United States Department of Labor
Employees' Compensation Appeals Board

TIMBERLE A. CERO, Appellant	)	
and	)	**Docket No. 03-1542**
	)	**Issued: December 6, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Carlisle, PA, Employer	)	

Appearances:
Benjamin Cero, Esq., for the appellant
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument November 10, 2004

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 6, 2003 appellant filed a timely appeal of a January 3, 2003 decision of the Office of Workers' Compensation Programs, by which the Office refused to modify its July 9, 2001 decision that the left ankle sprain and strain related to appellant's October 24, 1994 and March 30, 1995 employment injuries had resolved, and that her additional ankle conditions were not related to her employment injuries. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant's left ankle condition for which surgery was performed on June 17, 2002 is causally related to her October 24, 1994 or March 30, 1995 employment injuries.

FACTUAL HISTORY

On October 25, 1994 appellant, then a 42-year-old letter carrier, filed a claim for compensation for a traumatic injury sustained on October 24, 1994 when she twisted her left

ankle while delivering mail. The Office accepted that this injury resulted in a left ankle sprain, but by decision dated March 4, 1996, found that appellant had not established recurrences of disability on March 30 or November 6 or 13, 1994 related to the October 24, 1994 injury. This decision was affirmed by the Office on July 15, 1996, and by the Board on September 21, 1998.[1]

On March 12, 1996 appellant filed a claim for compensation for a traumatic injury to her left ankle sustained on March 30, 1995, contending that her ankle sprain had resulted in reflex sympathetic dystrophy (RSD). By decision dated September 26, 1996, the Office found that appellant had not established that she sustained an injury on March 30, 1995 as alleged. By decision dated September 21, 1998, the Board found that the medical evidence was insufficient to establish that appellant sustained an injury in the performance of duty on March 30, 1995.[2] The Office denied modification of its September 26, 1996 decision in a June 23, 1999 decision.

Appellant appealed to the Board, which, by decision dated August 24, 2000, found that a March 9, 1999 report from Dr. John C. Rodgers, appellant's attending orthopedic practitioner, supporting a causal relationship between RSD and appellant's employment injuries was not sufficient to meet appellant's burden of proof but was sufficient to require further development of the evidence by the Office. The Board directed the Office to obtain a rationalized medical opinion on whether appellant's RSD was causally related to her employment injuries.[3]

On remand the Office referred appellant, prior medical reports and a statement of accepted facts to Dr. Mehrullah Khan, a Board-certified neurologist, for a rationalized opinion on whether her RSD was related to her employment injuries. In a report dated February 8, 2001, Dr. Khan concluded that he could not confirm a diagnosis of RSD, since on examination he did not "see any discoloration of the skin or temperature differences between the two." Dr. Khan further concluded that appellant's diagnosis was "probably a sprained ankle that is not improving," that this diagnosis was "definitely in relationship to the injury she has suffered," and that her "disability at the present time is from her work-related injury."

The Office found that Dr. Khan's report created a conflict of medical opinion with the reports of Dr. Rodgers on the question of whether appellant had RSD. To resolve this conflict, the Office referred appellant, the case record and a statement of accepted facts to Dr. Carl Ellenberger, a Board-certified neurologist. In a June 10, 2001 report, Dr. Ellenberger noted that appellant complained that her pain continued unaffected by treatment, that no diagnostic procedures had demonstrated abnormalities in her left foot, and that she had no neurologic deficit on examination. Dr. Ellenberger stated that there were no signs to support a diagnosis of RSD, that he could not reach a diagnosis, and that, given the type of accident she had and the absence of any objective abnormality, he would have expected the pain to have spontaneously remitted a short time after the accident.

[1] Docket No. 97-110 (issued September 21, 1998).

[2] Docket No. 97-636 (issued September 21, 1998).

[3] Docket No. 99-2270 (issued August 24, 2000).

By decision dated July 9, 2001, the Office found that the weight of the medical evidence established that the left ankle sprain appellant sustained on October 24, 1994 and the left ankle strain she sustained on March 30, 1995 had resolved, and that she did not suffer from RSD as a result of either injury.

By letter dated July 5, 2002, appellant requested reconsideration and submitted additional medical evidence. In a May 29, 2002 report, Dr. Harold Schoenhaus, a podiatrist, noted a history of left ankle pain since an accident in March 1995 when she twisted her ankle in a dog hole. After describing findings on physical examination, Dr. Schoenhaus stated that a magnetic resonance imaging (MRI) scan done on December 11, 2001[4] showed an abnormality of the talar dome that was "probably suggestive of an osteochondritis dissecans." Dr. Schoenhaus recommended "diagnostic arthroscopy to determine if in fact the lesion within the talus can be causing the amount of pain she is experiencing." On June 17, 2002 Dr. Schoenhaus performed surgery, which he described as surgical arthroscopy of the left ankle with abrasion arthroplasty and osteochondral defect drilling. His pre- and postoperative diagnoses were adhesive capsulitis and chondromalacia of the left ankle joint, and osteochondral defect of the left talus.

In a June 26, 2002 progress note, Dr. Schoenhaus stated:

> "After reviewing the past medical records that have been provided by this patient it is certainly clear that she had sustained two injuries to her left ankle. One on October 24, 1994 and one on March 30, 1995. It is quite probable that either one of these injuries caused what was the severity of the problems of her ankle. It is most probable that the injury on March 30, 1995 certainly aggravated the injury from October 24, 1994. The intra operative findings are relatively clear. The disease within the joint was secondarily [sic] to trauma. The patient indicates that she had sustained no other trauma in the past and therefore would have concluded the problem in her left ankle was directly related to those two dates in question."

By decision dated January 3, 2003, the Office refused to modify its July 9, 2001 decision that the left ankle sprain and strain related to appellant's October 24, 1994 and March 30, 1995 employment injuries had resolved, and that her additional ankle conditions were not related to her employment injuries. The Office found: "Dr. Schoenhaus's opinion is speculative in nature and lacking in medical rationale. He doesn't explain any causal relationship between [appellant's] current condition and her work injuries from seven and eight years ago, which were accepted for only a left ankle sprain and strain."

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific

[4] The interpretation of the physician who performed the MRI scan was: "A small area of subchondral bone marrow edema is seen medially in the head of the talus on the left side and is suggestive of overlying cartilage loss."

[5] 5 U.S.C. §§ 8101-8193.

condition for which compensation is claimed are causally related to the employment injury.[6] Although compensation awards must be based on reliable, probative and substantial evidence, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational and sound; it is not necessary that the evidence be so conclusive as to establish causal connection beyond all possible doubt.[7] Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[8]

ANALYSIS

The facts in this case are straightforward and not in dispute. Appellant sustained a left ankle sprain on October 24, 1994 and a left ankle strain on March 30, 1995. There was a conflict of medical opinion on whether appellant's ankle injuries resulted in RSD, but this conflict was resolved by an impartial specialist, Dr. Ellenberger, a Board-certified neurologist, who concluded that appellant did not have RSD when he examined her on June 10, 2001.

Appellant then submitted medical evidence that she had a left ankle condition that was not previously diagnosed: an osteochondral defect of the talus seen on a December 11, 2001 MRI scan and confirmed during June 17, 2002 arthroscopic surgery by Dr. Schoenhaus, a podiatrist. The issue to be resolved in this case is whether this osteochondral defect is causally related to appellant's October 24, 1994 or March 30, 1995 employment injuries.

The only medical evidence addressing this relationship is a June 26, 2002 progress note from Dr. Schoenhaus, who stated that it was "quite probable that either one of these injuries caused what was the severity of the problems of her ankle." The Office found this opinion speculative, but its procedure manual states that the word "probably" is not speculative terminology, and that, if there is any doubt, an Office medical adviser should be consulted and clarification should be sought from the reporting physician if needed.[9]

The Office also found that Dr. Schoenhaus's June 26, 2002 report lacked medical rationale. The doctor's statement that the disease within the ankle joint was secondary to trauma is a conclusion rather than rationale, and the statement that appellant sustained no trauma in the past is essentially an opinion that the condition is causally related because appellant was

[6] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[7] *John P. Broll*, 42 ECAB 410 (1991); *Laura Garcia*, 32 ECAB 1336 (1981); *Sherwood R. McCartney*, 9 ECAB 129 (1956); *Elizabeth Maypother*, 5 ECAB 604 (1953).

[8] *Leon Thomas*, 52 ECAB 202 (2001).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.6d(3) (April 1993) states: "The word 'probably' can nearly always be taken as a redundancy, *e.g.*, 'probably related' means 'related' and 'probably preexisting' means 'preexisting.' If there is any doubt, the [d]istrict [m]edical [a]dviser should be consulted, and clarification should be sought from the report physician if needed."

asymptomatic before the injury. The Board has found such a statement "insufficient, without supporting rationale, to establish causal relation."[10]

On oral argument on appeal, appellant's attorney contended that the Board's holdings in *Shirloyn J. Holmes*[11] and *Lowell Spicer*[12] compel a finding that appellant's ankle condition for which surgery is causally related to her employment injuries, despite the lack of rationale in the medical evidence supporting causal relationship. In *Holmes*, the Board, after citing the principle set forth in the legal precedent section above and noting that the reports of appellant's physicians offered little rationale in support of causal relation, stated: "However, given the continual course of unsuccessful treatment for right shoulder problems, appellant's uncontradicted testimony that she had no shoulder problems before the May 21, 1984 injury, the absence of medical evidence negating causal relation, and the principles set forth above, the Board finds that the evidence, considered as a whole, is sufficient to lead to a sound, rational and logical conclusion that appellant's disability from June 7 to September 11, 1985 is causally related to her May 21, 1984 employment injury."[13] Similarly, in *Spicer*, the Board found that, although the evidence did not fit together so securely as to resolve the question of causal relation beyond all possible doubt, "the evidence, considered as a whole, leads to a sound, rational and logical conclusion" that appellant's disability beginning January 25, 1987 was causally related to his January 11, 1987 employment injury.

The circumstances that led the Board to find the claim compensable in *Holmes* are, for the most part, also present in appellant's case. As in *Holmes*, there was, in appellant's case, a continual course of unsuccessful treatment, no evidence of ankle problems before the employment injuries, an unrationalized medical opinion supporting causal relation, and no evidence negating causal relation. However, in *Holmes*, unlike appellant's case, the physician supporting causal relation of her condition one year after the employment injury made the "same initial diagnosis" as those reports on which the Office accepted an earlier recurrence of disability. In the present case, Dr. Schoenhaus made an entirely new diagnosis seven years after the most recent injury, a diagnosis not previously alluded to by another physician.

In *Spicer*, the medical evidence supporting causal relation, as in the present case, lacked rationale but the disability found to be related to the employment injury began two weeks after the injury. In appellant's case, there was a seven-year lapse between her latest injury and the MRI scan and arthroscopic surgery that revealed the osteochondral defect claimed to be related to the injury. The Board has addressed the relevance of a delay in diagnostic testing, stating in *Linda L. Mendenhall*[14] that it raises a question "as to whether that testing in fact documents the injury claimed by the employee." In *Mendenhall*, the Board found "that when the employee has established a *prima facie* case but the Office believes that a delay in diagnostic testing is so

[10] *Thomas D. Petrylak*, 39 ECAB 276, 281 (1987).

[11] 39 ECAB 938 (1988).

[12] 39 ECAB 1017 (1988).

[13] *Shirloyn J. Holmes*, 39 ECAB 938, 944 (1988).

[14] 41 ECAB 532, 539 (1990).

significant that it calls into question the validity of an affirmative opinion based at least in part on that testing, the Office should further develop the evidence to obtain the physician's explanation as to the reason he or she believes that such testing in fact documented the injury claimed by the employee…."[15] Ts is consistent with the direction in the Office's procedure manual: "If reports from the claimant's physician lack needed details and opinion, the [Office] should always write back to the doctor, clearly state what is needed, and request a supplemental report."[16]

CONCLUSION

The medical evidence that appellant submitted to support her claim that the osteochondral defect of her left ankle is causally related to her October 24, 1994 and March 30, 1995 employment injuries is not sufficient to meet her burden of proof to establish causal relation, but is sufficient to require the Office to further develop the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Issued: December 6, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *Id.* at 540.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims¸ *Developing and Evaluating Medical Evidence*, Chapter 2.810.5b (September 1993).