U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN GREGORY and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

Docket No. 02-1320; Submitted on the Record;
Issued October 11, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's wage-loss benefits effective January 28, 2001.

On October 14, 1998 appellant, then a 48-year-old letter carrier, sustained a right ankle sprain when she slipped on a plastic covered flier in the performance of duty. Appellant did not stop work but was assigned to sedentary duty until December 16, 1998, when she returned to full duty. On May 8, 1999 appellant filed a claim for a recurrence of disability, for lost time from work beginning May 5, 1999. On her claim form, appellant indicated that she had sustained a second employment-related injury in December 1998 when she slipped on a wet floor and fell flat on her right knee and both wrists.

In support of her claim for a recurrence of disability, appellant submitted reports from Dr. Philip C. Pollen, a Board-certified physiatrist, who began treating appellant in May 1999. In treatment notes and form reports dating from May 1999, Dr. Pollen diagnosed chronic ankle sprain, tarsal tunnel syndrome, lumbar sprain, lumbar radiculopathy, possible internal derangement of the right knee and possible lumbar disc disease and indicated by check mark that these conditions were caused or aggravated by appellant's employment. He further indicated that appellant was temporarily totally disabled due to her employment-related conditions.

On June 24, 1999 the Office accepted appellant's original claim for a right ankle sprain and, on August 9, 1999, accepted appellant's claim for a recurrence of total disability due to her right ankle sprain. The Office informed appellant, however, that there was no record of her having filed a claim for any injuries occurring in December 1998. In addition, the Office contacted the employing establishment regarding appellant's alleged December 1998 employment injury and was informed that appellant neither filed a claim nor notified the injury compensation office regarding any December 1998 work injuries. On December 23, 1999 appellant was placed on the periodic rolls.

Appellant continued submitting reports from Dr. Pollen, dating from May through November 1999, who consistently diagnosed chronic right ankle sprain, tarsal tunnel syndrome and lumbar radiculopathy as demonstrated by electromyogram (EMG), a ganglion cyst of the right ankle, internal derangement of the right knee and possible lumbar disc disease and indicated by check mark that these conditions were caused or aggravated by appellant's October and December 1998, employment incidents. In explaining his conclusion, Dr. Pollen stated only that appellant had never had any problems with her ankle, wrists, knee or spine prior to the October and December 1998 accidents.

On July 1, 1999 at the request of the employing establishment, appellant underwent a fitness-for-duty examination by Dr. Michael Brooks, an orthopedic surgeon, who diagnosed right ankle sprain/strain and mild tarsal tunnel syndrome and stated that appellant was capable of performing full-time sedentary duty with restrictions.

On April 10, 2000 the Office referred appellant for a second opinion to Dr. Stanley Soren, a Board-certified orthopedic surgeon. The Office provided Dr. Soren with appellant's medical records, a statement of accepted facts and a list of questions to be addressed.

In a medical report dated May 8, 2000, Dr. Soren indicated that he reviewed the records provided to him, including an EMG showing tarsal tunnel syndrome and right L5-S1 radiculopathy and a magnetic resonance imaging (MRI) scan showing a mild disc bulge at L3-4 and L5-S1 with a tiny herniation and performed a physical examination of appellant. Dr. Soren noted that upon physical examination appellant's right ankle revealed mild anterolateral tenderness but no effusion or instability. The ankle lacked 5 degrees of dorsiflexion and plantar flexion, but pulses were strong and sensation, color and temperature were normal. Transmalleolar girths were also normal, as were subtalar motion, inversion and eversion. Dr. Soren diagnosed right ankle sprain, causally related to her October 14, 1998 injury and subsequent recurrence and stated that she had a total of four percent permanent disability of the right ankle. Regarding appellant's ability to return to work, Dr. Soren stated:

> "It is possible for her, under the present circumstances, to work in a full-time capacity in her usual situation as a letter carrier, if she uses the air cast for ankle on an intermittent basis. This is something that fits into the shoe and can be used. It is not an actual cast in the usual sense of the term cast such as a plaster cast or fiberglass cast. The claimant is able to work full time, eight hours a day as a letter carrier."

With respect to the need for further medical treatment, Dr. Soren noted that appellant had reached maximum medical improvement and that while a chronic mild low grade ankle sprain can exist indefinitely, no additional treatment was indicated for the ankle beyond intermittent use of the air cast as needed.

On November 17, 2000 the Office issued a notice of proposed termination of wage-loss compensation on the grounds that Dr. Soren's May 8, 2000 report established no continuing disability as a result of the October 14, 1998 employment injury. The Office further noted that while Dr. Pollen continued to indicate that appellant suffered from disabling residuals of her

employment injury he had not provided any explanation or rational for his opinion. The Office allowed appellant 30 days in which to respond to this notice.

In a letter dated December 14, 2000, Dr. Pollen reiterated his initial examination based diagnoses of lumbar sprain with radiculopathy, possible lumbar disc disease, tarsal tunnel syndrome and medial ankle sprain and stated that MRI scan and EMG testing had confirmed the presence of the lumbar disc disease, S1 radiculopathy and tarsal tunnel syndrome. Dr. Pollen further stated that appellant was unable to walk for several blocks without experiencing an increase in swelling in the ankle and an exacerbation of her pain, along with a tingling sensation radiating into her foot. He added that as a result of her ankle injury, she tended to limp after walking for more than a short distance, which caused an increase in her back pain and lumbar radiculopathy. Dr. Pollen stated that appellant's right ankle sprain and tarsal tunnel syndrome were chronic and that appellant would need support on the ankle for any activity on uneven ground or increase in normal activities. He added that she should discontinue any prolonged walking activities and any carrying of heavy objects, which precluded her from performing her normal job as a letter carrier. Finally, Dr. Pollen commented on Dr. Soren's report stating:

> "It has recently come to my attention that she was evaluated by another physician for the employer and was told that she could continue to perform her usual duties provided she wear an air cast. This is felt to be a particularly poor idea since, as stated above, her ankle swells with any prolonged activity. Combine the welling of the ankle with compression from an air cast and the outcome will be increased pressure on the injured nerve. This is exactly the type of activity to be avoided. As such, it remains my opinion that she is unable to return to her usual occupation with or without the use of prosthetic device."

By decision dated February 7, 2001, the Office terminated appellant's wage-loss benefits effective January 28, 2001, on the grounds that the weight of the medical evidence, represented by Dr. Soren's report, established that appellant had no continuing disability resulting from her October 14, 1998 employment injury.

By letter dated March 20, 2001, appellant requested reconsideration of the Office's decision. She asserted that her ankle condition continued to worsen, causing her to fall on several occasions, that the employing establishment's procedures prohibited appellant from wearing any type of cast while working and that she had undergone additional fitness-for-duty examinations at the request of the employing establishment and been found unfit to return to work. In support of her request, appellant submitted additional medical reports[1] from Dr. Pollen, including a May 1, 2001 report, in which the physician reiterated his disagreement with Dr. Soren's recommendations, stating:

> "In reference to her lower extremity, [appellant] suffers from chronic ankle ligament sprain with underlying tarsal tunnel syndrome. As you are probably aware, tarsal tunnel syndrome is a compression of the nerve as it passes across the ankle somewhat analogous to carpal tunnel syndrome in the hand. Since

[1] Appellant also submitted reports from Dr. Pollen dated March 9 and August 9, 2001, in which he reiterated his prior conclusions.

repetitive use is contraindicated in carpal tunnel syndrome, so is repetitive use of the ankle contraindicated in tarsal tunnel syndrome. In fact Dr. Soren is recommending she return to repetitive use of the ankle and feels that putting a splint on it to prevent lateral instability will "fix" the problem. An air cast is a device which consists of a hard, plastic shell with a balloon-like liner which is inflated with air. The outer plastic shell prevents the ankle from twisting and giving out in a medial/lateral direction without prohibiting any motion in the flexion and dorsiflexion motions. Since there is a balloon apparatus within the air cast which is inflated, this inflation causes increased pressure on the tarsal tunnel thus further compressing the nerve. Certainly in carpal tunnel syndrome one does not apply more pressure to the nerve and recommend that the patient move the hand up and down repeatedly against resistance.

"I feel that a return to work guarantees a worsening of the condition and may necessitate a decompressive surgery on the ankle. Even with surgery, this injury is recalcitrant and heals poorly due to the amount of stress placed on the joint and the need to ambulate.

"Be that as it may disregarding the ankle completely, appellant suffers from other conditions as well. She was referred for MRI scan, which revealed multiple bulging discs with superimposed herniations. EMG testing has revealed radiculopathy.

"Certainly either the ankle or the back problem alone is sufficient to warrant continued, uninterrupted disability and together they represent a compound condition, in which one makes the other worse. Certainly, alternate mechanics of gait causes undue stress on the back and vice versa. Multilevel herniated discs with radiculopathy is generally a progressive condition even without further stressing of the spine. To ask this patient to carry heavy loads for varying distances on an inured ankle is both destructive and unsafe."

By letter dated January 30, 2002, the Office asked the employing establishment to clarify its policy regarding the wearing of casts, to submit any information it had pertaining to appellant's alleged December 1998 employment injury and to submit any fitness-for-duty reports which had been obtained. In a response dated February 19, 2002, the employing establishment stated that there was no case file, injury log or accident report for December 1998, as well as no known regulation or procedure that prohibits an employee from wearing an air cast, or any cast, while delivering mail. In addition, the employing establishment submitted the report of an August 21, 2001 fitness-for-duty examination performed by Dr. John de Jong, a Board-certified orthopedic surgeon. Dr. de Jong noted that the history of appellant's injury on October 14, 1998, reviewed the medical evidence of record and performed a complete physical examination. He diagnosed strain/sprain of lateral ligaments of right ankle, due to a twisting mishap at work on October 15, 1998, neck and low back pain syndrome since May 1999, not clearly related to the mishap of October 14, 1998 and MRI scan evidence of multilevel degenerative changes of the cervical as well as lumbar spine, preexisting and not related to the accident of October 14, 1998.

Dr. de Jong further noted that there was no clinical evidence of tarsal tunnel syndrome at the time of his examination. Dr. de Jong further stated:

> "As to her mild swelling at the lateral aspect of her right ankle with sensitivity at palpation over the lateral ankle ligaments and over the peroneal tendons posterior to this area, in my opinion, a stress test would be of value to determine any residual laxity of the ankle ligaments, which would explain the previous episodes of her losing her balance, which she had told us had occurred on three occasions since April of this year.
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> "To address the issues raised in your request for this evaluation, dated [July 5, 2001], I can state that if the stress studies of her right ankle would prove to be negative, that there is no need for further treatment within my discipline, that of orthopedics, she then would be able to return to work and in my opinion without restrictions. If, however, her lateral ankle ligament proved to be unstable, this would indicate that they were partially, if not completely torn, which would be a permanent condition unless corrected with reconstructive surgery. Following that procedure, if done well, I would expect a full recovery and she be able to return to work."

In a decision dated March 21, 2002, the hearing representative affirmed the February 7, 2001 decision, on the grounds that appellant had no continuing work-related disability on or after January 28, 2001.[2]

By letter dated April 25, 2002, appellant requested an "appeal" to the Branch of Hearings and Review. In a decision dated June 6, 2002, the Office denied appellant's request for a hearing as untimely filed. The Office also noted that appellant was not entitled to a hearing because the issue in the case could be equally well addressed through the reconsideration process.

The Board finds that the Office did not meet its burden of proof to terminate benefits effective January 28, 2001.

Once the Office accepts a claim, it has the burden of proof 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]

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[2] The Office further noted that due to a procedural error resulting in the delay of appellant's receipt of the February 7, 2001 decision, that decision was being reissued with an effective dated of March 21, 2002, thus allowing appellant the full appeal rights of reconsideration, hearing and appeal.

[3] *Ronald M. Jones*, 48 ECAB 600 (1997); *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Beverly J. Duffey*, 48 ECAB 569 (1997); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

In this case, the Office accepted that appellant sustained a right ankle sprain on October 14, 1998, with a subsequent recurrence of disability and placed her on the compensation rolls. The Office terminated appellant's compensation effective January 28, 2001, based on Dr. Soren's examination and report. The Board finds that there is a conflict in medical opinion between Dr. Soren, the Office referral physician and Dr. Pollen, appellant's treating physician, both of whom are Board-certified specialists in their respective fields.

Dr. Soren opined that appellant could return to her regular work as a letter carrier if she used an air cast on an intermittent basis. While Dr. Soren noted that several physicians had diagnosed concurrent tarsal tunnel syndrome, he did not offer an opinion as to whether he felt appellant suffered from this condition. By contrast, Dr. Pollen stated that appellant could not wear an air cast as it would further compress appellant's already damaged nerve and that her limping gait would aggravate her lumbar condition. The Board acknowledges that Dr. Pollen has provided no rationalized medical opinion explaining why he feels the additional conditions diagnosed by him, including tarsal tunnel and lumbar radiculopathy, are causally related to appellant's October 14, 1998 employment injury and further acknowledges that the Office has not accepted any additional conditions beyond right ankle sprain. However, the fact that the Office has not accepted appellant's additional conditions as employment related is not a bar to entitlement, as the Board has held that when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[5]

Section 8123 of the Federal Employees' Compensation Act[6] provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.[7] The Board finds that because the Office relied on Dr. Soren's opinion to terminate appellant's compensation without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating wage-loss compensation on the grounds that disability had ceased.[8]

[5] *Mary A. Moultry*, 48 ECAB 566 (1997). However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. *Id.*

[6] 5 U.S.C. § 8123(a).

[7] *Shirley L. Steib*, 46 ECAB 39 (1994).

[8] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

The March 21, 2002 decisions of the Office of Workers' Compensation Programs are hereby reversed.[9]

Dated, Washington, DC
October 11, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[9] In light of the Board's disposition of this case the Board need not address the Office's June 6, 2002 decision denying appellant's request for an oral hearing.