

return to full-time work effective December 1, 1994. Appellant subsequently accepted a voluntary retirement as part of a reduction-in-force action on July 30, 1995.¹

On September 9, 1997 appellant filed a recurrence of disability claim alleging that she “returned to work after the surgery with no restrictions,” but found that she “could not stand ... for too long.” Appellant alleged that she could not return to her nonfederal paralegal work after July 30, 1997.

In a report dated September 22, 1997, Dr. Shea stated that recent taping and strapping reduced foot swelling. He noted a limited range of motion at the metatarsophalangeal joint (MPJ), which caused pain and that the metatarsal head was “jamming up” with scar tissue which also caused pain. He recommended an orthotic device for her shoes and continued taping and strapping of her foot to relieve symptoms. The physician advised that if these measures did not relieve her symptoms, surgical repair would be considered.

On September 23, 1997 appellant filed a claim for compensation (Form CA-7) for lost wages from September 15, 1997, as a result of her work-related injury. Appellant noted that she was receiving monthly retirement payments from the Office of Personnel Management (OPM) of \$475.00.

On October 14, 1997 the Office accepted appellant’s recurrence claim. In a report dated November 20, 1997, a paralegal service advised that appellant received \$26,452.00 in gross income for 1,202 hours of work in 1996. In an undated report, the Social Security Administration noted that appellant’s self-employed earnings in 1996 were \$1,541.00.

In a report dated December 19, 1997, Dr. Shea stated:

“The fact that the patient is a paralegal, which involves a good deal of running between various courthouses, most definitely aggravated the work problem in her foot to the point where she is at right now, which is causing pain, swelling and inflammation. The condition in her foot would not have progressed to this point under normal conditions....”

Dr. Shea further noted that, if appellant accepted surgery, she would be totally disabled after surgery for two to six months, while shoe inserts would result in a permanent and stationary status “probably within a one to two[-]month period of time and then (claimant) could be rated and given vocational rehabilitation....”

By decision dated January 14, 1998, the Office denied her claim for lost wages from September 15, 1997, finding that the medical evidence did not support her claim that her current disability and request for surgery were related to the May 9, 1994 work injury. The Office found that Dr. Shea’s report attributed her recurrence of disability to her paralegal work and thus was not related to her 1994 work-related injury.

¹ Appellant was married on July 6, 2001 and changed her last name from Brooks to Fudge. The Office’s case record refers to her as Amelia Brooks.

On September 16, 1998 appellant filed a claim for a schedule award, which the Office on February 24, 1999 granted for a 14 percent permanent impairment of her left lower extremity. The period of award ran for 28.70 weeks from November 11, 1998, her date of maximum medical improvement, to May 30, 1999.

On June 21, 1999 appellant requested additional compensation for wage loss, noting that she had received a monthly award, which ended May 31, 1999.² In her attached Form CA-7, appellant noted that she had received retirement benefits since August 1, 1995.

In a report dated July 23, 1999, Dr. Shea noted limitation to dorsiflexion and plantar flexion at the first MPJ secondary to an arthritic joint.

In a report dated September 8, 1999, Dr. Richard A. Stone, a podiatrist and second opinion physician, stated that he examined appellant on September 3, 1999 and advised that her left hallux limitus (restricted range of dorsiflexion) at the first MPJ was causally related to her work-related injury. Dr. Stone stated that she was able to work with restrictions of no more than three hours of standing or walking during the day. He also recommended an osteotomy of the MPJ, noting that appellant would be totally disabled from work for two to six months after her surgery, after which time she would be able to return to work with restrictions limiting her to three hours a day of standing or walking.

By letter dated September 23, 1999, the Office advised appellant that she was entitled to compensation for wage loss from December 1, 1994 to September 23, 1999, for her May 9, 1994 work-related injury. However, the Office also noted that compensation benefits and retirement benefits were not payable for the same period of time and that she was required to elect which benefits she wished to receive. The Office also noted that her medical benefits would continue even if she elected to receive OPM benefits.

In a report dated September 25, 1999, appellant elected compensation benefits under the Federal Employees' Compensation Act.³ The Office noted that the effective date of election was May 31, 1999.

In a report dated September 30, 1999, Dr. Shea agreed to perform an osteotomy, adding that, if it failed, he would request authorization to perform an implant procedure. On October 23, 1999 the Office paid appellant total disability compensation from October 10 to November 6, 1999. By letter dated October 27, 1999, the Office advised appellant that she would receive disability compensation for her May 9, 1994 work-related injury from October 10, 1999 to October 7, 2000, or until she returned to work.⁴

In a report dated December 1, 1999, Dr. Shea stated that he would perform osteotomy surgery but added that it may be necessary to proceed with a subsequent arthroplasty with an implant. He advised that appellant had been unable to work due to pain in her toe since

² Appellant's period of entitlement for her left lower extremity schedule award ended on May 30, 1999.

³ 5 U.S.C. §§ 8101-8193.

⁴ On January 28, 2000 the Office reimbursed OPM \$2,456.37 covering May 31 to October 31, 1999.

January 1, 1996. On December 2, 1999 Dr. Shea stated that appellant had been under his care for painful hallux rigidus limitus, first MPJ, traumatically induced, from 1994 and again noted that she has been unable to work since January 1, 1996, due to pain, discomfort and disability in her big toe. In a supplemental report dated December 6, 1999, Dr. Stone advised that since an x-ray examination of the first MPJ revealed no clear degenerative arthritic changes, he requested authorization for a surgical examination of the first MPJ to assess further surgery.

On January 22, 2000 the Office paid appellant total disability compensation from January 30 to February 26, 2000. On January 28, 2000 the Office authorized a surgical repair of appellant's hallux limitus and an implant procedure as necessary.

On February 11, 2000 the Office requested appellant to submit medical evidence to support total disability from January 1, 1996. On April 25, 2000 Dr. Shea performed a bunionectomy/osteotomy on appellant's first MPJ, left foot.

On June 20, 2000 the Office asked appellant to submit medical records regarding any 1997 or 1998, foot surgery to determine whether it was work-related. On September 20, 2000 appellant requested a change in her physician from Dr. Shea to Dr. Jeffery A. Mann, a Board-certified orthopedic surgeon, who was nearer to her home. Appellant also noted that her foot condition had worsened under Dr. Shea's care.

By decision dated September 21, 2000, the Office denied appellant's claim for total disability from January 1, 1996, based on her work-related foot condition on the grounds that the medical evidence failed to establish that appellant was disabled from work from January 1, 1996, as a result of her work-related injury.⁵ However, the Office did not refer to appellant's schedule award or her election of FECA benefits effective May 31, 1999.⁶

By letter dated October 17, 2000, appellant requested an oral hearing. Appellant noted that her claim "for compensation for the period of January 1, 1996 has been denied."

A hearing was held on March 27, 2001. The Office hearing representative stated that the issue was whether appellant's claim for disability compensation from January 1, 1996, was causally related to her work-related injury of May 4, 1994. At her hearing, appellant stated that she retired from the federal service in September 1995, as a result of a reduction-in-force at her employing establishment and that she began work as a part-time paralegal in November 1995, stopping work in 1996 as a result of her foot injury. She stated that Dr. Shea considered her to be totally disabled as a result of her 1994 work-related injury. Appellant then submitted an April 18, 2001 report from Dr. Shea, in which he stated that appellant's "ongoing pain, discomfort and disability in her right foot is totally and completely secondary to the original injury of 1994." Dr. Shea performed an osteotomy on appellant, which failed to alleviate

⁵ In its decision, the Office noted that appellant's 1997 surgery was not work-related. However, the record failed to disclose that appellant underwent surgery in 1997. It is noted that Dr. Shea opined in a December 1997 report that if appellant agreed to further surgery, she would totally disabled for a period of several months.

⁶ The case record reflects that appellant was paid compensation from November 11, 1998 to October 7, 2000.

appellant's pain and disability and he again recommended an arthroplastic remodeling procedure with an implant of the first MPJ of the left toe.⁷

In a decision issued on May 31, 2001, the Office's hearing representative affirmed the September 21, 2000 decision, finding that the evidence failed to establish that appellant was totally disabled from January 1, 1996.⁸

LEGAL PRECEDENT

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as the result of an employment injury.⁹ Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury¹⁰ and whether a particular employment injury causes disability for employment and the duration of that disability are medical questions that are in the realm of medical evidence.¹¹

ANALYSIS

In this case, the Board notes that the record evidence reflects compensation payments from November 11, 1998 to October 7, 2000. The period of wage loss in this case, therefore, is January 1, 1996 to November 10, 1998, the date prior to the schedule award. With respect to her claim for total disability from 1996, the record includes a statement from a paralegal service that appellant received over \$26,000.00 in salary as a paralegal in 1996 and appellant's statement that she had self-employed earnings for that year of \$1,541.00. Since no medical evidence was submitted to establish her disability during that time, appellant failed to establish that she was entitled to total disability from January 1 to December 31, 1996.

With respect to the subsequent period of claimed disability from January 1, 1997 to November 10, 1998, Dr. Shea, appellant's treating podiatrist, stated in his December 19, 1997 report, that her disabling condition was caused by her 1996 nonfederal employment as a paralegal. This report attributes appellant's disability to a nonfederal position and thus is of no probative value. His reports dated December 1 and 2, 1999 and April 18, 2001, likewise do not include a rationalized medical opinion establishing a causal relationship between her work-related injury and her claim for disability from January 1, 1997. Further, the September 9, 1999 report from Dr. Stone, a second opinion physician, found that appellant was capable of working an eight-hour day with restrictions and that any period of disability would be the result of additional surgery. Appellant did not undergo surgery during the claimed time frame and thus

⁷ Dr. Shea meant left foot vice right foot.

⁸ The Office's decisions do not purport to rescind appellant's compensation payments, such that the issue is whether appellant met her burden of proof to establish any periods that the Office previously had not paid compensation.

⁹ *David H. Goss*, 32 ECAB 24 (1980).

¹⁰ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

¹¹ *Edward H. Horton*, 41 ECAB 301 (1989).

she failed to establish that her disability from January 1, 1997 to November 10, 1998 was causally related to her May 4, 1994 work-related injury.

By letter dated February 11, 2000, the Office requested that appellant submit medical evidence to support total disability from January 1, 1996. As appellant has failed to submit rationalized medical evidence establishing that her disability from January 1, 1996 to November 10, 1998, was causally related to her accepted employment injury, she has not met her burden of proof.

CONCLUSION

The Board finds that appellant failed to establish that her disability from January 1, 1996 to November 10, 1998, was causally related to her work-related injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 31, 2001 be and is affirmed.

Issued: February 5, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member