U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARISSA KREAGER and U.S. POSTAL SERVICE,
POST OFFICE, Fairport, NY

Docket No. 02-1337; Submitted on the Record;
Issued March 17, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant's February 3, 2000 fractured heel spur was a consequence of her accepted employment-related conditions; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On June 5, 1999 appellant, then a 45-year-old letter carrier, filed a claim for occupational disease alleging that she developed plantar fasciitis and heel spurs in the performance of duty. She did not lose time from work. On September 13, 1999 the Office accepted appellant's claim for aggravation of bilateral plantar fasciitis and paid all appropriate compensation benefits.

On May 2, 2000 appellant filed a claim for a recurrence of disability alleging that, on February 3, 2000, while on vacation, she fractured her right heel spur when she jumped into a swimming pool, approximately four to five feet deep and struck her right heel on the bottom of the pool. She contended that the employment-related aggravation of her plantar fasciitis had caused her heel spurs to develop and that without the heel spurs, she could not have sustained a heel spur fracture.

By letter dated May 17, 2000, the Office advised appellant that her claim was being developed as one for a new injury, as she had cited to intervening factors in the development of her fractured heel spur. In a decision dated August 4, 2000, the Office denied appellant's claim for a fractured heel spur on the grounds that it did not arise in the performance of duty, but had resulted from the intervening nonemployment-related act of jumping into a swimming pool.

On October 26, 2000 appellant requested an oral hearing before an Office representative.

In a decision dated September 12, 2001, an Office hearing representative found that, while the evidence of record did support the additional acceptance of bilateral heel spurs as a direct consequence of appellant's employment-related aggravation of plantar fasciitis, appellant

had not shown that her February 3, 2000 fractured right heel spur was a direct consequence of her employment-related conditions.

By letter dated February 22, 2002, appellant requested reconsideration of the Office's prior decision and submitted additional evidence in support of her request. In a decision dated March 18, 2002, the Office denied appellant's request for reconsideration on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant review of the prior decision.

The Board finds that, while appellant's accepted aggravation of plantar fasciitis and heel spurs contributed to her February 3, 2000 fractured right heel spur as a medical matter, the legal chain of causation was broken by an independent intervening cause.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which she claims compensation is causally related to the accepted injury.[1] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[2]

The Office accepted that appellant developed aggravation of plantar fasciitis and bilateral heel spurs as a result of her federal employment. Appellant's claim for a recurrence of disability and the reports of her attending physician, Dr. Paul J. Merkel, attribute her disability between February 8 and 28, 2000 not to her plantar fasciitis or heel spurs, *per se*, but to a fractured right heel spur which occurred on February 3, 2000.

Appellant's claim for a recurrence of disability beginning February 8, 2000 constitutes a claim for a consequential injury. It is an accepted principle of workers' compensation law and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. For example, if a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury.[3] An employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related one has the burden of proof to establish that such was the fact.[4] As is noted by Larson in his treatise on workers' compensation, once the work-connected character of any injury has been established,

[1] *John E. Blount*, 30 ECAB 1374 (1974).

[2] *Frances B. Evans*, 32 ECAB 60 (1980).

[3] *Sandra Dixon-Mills*, 44 ECAB 882 (1993).

[4] *Margarette B. Rogler*, 43 ECAB 1034 (1992).

the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances. A different question is presented, of course, when the triggering activity is itself rash in light of the claimant's knowledge of his condition.[5]

Appellant has not established that her fractured right heel spur was a direct and natural result of her accepted employment-related conditions. In reports dated February 14 and June 22, 2000 and December 12, 2001, Dr. Merkel, appellant's treating podiatrist, diagnosed bilateral plantar fasciitis, causally related to appellant's strenuous weight bearing in her federal employment. Dr. Merkel explained that continued foot stress tends to flatten, lengthen and cause tears in the plantar fascia and that, when this occurs near the heel bone, heel spurs develop. He clarified that, while plantar fasciitis does not always cause heel spurs, heel spurs do not develop without plantar fasciitis. Dr. Merkel further stated that, while appellant fractured her right heel spur as a result of jumping into a swimming pool, the fracture could have occurred at any time, while delivering mail, while walking or while sitting. He compared appellant's fractured heel spur to the formation and breaking of a blister, noting that, if a blister is formed by excess walking, that could be a job injury and the subsequent breaking of that blister would not be another separate injury, but rather a natural consequence of the job injury itself. Dr. Merkel concluded that it was a clear medical certainty that without the work-related injury and the 10 miles per day that appellant walked delivering the mail, the broken right heel spur would not have occurred.

While there may be a direct medical connection between appellant's fractured right heel spur and her accepted employment-related conditions, however, and while, as Dr. Merkel maintains, swimming may be an appropriate therapeutic activity for appellant, the Board finds that given appellant's knowledge of her bilateral heel spurs, jumping into a four- to five-foot-deep swimming pool was not a reasonable activity.[6] As the triggering activity for the February 3, 2000 broken heel spur was itself rash in light of appellant's knowledge of her condition, the injury cannot be deemed to have arisen out of the employment, but rather was the result of an independent intervening cause attributable to appellant's own intentional conduct. For this reason, the Office's September 12, 2001 decision will be affirmed on the issue of consequential injury.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for further merit review on March 18, 2002.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously

[5] 1 A. Larson, *The Law of Workers' Compensation* § 13.11(a) (1993).

[6] *See Clement Jay After Buffalo*, 45 ECAB 707 (1994).

considered by the Office.[7] Section 10.608 provides that, when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[8]

In support of her February 22, 2002 request for reconsideration, appellant, through counsel, disagreed with the Office's conclusions and reasserted the opinion that appellant's fractured heel spur was a natural consequence of her accepted employment-related conditions. The Board notes, however, that counsel's arguments essentially repeat those already contained in the record, which were fully considered by the Office prior to the issuance of its September 12, 2001 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[9] Therefore, appellant's February 22, 2002 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also submitted new evidence in support of her request for reconsideration, including copies of a medical article discussing the cause of heel spurs and a February 12, 2002 report from Dr. Merkel, in which he repeated his earlier conclusions regarding the causal relationship between appellant's accepted plantar fasciitis and heel spurs, and appellant's February 3, 2000 right heel spur fracture. The Board has held, however, that medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee. Therefore, appellant's submission of an excerpt from a medical publication did not warrant reopening of her claim for review on the merits.[10] In addition, while Dr. Merkel's February 12, 2002 report is new to the record, in it the physician reiterates his prior conclusion that appellant's fractured right heel spur is a direct consequence of her accepted employment-related conditions and again puts forth his analogy that a fractured heel spur is like a blister which eventually breaks. As Dr. Merkel essentially repeats his earlier conclusions, which were fully considered by the Office prior to the

[7] 20 C.F.R. § 10.606(b).

[8] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[9] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[10] *Dominic E. Coppo*, 44 ECAB 484 (1993).

issuance of its September 12, 2001 decision, Dr. Merkel's February 12, 2002 report does not constitute a basis for reopening appellant's claim.[11]

As all of the evidence submitted by appellant was either duplicative, repetitious, or did not address the relevant issue, and as appellant failed to raise substantive legal questions, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated March 18, 2002 and September 12, 2001 are hereby affirmed.

Dated, Washington, DC
March 13, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *See James A. England, supra* note 9*; Kenneth R. Mroczkowski, supra* note 9; *Marta Z. DeGuzman, supra* note 9; *Katherine A. Williamson, supra* note 9.