

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH HUEBNER and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Empire, MI

*Docket No. 02-706; Submitted on the Record;
Issued March 14, 2003*

DECISION and ORDER

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

The issue is whether appellant had any continuing disability or residuals after June 27, 1993.

On September 4, 1987 appellant, then a 35-year-old park ranger, filed a notice of traumatic injury alleging that on August 1, 1987 he injured both feet while walking 12 miles on irregular ground in new work boots. The Office of Workers' Compensation Programs accepted that appellant engaged in excessive walking on August 1, 1987 while in the performance of duty. Appellant was treated by his podiatrist, who performed surgery and the claim was accepted for tendinitis, multiple deformities and dropped transverse arches for both feet.

In 1992 appellant was referred to Dr. George C. Hill, a Board-certified surgeon, for a second opinion examination, to determine whether he had any residuals remaining from the August 1, 1987 work injury. In a report dated November 11, 1992, Dr. Hill stated that appellant still had pain in both feet of a dull, aching nature. He examined appellant and discussed his medical history. Dr. Hill found that most of appellant's foot discomfort was related to his obesity and the stress on his feet of carrying around the extra weight. He opined that there was no causal relationship between appellant's current condition and his employment. He recommended that appellant lose weight and was able to resume regular activities without restrictions.

On May 3, 1993 the Office issued a notice of proposed termination of wage-loss compensation finding that the weight of the medical evidence indicated that the disability resulting from appellant's accepted injury had ceased. On June 7, 1993 the Office finalized the termination of appellant's compensation benefits effective June 27, 1993, finding the report of Dr. Hill to constitute the weight of medical opinion.

Appellant disagreed with the Office's decision and requested an oral hearing. He submitted reports from Dr. Daniel T. Lathrop and Dr. Matthew A. Houghton. By report dated May 18, 1993, Dr. Lathrop found that appellant's current symptoms were directly related to his

work injury on August 1, 1987. He stated that it was reasonable to assume that the great amount of walking appellant had to do in his job contributed to his severe foot condition. He also noted that appellant gained weight as a result of inactivity, due to his injury. By report dated May 24, 1993, Dr. Houghton stated that he disagreed with Dr. Hill's evaluation on November 11, 1992 reporting no significant abnormality in appellant's right lower extremity. He opined that appellant's current deformities were the result of the initial injury, the surgery and recovery, which resulted in the altered biomechanics of his ambulation.

By decision dated June 29, 1994, the Office hearing representative affirmed the 1993 termination, but found that the medical reports from Drs. Houghton and Lathrop created a conflict in medical opinion with Dr. Hill.

On remand appellant was referred for an impartial medical examination. Dr. William E. Siebert, a Board-certified orthopedic surgeon, opined on October 26, 1994 that the loss and deformity of appellant's transverse arch was congenital and/or developmental in origin and was aggravated by prolonged walking without adequate foot support. Dr. Siebert opined that prolonged walking was a precipitating factor in the onset of appellant's symptomatology. The Office found that Dr. Siebert's report was inadequate since he did not provide a medical basis for his opinion or address whether the aggravation was temporary or permanent. By report dated March 28, 1996, the second impartial medical examiner, Dr. Thomas Allen, a Board-certified orthopedic surgeon, stated that it was very difficult to determine whether appellant's employment caused his current foot condition. Dr. Allen stated: "The disability would certainly be related to this patient's inability to walk for any significant distance due to foot pain. Whether or not this is work related is very difficult for me to determine at this point in time." The Office requested a clarification report from Dr. Allen but he stated that he did not know how many of appellant's symptoms were related to his employment. The Office found that Dr. Allen's reports were inadequate to resolve the conflict and thereafter referred appellant to Dr. Alfonse A. Villegas.

By report dated October 30, 1996, Dr. Villegas noted that he examined appellant and stated: "[Appellant] had problems with his feet before the incident in August 1987. The walking involved in his employment as a seasonal patrol ranger aggravated his preexisting condition, his excessive weight and physical deconditioning are also contributing factors." The Office requested clarification. By report dated December 13, 1996, Dr. Villegas stated: "If [appellant] is expected to walk a lot at work his problems will be permanent in nature. If he is allowed to mainly work at a position that is sedentary in nature his problems as related to his employment are temporary in nature."

By decision dated January 27, 1997, the Office found that the weight of the medical evidence demonstrated that appellant had no continuing residuals causally related to the August 1, 1987 employment injury. The Office found that the weight of the medical evidence rested with Dr. Villegas, the impartial medical examiner selected to resolve the conflict.

By letter dated January 5, 1998, appellant requested reconsideration. In support he submitted a November 14, 1997 deposition of Dr. Houghton, reports from Dr. Houghton dated February 28, 1988 and March 23, 1996 and a report from Dr. Lathrop dated February 10, 1997. Dr. Houghton discussed appellant's history of foot conditions starting in 1987 and stated that his

condition was precipitated by inadequate footwear and long hikes. He stated that he was still of the opinion that appellant's present medical condition was a direct result of the sequence of events that precipitated from the injury on August 1, 1987. He also stated that appellant's foot problems were extensive and permanent. Dr. Houghton indicated that appellant's condition was caused by his hiking and by walking over rough terrain for long periods of time. He opined that appellant was going to have foot problems for the rest of his life. He mentioned again that appellant's disability for the August 1, 1987 injury had not ceased and would continue for at least 12 months. Dr. Lathrop also opined that appellant's present day problems were related to the work injury.

By decision dated February 20, 1998, the Office denied appellant's request for reconsideration, finding that the evidence submitted was repetitious and insufficient to warrant review.

Appellant appealed his decision to the Board. By decision dated January 13, 2000, the Board remanded the case to the Office for further merit review, finding that appellant submitted new evidence with his January 5, 1998 request for reconsideration.

By decision dated June 16, 2000, the Office found that the evidence submitted was insufficient to warrant modification of the January 27, 1997 decision.

Appellant, through counsel, requested reconsideration and submitted a September 20, 2000 deposition of Dr. Villegas, who stated that appellant's disability, as a result of his work-related injury, was a permanent condition.

By decision dated September 13, 2001, the Office found that the evidence submitted was insufficient to warrant modification of the January 27, 1997 decision.¹

The Board finds that this case is not in posture for decision.

Under the Federal Employees' Compensation Act,² once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.⁴ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁵ In order to prevail, appellant must establish by the weight of the reliable,

¹ The Office noted that it was affirming the June 16, 2000 decision.

² 5 U.S.C. §§ 8101-8193.

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁴ *Id.*

⁵ *Virginia Davis-Banks*, 44 ECAB 389 (1993).

probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.⁶

In this case, the Office terminated appellant's compensation benefits in 1993, based on the November 11, 1992 report from Dr. Hill. He opined that the continuing pain in appellant's feet was related to his obesity and the stress on his feet from carrying extra weight. He found there was no causal relationship between appellant's current condition and his employment. The Office appropriately found his report to constitute the weight of medical opinion. After the Office terminated appellant's benefits effective June 27, 1993, the burden shifted to appellant to show that he still had residuals related to the accepted employment injury. Appellant submitted medical reports from Drs. Lathrop and Houghton. Both physicians opined that appellant's current condition was related to the August 1, 1987 injury. Dr. Lathrop noted that appellant's condition was not due to his weight, but that he gained weight as a result of his inactivity. The Office hearing representative found a conflict in medical opinion between Dr. Hill and Drs. Lathrop and Houghton. The Office referred appellant to an impartial medical specialist to resolve the conflict.

It is a well-settled rule that, in situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷

The Office first referred appellant to Dr. Siebert, but found that Dr. Siebert's report was inadequate to resolve the conflict since he did not provide a medical basis for his opinion or comment on whether the aggravation of appellant's foot condition was temporary or permanent in nature. Dr. Allen, the second impartial medical specialist, stated that he could not positively determine whether appellant's current condition was work related. The Office also found Dr. Allen's reports to be inadequate since he could not determine the nature or cause of appellant's condition.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.⁸ Unless this procedure is carried out by the Office, the intent of

⁶ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁷ *Jack R. Smith*, 41 ECAB 691, 701 (1990).

⁸ *Nathan L. Harrell*, 41 ECAB 402 (1990).

section 8123(a) of the Act⁹ will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁰

The Board finds that the reports from Dr. Villegas are insufficient to resolve the conflict in medical opinion in this case.

In this case, the Office referred appellant to Dr. Villegas to resolve the conflict in medical opinion to determine whether appellant still had residuals causally related to the August 1, 1987 employment injury. Dr. Villegas stated, in his October 30, 1996 report, that appellant had problems with his feet before the incident in 1987, but that the walking involved with his employment, as well as his weight, aggravated his preexisting condition. The Office requested a clarification report from Dr. Villegas, finding his first report to be vague and not fully rationalized. He responded, regarding the permanency of appellant's condition, stating that, if appellant expected to walk a lot, his problems would be permanent in nature, but if he were placed in a sedentary position, his condition would be temporary in nature. The Office also received a September 20, 2000 deposition from Dr. Villegas. In his deposition, Dr. Villegas stated that appellant's conditions of transverse arch and deformities of the toes were permanent conditions. He agreed that appellant had a foot condition that preexisted the August 1, 1997 injury and stated that the walking involved in appellant's employment aggravated the condition. He concluded that the aggravation to the preexisting congenital condition was permanent.

The Board finds that the reports from Dr. Villegas are not sufficient to resolve the conflict in medical opinion between Dr. Hill and Drs. Houghton and Lathrop. Dr. Villegas' opinion is vague and suggests that appellant has continuing employment-related residuals due to his accepted foot condition. This evidence is insufficient to resolve the conflict of medical opinion.

On remand, the Office should prepare a new statement of accepted facts which should inquire whether appellant's foot condition was caused or aggravated by his federal employment; if aggravated, was the aggravation temporary or permanent in nature; if temporary in nature, when did it cease, and if permanent, advise recommendations concerning appellant's capacity for employment (Form OWCP-5) and further treatment modalities. Thereafter, appellant should be referred to a new impartial specialist to address the issues in this case.

⁹ 5 U.S.C. § 8123(a) provides the following: "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

¹⁰ *Harold Travis*, 30 ECAB 1071 (1979).

The decision of the Office of Workers' Compensation Programs dated September 13, 2001 is hereby set aside and the case is remanded for such further development as the Office deems necessary, to be followed by a *de novo* decision on the issue of appellant's continuing disability.

Dated, Washington, DC
March 14, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member