U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE McNEAL and U.S. POSTAL SERVICE,
SEATTLE BULK MAIL CENTER, Federal Way, WA

Docket No. 01-2163; Submitted on the Record;
Issued June 12, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability.

On November 17, 1996 appellant, then a 40-year-old mailhandler, filed a notice of traumatic injury alleging that on November 16, 1996 he was walking and felt a sharp pain in his right foot. He was diagnosed with a right foot sprain. Appellant underwent surgery on June 16, 1998 for a callous removal from his foot and started wearing orthopedic shoes.

On June 15, 1998 he filed a claim for recurrence beginning June 5, 1998. Appellant stated that he noticed a needle-like pinch in his right foot and found a metal spike in his shoe. The record later revealed that appellant only realized on or around June 5, 1998 that a foreign object had been imbedded in his shoe on November 16, 1996. Dr. Vicki Driver stated in a June 16, 1998 letter: "It appears … [that] [appellant] had a work-related injury November 16, 1996 (stepped on something)."

In an April 13, 1999 attending physician's report, Dr. Driver stated: "Patient stated lesion noticed shortly after traumatic incident to right foot (says he stepped on sharp object while at work and it lodged in shoe) lesion became noticeably painful about 10 months after incident." She indicated that she performed an excision of painful soft tissue lesion (parakeratosis).

In a May 6, 1999 statement, appellant noted that he stepped on a staple at work on November 16, 1996. He explained that the soft tissue lesion caused by the staple gradually became a painful scar requiring surgery. In a May 6, 1999 report from Dr. Terry J. Felts, a Board-certified family practitioner, stated:

> "I am writing on behalf of [appellant]. He suffered an industrial injury to his [right] foot at the [employing establishment] on November 1996. He has had steady and constant care since that time for his foot injury. The appropriate diagnosis was not made initially because of confusion created by his diabetic neuropathy. Originally, he was diagnosed as a sprain but he had actually suffered

> a puncture wound. He went on to develop a painful hypertrophic scar at the puncture site. We treated the painful lesion conservatively at the V[eterans] A[dministration] (VA) hospital with topical agents, debridement and orthotic therapy to take the pressure off the area. These treatments were not sufficient and he eventually progressed to a surgical excision of the painful scar."

By decision dated June 2, 1999, the Office denied appellant's claim for compensation for the periods June 16 to July 13, 1998 and March 9, 1999 to the present.

Appellant requested an oral hearing. He submitted a December 15, 1999 report from Dr. Eddie Davis, a podiatric physician and surgeon, diagnosing appellant with plantar fasciitis and lesion of the right heal. Dr. Davis stated:

> "[Appellant] has a painful lesion on the right heel. The lesion is an epidermal inclusion cyst. The epidermal inclusion cyst was caused by a puncture of the right shoe with a spike that penetrated the shoe, soft inlay, and penetrated the skin on the heel. The spike basically caused an area of puncture, which was then chronically irritated. The superficial layer of skin known as the stratum corneum is pushed into the deeper layers by the pressure from the spike and continues to grow inwardly as a cyst, which is very painful. His job lifting 50 to 70 pound sacks of mail and walking several miles a day at work exacerbated the plantar fasciitis."

By decision dated February 29, 2000, the hearing representative vacated the Office's previous decision and remanded the case to the Office for a second opinion. By decision dated March 23, 2000, the Office accepted that appellant sustained a puncture wound to his right heel on November 16, 1996, which developed into an epidermal inclusion cyst for which surgical removal was required.

In a May 12, 2000 second opinion report, Dr. Kenneth D. Sawyer stated: "History of spontaneous onset of right foot and/or leg pain, November 16, 1996, probably unrelated to the subsequent alleged finding of a metal "spike" in the right shoe." He stated that there was insufficient evidence that appellant ever even had a "spike" or any other metallic foreign body in his shoe since the only proof was in the form of statements from appellant and his wife.

In a report dated July 24, 2000, Dr. Harry Reese, a Board-certified orthopedic surgeon, stated:

> "History of intractable plantar keratosis, medial longitudinal arch right foot, resulting from irritation and foreign body in shoe and a partially sensate right foot, relationship to the industrial event of November 16, 1996 unknown. Status post excision of intractable plantar keratosis, medial arch of right foot, relationship to the industrial injury of November 16, 1996 unknown."

Dr. Reese stated that it was possible that appellant did not feel the sharp object in his shoe due to the diminished sensation in his foot, due to his preexisting diabetes, but that there was no way for him to know whether the foreign body had been embedded in the shoe. He also opined that the June 17, 1998 surgery was necessitated by the foreign body in appellant's shoe, resulting

in increased rubbing on the bottom of the foot, but stated that he could not state with greater than 50 percent probability that it was work related.

By decision dated September 5, 2000, the Office denied appellant's claim for recurrence and compensation benefits for the right foot callous with subsequent surgery.[1]

The Board finds that this case is not in posture for decision.

The Board has held that a medical expert should only determine the medical question certified to him. Determination of the legal standards in regard to such medical questions is outside the scope of his expertise.[2] In this regard, FECA Bulletin No. 84-33 states that the Office medical consultant's opinion should not "explicitly address legal or adjudicating issues" when providing an opinion to the Office claims examiner, as questions relating to the acceptance or weight of medical evidence are in the province of the claims examiner and not the Office medical consultant.[3]

In this case, appellant was referred to Dr. Sawyer for a second opinion examination. Dr. Sawyer engaged in a factual analysis in his May 12, 2000 report, stating that there was insufficient evidence that appellant had ever even had a "spike" in his shoe. At the time of Dr. Sawyer's examination, the Office had already accepted, in their March 23, 2000 decision, that appellant sustained a puncture wound to his right heel on November 16, 1996. Dr. Sawyer improperly engaged in an analysis of the legal issues of the case, injecting extra-medical considerations into a judgement which are not properly in the scope of a medical opinion.[4] Since he engaged in a legal analysis and did not provide a proper medical opinion, the second opinion examination and evaluation by Dr. Sawyer is of little probative value.

The Office then referred appellant to Dr. Reese, who stated that he could not determine whether or not appellant stepped on a sharp object on November 16, 1996 which became imbedded in his shoe. However, the Office did not present a proper statement of accepted facts to Dr. Reese, which included the acceptance of the puncture wound on November 16, 1996. Dr. Reese therefore based his medical opinion on an incomplete statement of accepted facts. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.[5] As noted by the Office in its procedure manual, "[w]hen the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on an SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously

[1] The Office stated that they accepted a sprain-type injury on November 16, 1996, but the medical evidence of record was insufficient to establish causal relationship between the plantar keratosis and November 16, 1996.

[2] *Jeannine E. Swanson*, 45 ECAB 325 (1994).

[3] FECA Bulletin No. 84-33 (issued July 6, 1984).

[4] *John W. Butler*, 39 ECAB 852 (1988).

[5] *Helen Casillas,* 46 ECAB 1044 (1995).

diminished or negated altogether."[6] Dr. Reese should have based his medical opinion on a complete statement of accepted facts, which includes the Office's acceptance on March 23, 2000 that appellant sustained a puncture wound on November 16, 1996. Since Dr. Reese rendered his medical opinion based on incomplete factual information, the probative value of his report is also limited. The Board finds that both Drs. Sawyer and Reese's medical opinions are of diminished probative value since they engaged in factual analyses and were based on an incomplete set of facts. The Office should refer appellant and a statement of accepted facts to a second opinion physician who can properly determine whether appellant suffered a recurrence on or about June 6, 1998.

The September 5, 2000 decision of the Office of Workers' Compensation Programs is set aside and remanded to the Office for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
June 12, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports,* Chapter 3.600(3) (1990).