

metal gate of an all purpose container struck the top of her right foot.¹ She stated that her foot injury was sometimes aggravated by standing and walking. Appellant identified her condition as Morton's neuroma.

In a report dated October 16, 2002, Dr. Katherine L. Young, a family practitioner, reported that appellant had a history of chronic right foot pain dating back to a June 11, 2001 employment injury when a metal gate from a cart fell on her right foot. She also reported that appellant was disabled by the pain and was currently taking medication and was on continued restrictions due to the injury. Dr. Young described appellant's prior medical treatment and advised that conservative treatment was recommended along with continued sedentary work.

On November 20, 2002 Dr. Young advised that appellant continued to have foot problems and that she was currently pregnant and could not take some of her medications.² She indicated that appellant needed a sit-down job. In response, the employing establishment offered appellant a light-duty assignment effective November 27, 2002, which she accepted. The description of duties with physical requirements was identified as "Manual sort 044, VSM as needed, other duties within restrictions."

On April 4, 2003 the Office accepted appellant's claim for lesions of plantar nerve and injury to dorsal aspect of right foot.

Beginning April 17, 2003 appellant filed a number of claims for compensation (Form CA-7) for wage loss as of March 9, 2002. She claimed a total of 133.7 hours of intermittent wage loss between March 9, 2002 and April 4, 2003. Appellant also claimed temporary total disability beginning April 14, 2003. The employing establishment questioned whether appellant's disability beginning April 14, 2003 was due to her pregnancy.

In an April 15, 2003 report, Dr. Young advised that appellant had previously sustained an injury to her right foot and she was presently unable to bear weight for any length of time. Dr. Young also stated that appellant required a sit-down job and that she could not lift greater than 15 pounds. She noted that appellant had repeatedly missed work in March due to her condition and because of the recent increase of pain she would be off work from April 14 to June 14, 2003 to facilitate treatment and pain control.

In a May 5, 2003 attending physician's report (Form CA-20), Dr. Young indicated that appellant was totally disabled from April 14 to June 28, 2003. She further noted that appellant needed a sitting job with no standing or lifting. Dr. Young explained that "very little aggravates the foot now." On a May 13, 2003 prescription pad note Dr. Young stated that appellant was completely disabled and unable to work from April 14 to June 28, 2003.

On June 3, 2003 Dr. Young reported that when she saw appellant on April 14, 2003 she was experiencing increased pain to the point that she could not walk. She noted that appellant

¹ Appellant previously filed a traumatic injury claim for the June 11, 2001 injury, which was assigned claim number 09-2012085.

² Based on treatment records from her obstetrician, appellant was approximately eight weeks pregnant at the time.

was in pain at rest and that her foot reportedly felt as bad as when she initially injured it in June 2001. Dr. Young reported evidence of tenderness in the anterior cuboid cuneiform bones and noted that it was uncomfortable for appellant to walk. She further explained that appellant was unable to bear weight on that area and had to walk instead on her heel. Dr. Young stated that she elected to leave appellant off work at the time to try to help her get back into a pain clinic and return to a regimen of drugs that would provide more suitable pain control. She concluded that at the time appellant was physically unable to work.

In a decision dated June 24, 2003, the Office denied appellant's claim for wage-loss compensation finding that the evidence failed to demonstrate that appellant's disability during the period March 9, 2002 to May 30, 2003 was due to the accepted work injury.

Appellant requested an oral hearing, which was held on January 27, 2004. She submitted additional medical evidence which included pain clinic treatment records from July 16 and August 19, 2003 and a release from Dr. Young to return to work effective September 24, 2003. Dr. Young explained that appellant had been disabled since April 14, 2003 and that her absence was due to right foot complications, maternity leave and gastric bypass surgery. He noted that appellant continued to have problems with her right foot and that she needed a permanent sit down job with foot elevation. Dr. Young also indicated that appellant could not lift more than 15 pounds.

In a January 7, 2004 report, Dr. Young explained that appellant was off work from April 15 to June 19, 2003 because of continued problems with her right foot injury and chronic foot pain. The throbbing pain was such that appellant could not stand for any length of time. Dr. Young stated that appellant was unable to work completely and she would have been unable to work at any job during that time. Dr. Young also indicated that appellant was absent from June 20 to August 28, 2003 due to maternity leave and subsequent to that she was off August 29 to September 23, 2003 due to her surgery and postoperative recovery.

Dr. Young also provided a January 26, 2004 report in which she again described the history of appellant's June 11, 2001 employment injury, the treatment appellant received and the dates she was incapacitated from work due to her injury beginning March 9, 2002. She also commented that appellant became pregnant in October 2002 and gave birth on June 20, 2003. Dr. Young explained that but for appellant's foot injury she may have been able to work until approximately two weeks prior to the birth of her baby.

By decision dated April 22, 2004, the Office hearing representative affirmed the June 24, 2003 decision. The Office hearing representative found that, while Dr. Young presented an accurate history of appellant's history of injury and subsequent treatment, her various reports did not present an accurate factual presentation of appellant's work history. He noted Dr. Young's failure to mention that appellant was given a limited-duty sit down position in November 2002. He also noted that none of the medical reports explained why appellant was unable to perform her limited-duty assignment.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.⁵

ANALYSIS

The Board finds that the case is not in posture for decision. Appellant claimed intermittent wage loss between March 9, 2002 and April 4, 2003. She also claimed temporary total disability beginning April 14, 2003. To establish her claim for recurrence of disability appellant must show a change in the nature and extent of her employment-related condition or a change in the nature and extent of the light-duty job requirements.⁶ However, the record does not include a detailed description of appellant's modified duties effective November 27, 2002. The Office hearing representative characterized appellant's November 2002 assignment as a "sit down" position, however, it is not apparent from the record how he reached this conclusion. The November 27, 2002 job offer identified appellant's duties as "Manual sort 044, VSM as needed, other duties within restrictions." The job offer does not specifically identify the position as either sit down or involving little or no standing.

Dr. Young stated that appellant was unable to work beginning April 14, 2003 due to her June 11, 2001 employment injury. However, the probative value of her opinion was questioned because she did not exhibit an awareness of the type of work appellant had been performing. If appellant was performing a sit down job then it would be reasonable to question Dr. Young's opinion in the absence of an explanation as to why appellant's foot condition prevented her from

³ 20 C.F.R. § 10.5(x) (1999).

⁴ *Id.*

⁵ *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Barry C. Peterson*, *supra* note 5.

performing otherwise sedentary duties. But because the record does not specify the duties appellant performed on or after November 22, 2002, the significance of Dr. Young's oversight is unclear.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in developing the evidence to see that justice is done.⁷ The Office should obtain from the employing establishment a detailed description of the type of work made available to appellant dating back to March 9, 2002. This information should then be forwarded to appellant for her comments as to its accuracy. Thereafter, the Office should prepare a statement of accepted facts and forward this information to Dr. Young for an explanation as to why appellant was precluded from performing her duties beginning March 9, 2002.

The Office should also obtain a specific breakdown of the dates appellant was absent from work during the period March 9, 2002 to April 4, 2003. While appellant claimed a total of 133.7 hours of intermittent wage loss between March 9, 2002 and April 4, 2003, the record does not clearly indicate the specific dates on which appellant claims to have been disabled for work during this time frame. For example, appellant claimed 8 hours of leave without pay (LWOP) for the 14-day period of March 9 to 22, 2002. There is reference in the medical records that appellant was scheduled for a magnetic resonance imaging (MRI) scan on March 12, 2002, but there is no specific confirmation that appellant received an MRI scan or any other type of medical treatment during the period March 9 to 22, 2002. Appellant also claimed 7.7 hours of LWOP during the period September 21 to October 4, 2002. It is unclear whether the 7.7 hours claimed was for one particular day or if it was spread over a number of days during the noted time frame. There is no specific medical evidence indicating that appellant was disabled for work during this period, however, the record indicates that Dr. John G. Anderson, a Board-certified orthopedic surgeon, treated appellant for her June 11, 2001 injury on October 2, 2002. An employee is entitled to disability compensation for loss of wages incidental to treatment for an employment injury.⁸

For the period October 19 to November 29, 2002, appellant claimed 50 hours of LWOP. Dr. Young reported on appellant's condition twice during this time period, but it is not apparent from the record whether appellant received medical treatment on either October 16 or November 20, 2002. Appellant claimed an additional 68 hours of intermittent wage loss from December 14, 2002 to April 4, 2003. The specific dates of appellant's claimed wage loss need to be ascertained before a proper analysis of her entitlement to compensation can be undertaken.

CONCLUSION

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

⁷ *Leon Thomas*, 52 ECAB 202, 204 (2001).

⁸ *Daniel Hollars*, 51 ECAB 355, 356-57 (2002); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16(a) (December 1995).

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision of the Board.

Issued: December 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member