



Appellant was initially treated at the Norwegian American Hospital emergency department on October 21, 2006 and from Dr. Joel Anderson, a podiatrist. On October 23, 2006 Dr. Anderson reported that x-rays showed an avulsion fracture of the calcaneus of the right ankle and possible ruptures of the calcaneal fibular and anterior talo-fibular ligaments of the right ankle. He also diagnosed a severe right ankle sprain and indicated that appellant might be totally disabled for six to eight weeks. On November 6, 2006 Dr. Anderson noted that recent magnetic resonance imaging (MRI) scan testing of appellant's right ankle showed edema at the anterior talofibular ligament with poor visualization of the ligament consistent with injury. He found that appellant was totally disabled from work for the next two weeks but would return for a follow-up examination in two weeks "with the possibility of return to work if stability and decreased pain is noted with ambulation."

On November 22, 2006 Dr. Anderson stated that appellant reported that he had pain and instability on a daily basis and tried to increase his ambulatory activities with difficulty. Appellant indicated that he wanted to return to work as soon as possible, but had concerns about his right ankle instability and difficulty with walking. Examination showed pain in the calcaneal fibular and anterior talo-fibular ligaments of the right ankle. Dr. Anderson stated, "He is to continue with ankle brace and is not to return to work due to concerns of ankle weakness and instability. I don't recommend light duties due to concern of the possibility of surgery in the near future." On December 6, 2006 he noted that appellant had reported improvement in his right ankle condition. There was minimal pain on palpation and range of motion of the right ankle and calcaneal fibular and anterior talo-fibular ligaments. Dr. Anderson indicated that appellant could return to work on December 7, 2006 with "no restrictions as tolerated" and stated that there was no need for further treatment or surgery. Appellant returned to his regular-duty work for the employing establishment on December 7, 2006.

The U.S. Postal Inspection Service conducted an investigation of appellant's activities after his October 21, 2006 injury and provided evidence that he worked for EDCO Inc., a subcontractor for the Comcast Cable Company, between October 23 and December 5, 2006. The testimony of appellant and other documentary evidence establishes that, for about three days per week during this period, appellant drove his personal vehicle to pick up cable boxes and modems from private residences. Surveillance video was obtained of appellant working in his yard between November 21 and December 5, 2006. On November 21 and 27, 2006 appellant performed such tasks as carrying cinder blocks and plywood sheets, kneeling to work with tools on the ground, mowing the lawn, shoveling stones into a wheelbarrow, pushing the wheelbarrow back and forth a number of times between a stone pile and a pool, and patting down dirt and moving stones with both feet.

Two investigators interviewed Dr. Anderson on December 11, 2006 and presented him with surveillance videotapes of appellant's activities at home on November 21 and 27, 2006. The investigators stated that if, Dr. Anderson had known that appellant was capable of shoveling the truck load of rocks, mowing the lawn without problems, and driving for extended periods while performing private employment, he would have released appellant back to normal work. The investigators noted:

"Dr. Anderson admitted that [appellant] had misrepresented himself during his November 22, 2006 visit, based on what he observed in the videotape of

November 21 and 27, 2006. He opined that based on his observation of the videotape activities of [appellant], he could have returned to his job driving a truck for the [employing establishment].”

In a December 11, 2006 statement, Dr. Anderson indicated that he had reviewed the surveillance videotape and believed that appellant had misrepresented himself about his work-related condition. He noted, “[Appellant] was capable of performing the duties as described by his employment agency sooner than anticipated. Light duties would have been possible within four weeks of the injury and full duties as tolerated at the four-week interval -- according to the video that was reviewed.”

On March 29, 2007 the Office asked appellant to provide medical evidence establishing that he was in fact disabled from his work at the employing establishment on and after October 23, 2006 given that he worked in other employment on and after this date.

In a May 4, 2007 decision, the Office denied appellant’s claim for continuation of pay on and after October 23, 2006 on the grounds that the evidence failed to establish that he was totally disabled from his federal employment due to his employment injury.<sup>1</sup> It found that the medical reports of Dr. Anderson and the evidence indicating that he was able to perform another job beginning October 23, 2006 established that he was not entitled to continuation of pay after that date.<sup>2</sup>

Appellant requested a hearing before an Office hearing representative. The hearing was held on October 25, 2007. Appellant testified that he worked for EDCO Inc. on various dates while he was off work from his job at the employing establishment due to his October 21, 2006 injury. His work for EDCO Inc. involved retrieving cable equipment from former customers and required him to drive his personal vehicle. Appellant asserted that he did not climb stairs or engage in extensive walking between the time of his injury and his return to regular work on December 7, 2006. He alleged that the medical restrictions provided by Dr. Anderson did not specifically restrict him from driving a vehicle.

Appellant submitted an April 23, 2007 letter from Dr. Anderson who described the medical treatment provided since October 23, 2006. He was unaware, until visited by postal inspectors, that appellant was performing private work while he was off work from the employing establishment on disability compensation. Dr. Anderson indicated that an avulsion fracture of the calcaneal fibular ligament generally should be immobilized for at least four to six weeks status post injury, possibly longer if surgery was necessary. Based on the objective findings and test results, he would not have allowed appellant to return to any work activities at EDCO Inc. or the employing establishment for at least four to six weeks.

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<sup>1</sup> The Office determined that appellant was entitled to continuation of pay for October 21 and 22, 2006.

<sup>2</sup> It appears from the record that the employing establishment actually paid appellant 45 days of continuation of pay, but it is unclear whether appellant was required to use leave to cover the period of continuation of pay denied in the Office’s May 4, 2007 decision.

In a January 18, 2008 decision, the Office hearing representative affirmed the Office's May 4, 2007 decision, as modified, to reflect that appellant was entitled to continuation of pay for the period October 21 to November 18, 2006. The Office hearing representative determined that the opinion of Dr. Anderson showed that appellant could return to his regular-duty work by November 19, 2006, *i.e.*, four weeks after his October 21, 2006 injury.

### **LEGAL PRECEDENT**

In order to establish entitlement to continuation of pay, an employee must establish, on the basis of reliable, probative and substantial evidence, that he was disabled as a result of a traumatic employment injury. As part of this burden, he must furnish medical evidence from a qualified physician who, based on a complete and accurate history, concludes that the employee's disability for specific periods was causally related to such injury.<sup>3</sup> As used in the Federal Employees' Compensation Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury.<sup>4</sup> In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.<sup>5</sup>

### **ANALYSIS**

The Office accepted that on October 21, 2006 appellant sustained right ankle and right deltoid ligament sprains when he twisted his ankle while coming down off his vehicle. Appellant claimed entitlement to continuation of pay for up to 45 days following the injury. The Office determined that he was entitled to continuation of pay for the period October 21 to November 18, 2006, *i.e.*, for four weeks after his October 21, 2006 injury. It found that appellant did not submit medical evidence establishing that he had employment-related disability after that point such that he would be entitled to additional continuation of pay.

The Board finds that appellant did not meet his burden of proof to submit medical evidence showing that he was entitled to continuation of pay for the period following November 18, 2006. Dr. Anderson, an attending podiatrist, initially suggested that appellant might be disabled by the October 21, 2006 employment injury for six weeks or more. However, after he became aware that appellant performed work for a private cable contractor and performed heavy yard work at his home between late October and early December 2006, Dr. Anderson provided an opinion that appellant could return to his regular work for the employing establishment four weeks after his October 21, 2006 employment injury.

In a December 11, 2006 statement, Dr. Anderson indicated that he had reviewed the surveillance video from November 21 and 27, 2006 of appellant's work at home, and stated that he believed that appellant had misrepresented himself about his work-related condition. He concluded that appellant was capable of performing his regular duties for the employing

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<sup>3</sup> *Carol A. Dixon*, 43 ECAB 1065 (1992); *Virginia Mary Dunkle*, 34 ECAB 1310 (1983).

<sup>4</sup> *Marvin T. Schwartz*, 48 ECAB 521 (1997).

<sup>5</sup> *Id.*

establishment sooner than anticipated and indicated that, according to the videotape that was reviewed, he would have been able to perform full-duty work for the employing establishment by four weeks after October 21, 2006.<sup>6</sup>

In an April 23, 2007 letter, Dr. Anderson indicated that an avulsion fracture of the calcaneal fibular ligament generally should be immobilized for at least four to six weeks status post injury, possibly longer if surgery was necessary. He stated that, based on the objective findings and test results, he would not have allowed appellant to return to any work activities at EDCO Inc. or the employing establishment for at least four to six weeks. Dr. Anderson noted that, if he had known about appellant's extensive physical activities after October 21, 2006, he might have recommended that he stay off work for a longer period. It does not change his earlier opinion that appellant's level of activity after October 21, 2006 established that he could return to his regular-duty work for the employment establishment four weeks after the October 21, 2006 injury, *i.e.*, on or about November 19, 2006.

Appellant did not submit any medical evidence showing that he had employment-related disability after November 18, 2006. Therefore, the Office properly found that he was not entitled to continuation of pay after November 18, 2006.<sup>7</sup>

### **CONCLUSION**

The Board finds that appellant is not entitled to continuation of pay after November 18, 2006. While appellant appealed the May 4, 2007 decision, the January 18, 2008 decision superseded and modified it as to the dates for which benefits are payable.

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<sup>6</sup> Dr. Anderson also indicated that appellant might have been able to perform light-duty work prior to four weeks after October 21, 2006, but he did not specify when this could have occurred.

<sup>7</sup> See *supra* note 3 and accompanying text.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 18, 2008 decision is affirmed.

Issued: November 3, 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