United States Department of Labor
Employees' Compensation Appeals Board

W.P., Appellant	)	
and	)	**Docket No. 07-2033**
	)	**Issued: March 11, 2008**
U.S. POSTAL SERVICE, HENDERSONVILLE ANNEX, Hendersonville, NC, Employer	)	

Appearances:
Linda Temple, 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 July 27, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 9, 2007 merit decision denying his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of total disability from June 10 to September 16, 2005 due to his accepted foot condition.

FACTUAL HISTORY

On March 12, 2001 the Office accepted that appellant, then a 48-year-old mail carrier, sustained bilateral aggravation of athlete's foot (tinea pedis).[1] The Office based its acceptance of

[1] Appellant was working at the Hendersonville Annex at the time he became aware of his foot condition.

this condition on the reports of Dr. Sheldon Marne, an attending podiatrist.[2] The Office paid appellant compensation for periods of disability.

In a September 2, 2001 report, Dr. John Godehn, Jr., an attending Board-certified dermatologist, stated that he did not find evidence of tinea pedis. He indicated that appellant's clinical history and physical findings were consistent with tropical immersion foot. On June 13, 2002 Dr. Marne stated that he had reviewed Dr. Godehn's reports regarding appellant's foot condition and noted that it "has been and still is my opinion that the vehicle which [appellant] operates has either caused or exacerbated his condition. His condition has been categorized as a thermoregulator disorder of the class of tropical immersion foot." The Office upgraded appellant's accepted condition to bilateral tropical immersion foot.

Appellant continued to work in limited-duty positions at the employing establishment and accommodations were made for his employment-related foot condition, including placing heat resistant mats in his vehicle.

In a May 20, 2004 report, Dr. Marne indicated that he had treated appellant for years and stated:

> "[Appellant] has a condition called thermoregulated disorder of the class of tropical immersion foot. He should not be subjected to heat conditions above 87 degrees. The prognosis for this patient would be vascular hyperreactivity, edema, erythema, pain with persistent exposure, chronic injury, hypersensitivity to temperature extremes with excessive skin sweating when a foot is kept in a hot, sweaty shoe above the 87 degree temperature mentioned above.
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> "In my opinion, [appellant's] condition would be helped significantly by air conditioning, a fan or a vent in his postal delivery vehicle. He would also benefit from wearing the sandals that [appellant] showed me…. [Appellant] should not work May through September without the use of sandals in the vehicle or on his job inside the building. This is a permanent condition for this patient."

On March 28, 2005 the employing establishment offered appellant a job as a modified laborer custodian in the Processing and Distribution Center in Asheville, NC.[3] The job involved performing custodial duties as needed and required such physical actions as engaging in continuous lifting and grasping and standing and walking up to seven hours per day. Under the heading, "Special demands of the workload or unusual or unusual working conditions" the job

[2] On July 3, 2000 Dr. Marne stated that an increase in the temperature of the cab in appellant's postal vehicle caused the fungi in his feet to become activated. He indicated that "given my patient's occupational condition, his chronic and sometimes acute mycosis will continue." On July 11 and 13, 2000 Dr. Marne stated that appellant had tinea pedis which was aggravated by heat at work and indicated that he should not be in heat higher than 87 degrees Fahrenheit "for any protracted period of time."

[3] The distance from appellant's home in the Mills River/Horse Shoe, NC area to the Asheville Processing and Distribution Center is about 19 miles. This distance is a few miles greater than the distance from his home to the Hendersonville Annex.

description indicated "No temperature above 70 degrees on feet," "No driving a vehicle more than [four] hours per day" and "Foot kept cool in open shoe."

It does not appear that appellant worked in the limited-duty position in Asheville, but rather continued performing limited-duty work at the Hendersonville Annex until he stopped work on June 10, 2005. He alleged that he sustained a recurrence of total disability from June 10 to September 16, 2005 due to his accepted foot condition.[4] Appellant claimed that appropriate limited-duty work was not available to him after June 10, 2005.

Appellant submitted June 8 and July 22, 2005 reports of Dr. Marne, who reiterated in his May 20, 2004 report.

In an August 26, 2005 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to show that he sustained a recurrence of total disability from June 10 to September 16, 2005 due to his accepted foot condition.

On October 5, 2005 Dr. Godehn indicated that he had not seen appellant since August 20, 2001. He stated that appellant complained of discomfort, redness and swelling in his feet during the summer. Dr. Godehn noted that appellant's feet showed "only mild livid discoloration of the soles of his feet but without significant erythema at this time." He indicated that appellant's history and present clinical findings continued to be consistent with tropical immersion foot neurovascular regulatory disorder and stated that this was a chronic condition. Dr. Godehn indicated that although appellant "is somewhat better working in a cooler environment, his symptoms continue even during the winter months."

On December 21, 2005 Dr. Marne stated that since 2001 appellant had a chronic and permanent condition known as thermoregulated disorder of the class of tropical immersion foot, which was caused by excessive heat on the feet from the floorboard of his postal vehicle. He indicated that appellant's feet were more sensitive to a hot/wet environment when he wore black leather shoes and recommended that he wear New Balance sneakers with custom inserts. Dr. Marne stated that appellant had been "available for inside work during the summer of 2005."

Appellant requested a hearing before an Office hearing representative. At a January 10, 2007 hearing, he testified that appropriate limited-duty work was not available to him between June 10 and September 16, 2005 in that the job offer in Asheville was "defective." Appellant asserted that he had to work in hot temperatures in the Spring of 2005.

Appellant submitted copies of several decisions issued in connection with grievances he filed regarding the Asheville job offer. In November 2, 2004 and April 19, 2005 decisions, it was determined that management violated Articles 13 and 19 of the National Agreement by offering the Asheville job to appellant. It was found that management should have attempted to find adequate limited-duty work for appellant in Hendersonville before offering him a job at another facility. The grievance documents provide no indication that the job offer in Asheville

[4] In a July 14, 2005 letter, the employing establishment indicated that the limited-duty position in Asheville remained available to appellant. The record reveals that appellant returned to his regular-duty work in Hendersonville without restrictions after September 16, 2005.

was withdrawn or that the modified work duties and conditions in Asheville were inappropriate for appellant's medical condition.

In a May 9, 2007 decision, the Office hearing representative affirmed the August 26, 2005 decision. The Office found that appellant had not established his claim that the employing establishment withdrew his limited-duty work in June 2005 in that limited-duty work within his work restrictions remained available to him in Asheville. The Office concluded that appellant did not submit sufficient evidence to show that his employment-related condition or limited-duty work changed such that he sustained total disability for any period between June 10 and September 16, 2005.

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[5] Office procedure provides that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.[6]

ANALYSIS

The Office accepted that appellant sustained employment-related bilateral tropical immersion foot. Appellant was working at the Hendersonville Annex as a mail carrier at the time he became aware of his foot condition. On March 28, 2005 the employing establishment offered him a job as a modified laborer custodian in the Processing and Distribution Center in Asheville, NC.[7] The job involved performing custodial duties and under the heading "Special demands of the workload or unusual or unusual working conditions" the job description indicated "No temperature above 70 degrees on feet," "No driving a vehicle more than [four] hours per day" and "Foot kept cool in open shoe." Appellant did not accept this position in Asheville and he was performing limited-duty work at the Hendersonville Annex until he stopped work on June 10, 2005. He alleged that he sustained a recurrence of total disability from June 10 to September 16, 2005 due to his accepted foot condition. The Office found that appellant did not submit sufficient evidence to show that his employment-related condition or limited-duty work changed such that he sustained total disability for any period between June 10 and September 16, 2005.

[5] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

[7] The distance from appellant's home in the Mills River/Horse Shoe, NC area to the Asheville Processing and Distribution Center is about 19 miles. This distance is a few miles greater than the distance from his home to the Hendersonville Annex.

Appellant alleged that there was a change in the nature and extent of the limited-duty job requirements after June 10, 2005 in that he was exposed to high temperatures after this date. However, he did not submit adequate evidence to support this assertion. His attending podiatrist, Dr. Marne, indicated that he should not be exposed to heat higher than 87 degrees Fahrenheit for any protracted period of time. Appellant did not submit evidence showing that his limited-duty work subjected him to temperature conditions which would have caused him to work beyond his work restrictions. Moreover, the record reveals that appellant had appropriate limited-duty work available to him for the period June 10 to September 16, 2005. In March 2005, he was offered a modified laborer custodian in the Processing and Distribution Center in Asheville, NC. The job involved performing custodial duties and was designed to prevent his feet from being subjected to temperatures above 70 degrees Fahrenheit.[8]

Appellant contended that this job offer was "defective" and therefore he did not have appropriate limited-duty work available to him. In November 2, 2004 and April 19, 2005 grievance decisions, it was determined that management violated Articles 13 and 19 of the National Agreement by offering the Asheville job to appellant.[9] It was found that management should have attempted to find adequate limited-duty work for appellant in Hendersonville before it offered him a job at another facility. The Board finds, however, that the grievance documents provide no indication that the Asheville job offer was withdrawn or that the modified work duties and conditions in Asheville were inappropriate for his medical condition. As noted, there is no indication that appropriate work was not available in Hendersonville during the period in question.

Appellant also did not show that a change in the nature and extent of the injury-related condition caused him to be totally disabled from June 10 to September 16, 2005. In June 8 and July 22, 2005 reports, Dr. Marne stated that appellant had thermoregulated disorder of the class of tropical immersion foot and should not be subjected to heat conditions above 87 degrees Fahrenheit. He indicated that appellant's prognosis was vascular hyperreactivity, edema, erythema, pain with persistent exposure, chronic injury, hypersensitivity to temperature extremes with excessive skin sweating when his foot was kept in a "hot, sweaty shoe above the 87 degree temperature mentioned above." Dr. Marne stated that appellant's condition would be helped significantly by air conditioning, a fan or a vent in his postal delivery vehicle and by wearing sandals. He indicated that appellant should not work May through September "without the use of sandals in the vehicle or on his job inside the building."[10]

[8] The Asheville worksite was only a few miles farther away from his home than the Hendersonville worksite and still would have been within his general commuting area.

[9] It was found that management should have attempted to find adequate limited-duty work for appellant in Hendersonville before offering him a job in another facility.

[10] On December 21, 2005 Dr. Marne stated that since 2001 appellant had a chronic and permanent condition known as thermoregulated disorder of the class of tropical immersion foot, which was caused by excessive heat on the feet from the floorboard of his postal vehicle. He indicated that appellant's feet were more sensitive to a hot/wet environment when he wore black leather shoes and recommended that he wear New Balance sneakers with custom inserts.

The Boards notes that Dr. Marne's reports would not establish appellant's claim because he did not provide a clear opinion that appellant was totally disabled between June 10 and September 16, 2005 due to his accepted foot condition, tropical immersion foot. Dr. Marne's reports are essentially prescriptive in nature and the Board has held that the possibility of future injury constitutes no basis for the payment of compensation.[11] His reports do not contain any notable findings on examination for the period June 10 and September 16, 2005 and they do not show that appellant's employment-related condition worsened such that he was unable to perform his limited-duty work during this period.

Appellant also submitted an October 5, 2005 report in which Dr. Godehn, an attending Board-certified dermatologist, stated that appellant complained of discomfort, redness and swelling in his feet during the summer.[12] Dr. Godehn noted that appellant's feet showed "only mild livid discoloration of the soles of his feet but without significant erythema at this time." He indicated that appellant had chronic tropical immersion foot neurovascular regulatory disorder and stated that this was a chronic condition.[13] Dr. Godehn also did not provide a clear opinion that appellant was totally disabled between June 10 and September 16, 2005 due to his accepted foot condition. He did not examine appellant between the period of claimed disability, June 10 to September 16, 2005 and therefore his assessment of appellant's condition after that date would have limited relevance to the main issue of the present case.

For these reasons, appellant did not show that he sustained a recurrence of total disability from June 10 to September 16, 2005 due to his accepted foot condition.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability from June 10 to September 16, 2005 due to his accepted foot condition.

[11] *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

[12] Dr. Godehn had not seen appellant since August 20, 2001.

[13] Dr. Godehn indicated that although appellant "is somewhat better working in a cooler environment, his symptoms continue even during the winter months."

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 9, 2007 decision is affirmed.

Issued: March 11, 2008
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