

FACTUAL HISTORY

On May 5, 2006 appellant, then a 49-year-old plate printer, sustained a traumatic injury to his right thigh and foot when a 55-pound ink drum fell off a jack and struck him. He stopped work that day and did not return. On May 19, 2006 appellant was admitted to Inova Fairfax Hospital for a severe right leg infection and underwent two surgical procedures for debridement of necrotic tissue, drainage of deep abscesses and four-compartment fasciotomies of the distal right lower extremity. He was discharged on May 26, 2006. Appellant was admitted to Georgetown University Hospital and underwent debridement and skin graft procedures to his right lower extremity on May 28 and 30, 2006. On June 10, 2006 he was discharged to a rehabilitation center with diagnoses including necrotizing fasciitis, other early complications of trauma and open wound of lower extremity. Appellant was discharged from the rehabilitation facility on July 4, 2006.

On July 26, 2006 the Office accepted that appellant sustained employment-related contusions of the right thigh and foot. Appellant filed CA-7 claims for compensation beginning on May 19, 2006. In February 2007, the Office referred him to Dr. Eric Reines, Board-certified in internal medicine, for a second opinion evaluation. In a March 20, 2007 report, Dr. Reines reviewed the history of injury and provided findings on physical examination. He diagnosed a deep-seated infection and compartmental syndrome due to blood hematoma from the employment injury that led to necrosis of the foot, necrotizing fasciitis and widespread infection in the ankle and foot. In response to specific Office questions, Dr. Reines advised that appellant could not stand for a prolonged period of time or walk significant distances. He concluded that appellant was disabled from work due to the injury and could return to work in May or June.

On July 17, 2007 the Office paid appellant wage-loss compensation for the period June 20, 2006 through June 29, 2007. Appellant filed claims for compensation through February 28, 2009 and the Office paid wage-loss compensation from July 1, 2007 through April 30, 2008 and June 1 through October 31, 2008. On May 8, 2008 the Office accepted that he sustained employment-related right necrotizing fasciitis.

In letters dated September 5, 2008 to March 13, 2009, the Office requested that appellant provide detailed medical evidence to support his claims for disability compensation. Appellant submitted an April 18, 2008 report from Dr. Ivica Ducic, Board-certified in plastic surgery,² who advised that appellant had a significant injury on May 5, 2006 which developed into necrotizing fasciitis and compartment syndrome. Dr. Ducic described the surgical procedures performed which, he opined, saved appellant's leg. In an August 28, 2008 report, Dr. John E. Toerge, an osteopath Board-certified in physical medicine and rehabilitation, noted the history of injury and appellant's subsequent hospitalizations.³ He found that he needed multiple surgical procedures and prolonged care to restore circulation, muscle function and skin closure of the injury. Appellant had multiple physical therapy treatments and progressed to walking independently

² Dr. Ducic is an associate professor in the Department of Plastic Surgery at Georgetown University Hospital.

³ Dr. Toerge is Chief of the Department of Rehabilitation Medicine at Georgetown Hospital, Chair of Physical Medicine and Rehabilitation at Washington Hospital Center and Vice President, Medical Affairs, at National Rehabilitation Hospital.

with the use of an orthosis and rocker bottom shoe. On physical examination, the right lower extremity revealed preserved motor and sensory function with decreased strength and endurance and restricted motion of the foot at most major joints. Dr. Toerge recommended that appellant return to physical therapy to increase his strength and endurance and advised that the prognosis was good but still needed to advance. He reviewed appellant's position description and projected a return to work in December 2008 or January 2009, provided physical therapy was reinstated, and appellant was highly motivated to work.

In an April 27, 2009 decision, the Office denied appellant's claim for compensation from November 2, 2008 to February 28, 2009 finding that he failed to submit sufficient medical evidence to establish his disability.

Appellant requested reconsideration and submitted a discharge summary from Georgetown University Hospital regarding his admission from May 26 to June 10, 2006 and Dr. Toerge's treatment notes dated July 25, 2008 to March 9, 2009. Dr. Toerge advised that appellant had retired on disability.⁴ By letter dated March 22, 2009, appellant contended that he had been forced to retire.

In a May 29, 2009 decision, the Office denied disability compensation for the period April 1, 2008 to April 30, 2009.

LEGAL PRECEDENT

Section 2.811 of the Office procedure manual describes the procedures to be followed in the early management of disability claims.⁵ Subsections 8 and 9 distinguish payments on the daily and periodic compensation rolls and describe the procedures to be followed in maintaining a claimant on each payment roll.⁶ The procedures provide that the daily roll is to be used where the term of disability is not likely to exceed 60 days.⁷ When the period of disability is likely to be prolonged, or over 90 days, or permanent disability is expected, compensation for wage loss should be paid on the periodic rolls.⁸

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹

⁴ The handwritten notes are difficult to decipher.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811 (July 1997).

⁶ *Id.* at Chapter 2.811.8.9 (July 1997).

⁷ *Id.* at Chapter 2.811.7.a(1) (July 1997).

⁸ *Id.* at Chapter 2.812.4 (October 2005).

⁹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

ANALYSIS

The Board finds that the Office abused its discretion in retaining appellant on the daily compensation rolls for a period that exceeded one year.¹¹ As noted, Office procedures provide that the daily rolls is to be used where the term of disability is not likely to exceed 60 days. When the period of disability is likely to exceed 90 days, the claimant is to be placed on the periodic rolls. Appellant's employment injury occurred on May 5, 2006, and that he received wage-loss compensation on the daily rolls from June 20, 2006 through April 30, 2008 and June 1 through October 31, 2008, approximately a 28-month period. Shortly after the May 5, 2006 employment injury, appellant was hospitalized on two occasions and underwent four surgical procedures due to an infection of his right leg. On June 10, 2006 he was discharged to a rehabilitation center with diagnoses including necrotizing fasciitis of the right lower extremity and was not discharged until July 4, 2006. Office procedures further provide that it is the responsibility of the claims examiner to request medical information which is to include an inquiry about the reasons and objective findings that support continuing injury-related disability and reasons for continuing absence from work.¹² While the Office compensated appellant on the daily rolls there is no evidence that it attempted to secure medical information until February 2007, nine months after the May 5, 2006 employment injury, when appellant was referred to Dr. Reines for a second opinion evaluation.

In his March 20, 2007 report, Dr. Reines diagnosed a deep-seated infection due to the employment injury that led to necrosis of the foot, necrotizing fasciitis and widespread infection, a serious medical condition. At that time he found that appellant was disabled from all work because he could not stand or walk. On August 28, 2008 Dr. Toerge advised that appellant needed prolonged medical care and advised that he could possibly return to work in December 2008 or January 2009 if physical therapy were reinstated. There is no indication in the record that physical therapy was approved prior to the May 29, 2009 decision.

In accordance with Office procedures, appellant should have been placed on the periodic rolls and not maintained on the daily rolls for 28 months. Consequently, the Office has the burden of proof to establish that appellant had no further disability due to his accepted employment injuries. Appellant was entitled to a pretermination notice. The Office should have provided him notice of the proposed action and given him the opportunity to submit relevant evidence or argument to support continued compensation prior to denying his claims. It failed to meet its burden of proof to terminate appellant's compensation as it failed to provide a pretermination notice and maintained appellant on the daily rolls.

¹⁰ *Id.*

¹¹ *Lan Thi Do*, 46 ECAB 366 (1994).

¹² Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.600.6.b(3), (4) (November 1996).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.¹³

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 29 and April 27, 2009 be reversed.

Issued: May 4, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

¹³ The Board notes that appellant submitted a medical report subsequent to the May 29, 2009 decision of the Office. The Board cannot consider this evidence as its review of the case is limited to that evidence before the Office at the time of its final decision. 5 U.S.C. § 501.2(c).