probative medical evidence that appellant continued to have residual disability from his accepted right foot condition. Drs. D'Ortone and Boc both stated that appellant developed a hallux limitus condition because he tried to do too much during his return to work from his initial October 1995 surgery, resulting in damage to his first metatarsophalangeal joint; and Dr. D'Ortone advised that this was a contributing factor to his current condition. Dr. Boc indicated that appellant's current conditions resulted directly from his employment, stating that lifting, carrying and walking for periods of time resulted in the capital dislocation and subsequently the degenerative changes of the first metatarsal phalangeal joint. However, these opinions, in addition to that of Dr. Chairman, appellant's treating physician and surgeon, were merely a restatement of one side of the conflict which was resolved by Dr. Arena. In addition, Dr. Chairman's July 10, 2000 report merely reiterated his previously stated opinion concerning appellant's diagnosis and disability. Thus, these reports did not satisfy his burden of proof to submit medical evidence sufficient to warrant modification of the Office's June 12, 2000 termination decision, which properly found that Dr. Arena's impartial opinion constituted the weight of the medical evidence. The additional reports appellant submitted are insufficient to overcome the special weight accorded to the impartial medical specialist report or to create a new conflict.⁶ Accordingly, the Board affirms the Office's February 14, 2001 decision, affirming the June 12, 2000 termination decision.

⁵ *Gary R. Seiber*, 46 ECAB 215 (1994).

⁶ *Virginia Davis-Banks*, 44 ECAB 389 (1993).

The decisions of the Office of Workers' Compensation Programs dated February 14, 2001 and June 12, 2000 are hereby affirmed.

Dated, Washington, DC
April 3, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member