United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 07-922**
	)	**Issued: August 22, 2007**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 20, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 8, 2006 finding that she did not sustain a recurrence of her October 26, 1998 employment injury on August 8, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merit issue of the case.

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability on August 8, 2000 causally related to her October 26, 1998 accepted work injury.

FACTUAL HISTORY

This case has previously been before the Board.[1] On October 29, 1998 appellant, then a 44-year-old budget assistant, sustained an injury to her left ankle. On December 28, 1998 the

[1] Docket No. 03-374 (issued March 10, 2003).

Office accepted appellant's claim for a left ankle sprain. Dr. Peter E. Krumins, a Board-certified orthopedic surgeon, performed a left ankle lateral ligament reconstruction as well as excision of a posterior loose body on August 12, 1999. Appellant returned to part-time work in December 1999 and full-time work on or about January 27, 2000, at which time the Office closed wage-loss compensation.

In a report dated August 1, 2000, Dr. Guy H. Earle, a Board-certified family practitioner, indicated that, as a result of the October 26, 1998 incident, appellant sustained an unstable left ankle sprain, occult fracture of the talus, status post left ankle reconstruction and loose body removal with post-traumatic degenerative arthritis of the left tibiotalar joint. He described her present status as "fixed, stable and fully treated." Dr. Earle noted no vocational issues as appellant was reemployed at the employing establishment.

Appellant stopped working on August 8, 2000.

In a medical report dated September 6, 2000, Dr. Oanh Truong, a Board-certified family practitioner, indicated that appellant was his patient and that she sustained a job injury at the employing establishment on October 26, 1998 which led to ligament surgery on August 12, 1999. Since the surgery, appellant continued to have chronic foot pain despite physical therapy. Dr. Truong indicated that she suffered from continuous migraine headaches, nausea and high blood pressure. He opined that all of these symptoms were due to her foot injury. Dr. Truong stated that the foot injury also resulted in hip and lower back pain which created a continuous cycle of pain which could not be broken without proper treatment. He opined that appellant's activities at work and home were severely hampered. As of August 8, 2000, she was on indefinite medical leave because of the complication from her foot injury. Dr. Truong advised appellant to seek medical retirement as she was not physically able to continue working with this disability.

By letters dated October 12, 2000, the Office referred appellant to Dr. Stanley Kopp, a Board-certified orthopedic surgeon, and Dr. Lewis Almaraz, a Board-certified neurologist, for a second opinion. In a joint report dated October 20, 2000, Drs. Kopp and Almaraz diagnosed appellant as status post left ankle reconstruction, excision and posterior ankle loose body with good result and noted a history of cerebral palsy. They found appellant's ankle condition had healed with full range of motion.

In a November 15, 2000 report, Dr. Truong indicated that appellant had done better since quitting her job. In a report dated December 21, 2000, he indicated that appellant was instructed to refrain from her working activities because the walking and lifting activities were causing the condition of her left ankle and lower extremity to worsen. In a November 15, 2000 report, Dr. Earle indicated that it was his medical opinion that appellant's history of an unstable left ankle sprain coupled with occult fracture of the talus and post left ankle reconstruction with loose body removal is a more than adequate history of trauma to produce appellant's post-traumatic degenerative arthritis.

In a July 18, 2002 report, Dr. Krumins, indicated that he had been treating appellant since April 20, 1999 for ongoing problems with her left ankle sustained on October 26, 1998 when an electronic door closed on her foot causing her to fall. He noted that, despite physical therapy,

she experienced problems with pain and laxity about the ankle. Dr. Krumins opined that appellant's ability to function at her previous job was limited as this required considerable walking and the ability to go up and down stairs to get in and out of the office. He opined that appellant had some ongoing residuals as a result of the work injury and her underlying cerebral palsy.

By decision dated March 10, 2003, the Board found a conflict in medical opinion and remanded the case to the Office to refer appellant to an impartial medical examiner. The facts of the case, as set forth in the prior decision, are incorporated herein by reference.

By letter dated June 2, 2003 the Office referred appellant to Dr. Charles Peterson, a Board-certified orthopedic surgeon, for an impartial medical examination. In a medical report dated June 17, 2003, Dr. Peterson listed his impressions as: (1) painful left ankle following spraining episode, worsened following surgery; (2) persistent symptoms of giving way, despite the use of an ankle stabilizing orthosis; (3) cerebral palsy by history; (4) chronic pain; (5) no obvious findings of lateral instability, but mild anterior-posterior instability; and (6) possible tendinitis of the peroneal tendons. He noted that the diagnoses with regard to her ankle sprain was historic, but that the diagnoses regarding mild instability, anterior-posterior, chronic pain and tendinitis are current. Dr. Peterson opined that appellant's tendinitis and anterior instability were related to the work incident and surgery and that the injury and surgery resulted in a chronic pain condition. However, he was not convinced that appellant had any lateral instability at this time. Dr. Peterson agreed with Dr. Krumins that appellant's condition was not going to improve. He stated that there was no doubt that the diagnosis of chronic pain was current and disabling.

By letter dated July 31, 2003, the Office asked Dr. Peterson to clarify whether appellant's ankle condition worsened to the point that by August 8, 2000, she was totally disabled. In an addendum dated July 11, 2003, Dr. Peterson reviewed appellant's magnetic resonance imaging scan/arthrogram dated July 9, 2003. He noted that appellant's anterior talofibular ligament and anterior tibiofibular ligament were abnormal. Dr. Peterson presumed that these were repaired at the time for the surgery. He opined that appellant had a painful ankle following surgery to stabilize her ankle, but that there was no objective evidence of instability. By letter dated August 18, 2003, the Office informed Dr. Peterson that it had not received a response to the July 31, 2003 request for clarification.

The Office found that Dr. Peterson was unable to provide an opinion on whether appellant had a material worsening of her work-related ankle condition effective August 8, 2000.[2] By letter dated October 8, 2003, the Office referred appellant to Dr. Donald Hubbard, a Board-certified osteopath, for an impartial medical opinion. In a medical report dated October 18, 2003, Dr. Hubbard diagnosed: (1) MRR, preexisting subclinical (asymptomatic) instability left ankle, secondary to cerebral palsy; (2) by history, left ankle pain secondary to accepted conditions of left ankle strain, instability and loose body; and (3) status

[2] By letter dated October 8, 2003, the Office referred appellant to Dr. William Thieme a Board-certified orthopedic surgeon, for an impartial medical examination. Appellant refused to attend this appointment and the Office accordingly suspended her benefits. However, a hearing representative found the suspension was improper and appellant's benefits were reinstated.

post left ankle reconstruction and loose body removal. He noted that the work incident precipitated, caused and significantly contributed to the objective findings of surgical incision and perhaps instability. Dr. Hubbard noted that the work incident permanently aggravated the preexisting condition of cerebral palsy and sub-clinical ankle instability. With regard to appellant stopping work on August 8, 2000, Dr. Hubbard indicated that the treating physicians opined that appellant was not able to work based primarily on subjective criteria and that there was no record or significant clinical findings that supported this worsening. Dr. Hubbard also noted that appellant's current work-related diagnoses was not disabling, although the left ankle/lower extremity was impaired and it was reasonable to provide restrictions and limitations. He did not recommend medical treatment for the work injury. In response to a July 2, 2004 letter from the Office, for clarification, on July 7, 2004 Dr. Hubbard concluded that prior to the injury asymptomatic left ankle instability existed. He noted that the ankle instability was aggravated, not the cerebral palsy. Dr. Hubbard stated: "Surgery, by intention, changed the structural musculoligamentous and musculotendinous dynamics of ankle stability and in that manner materially changed the ankle dynamics probably related in part to cerebral palsy, since no definite history of trauma of the left ankle resulting in instability existed in the case file."

By decision dated August 4, 2004, the Office found that the special weight of the evidence rested with Dr. Hubbard the impartial medical examiner. It found that he did not support a recurrence of disability effective August 8, 2000.

By letter dated September 27, 2004, appellant requested reconsideration. She alleged that she was deprived of her right to request an oral hearing because the decision was mailed to the wrong address. In a decision dated January 10, 2005, the Office found that the decision was sent to an incorrect address. The Office reissued the September 27, 2004 decision on January 10, 2005.

By letter dated January 28, 2005, appellant requested an oral hearing. In an April 11, 2006 report, Dr. Krumins indicated that appellant continued to be symptomatic and that for that reason on July 8, 2005 she underwent a left ankle repair of the anterior talofibular ligament and also had partial excision of the fifth metatarsal base for symptomic tarsal bossing. He noted that appellant's continuing problems related to her work injury 10 years ago.

By letter dated June 15, 2006, appellant, through her new attorney, changed her request from a request for an oral hearing to a request for review of the written record.

By decision dated December 8, 2006, the hearing representative affirmed the denial of appellant's claim for a recurrence of total disability on August 8, 2000 causally related to the accepted October 26, 1998 work injury.

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that

caused the illness.[3] An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[4]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[5]

ANALYSIS

In the instant case, the Office accepted that appellant sustained a sprain of the left ankle on October 29, 1998 and appropriate compensation benefits were awarded. After her surgery on August 12, 1999 appellant returned to part-time work in December 1999 and full-time work on or about January 27, 2000. She stopped working on August 8, 2000 and alleged that a recurrence of disability occurred at that time.

The Board finds that appellant did not establish a recurrence of disability on August 8, 2000. In the Board's prior decision, a conflict in medical opinion was found between appellant's physicians, Drs. Krumins and Truong, and the second opinion physicians, Drs. Almarz and Kopp, as to whether she continued to have residuals from her accepted work injury. Subsequently, the Office referred appellant to an impartial medical examiner to resolve the conflict. The first referral to an impartial medical examiner was to Dr. Peterson, who never gave an opinion as to whether appellant's accepted ankle condition had worsened to the point that she was disabled on August 8, 2000, despite a follow-up letter from the Office. The Board precedent and Office procedure manual provides that if a report of an impartial medical examiner is vague, speculative, incomplete or unrationalized, it is the responsibility of the Office to secure a supplemental report to correct the defect. However, if the impartial specialist is unable or unwilling to give a supplemental report or if the supplemental report is also defective, the Office should arrange for another impartial medical examination.[6] Accordingly, as the reports of Dr. Peterson were incomplete the Office properly referred appellant to Dr. Hubbard for a second impartial medical examination.

In a medical report dated June 18, 2003, Dr. Hubbard indicated that although appellant's treating physicians opined that she was not able to work, this was based primarily on subjective

[3] 20 C.F.R. § 10.5(x).

[4] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956).

[5] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[6] *See Raymond A. Fondots*, 53 ECAB 637 (2002) and *Harold Travis*, 30 ECAB 1071 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(c)(2) (April 1993).

criteria in that there was no record of significant clinical findings that supported this worsening. He added that the employment-related injury was not disabling. Accordingly, Dr. Hubbard found that the medical evidence did not establish that appellant's work-related ankle condition materially worsened by August 8, 2000 to the point that she was totally disabled.

The Board finds that the opinion of Dr. Hubbard is based on a proper factual and medical background and is entitled to special weight. Dr. Hubbard found that appellant's condition had not worsened by August 8, 2000 to the point wherein she was disabled. Accordingly, as his report is entitled to special weight afforded an impartial medical specialist, the Board finds that the Office properly determined that appellant had not shown a recurrence of her accepted work injury on August 8, 2000.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability on August 8, 2000 causally related to her October 26, 1998 accepted work injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 8, 2006 is affirmed.

Issued: August 22, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board