United States Department of Labor
Employees' Compensation Appeals Board

CYNIA V. BLAKE, Appellant	)	
and	)	**Docket No. 05-313**
	)	**Issued: April 18, 2005**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Florence, KY, Employer	)	

Appearances:
Cynia V. Blake, pro se,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 16, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 14, 2004 terminating her compensation benefits. She also appealed an August 19, 2004 decision denying her request to have her case reopened for a merit review under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and the nonmerit Office decision.

ISSUES

The issues on appeal are: (1) whether the Office properly terminated appellant's compensation benefits effective July 14, 2004; and (2) whether the Office properly denied appellant's request for a merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On November 16, 2002 appellant, then a 29-year-old mail processor, filed an occupational disease claim alleging that the repetitive duties of her position which included

walking and standing caused her foot condition. The employing establishment explained that appellant changed jobs on September 21, 2002 and that her duties changed. The employing establishment did not indicate that appellant stopped work. The Office accepted appellant's claim for aggravation of posterior tibial tendinitis and aggravation of tarsal tunnel syndrome on the right.[1]

Appellant's treating physician Dr. Todd Van Wyngarden, a podiatrist, diagnosed *pes planus* of both feet, tarsal tunnel syndrome of the right foot and tendinitis. He submitted several disability certificates from January 30 to September 30, 2002 in which he excused her from work for intermittent dates of disability. Dr. Van Wyngarden also prescribed limitations which included no standing or walking longer than 4 to 6 hours, sitting for no more than 4 hours in an 8-hour day, and overtime of no more than 2 hours in a 10-hour day. He recommended a chair, a rest bar, and good supportive shoes and advised orthotic therapy. Dr. Van Wyngarden continued to submit periodic reports. In a December 17, 2002 work capacity evaluation, he advised that appellant's restrictions were permanent and that she was limited to four hours of total walking and standing, sitting for no more than four hours in an eight-hour day, and walking and standing no more than four hours. In addition, Dr. Van Wyngarden repeated that appellant should have the use of a chair as needed.

The Office continued to develop the claim and on May 21, 2003, referred appellant to Dr. Dale Dalenberg, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 7, 2003 report, Dr. Dalenberg described appellant's history of injury and treatment, which included an ankle sprain at home in January 2001, and nonwork-related costochondritis. He noted that appellant had not received electrodiagnostic testing, and determined that noninvasive testing was warranted. Dr. Dalenberg opined that diagnostic findings were consistent with a normal right peroneal nerve and a tibial neuropathy at the right ankle. He also noted a nonspecific abnormal finding consistent with a lesion of the right A1 nerve root or right tibial nerve. Dr. Dalenberg indicated that testing was only conducted on the right, as the examination was only for the right lower extremity. He determined that appellant appeared to have right posterior tibial tendinitis, and a right tibial neuropathy, which was consistent with tarsal tunnel syndrome. Dr. Dalenberg also noted that the left lower extremity was somewhat affected but was not the subject of the current examination. He explained that appellant had a planovalgus foot, which was a developmental change, right posterior tibialis, and tarsal tunnel syndrome with right tibial neuropathy of the ankle. Dr. Dalenberg added that the right foot condition appeared related to nonwork-related factors. He explained that the *pes planus* was chronic and related to congenital or developmental changes and that there was no work injury history. Dr. Dalenberg opined that appellant's problem was bilateral, and a possible reason for the right being more symptomatic than the left was the recent history of a nonwork-related ankle sprain. He explained that this could have exacerbated the right posterior tibial tendinitis and tibial neuropathy because of the swelling and inflammation in the tarsal tunnel. Dr. Dalenberg advised that these conditions had not resolved, as appellant continued to have symptoms despite working with restrictions since February 2002. Dr. Dalenberg indicated that appellant would continue to experience difficulty while working in her clerical position; however, he noted that she was performing her duties. He completed the work restrictions, and advised that they were

[1] The Office indicated appellant's bilateral *pes planus* was nonwork related.

reasonable for a nonwork-related condition and they were permanent. Regarding future treatment, Dr. Dalenberg suggested that appellant might benefit from a period of cast immobilization or surgery.

By letter dated July 17, 2003, addressed to appellant's treating physician, Dr. Van Wyngarden, the Office requested that he review Dr. Dalenberg's report and offer an opinion regarding whether he agreed with his assessment.

On July 30, 2003 the Office received a July 8, 2003 work capacity evaluation, from Dr. Van Wyngarden, in which he indicated that appellant could only do sedentary work for no more than 10 hours a day with the use of a chair. He did not comment with respect to Dr. Dalenberg's report. In a September 11, 2003 work capacity evaluation, Dr. Van Wyngarden indicated that appellant's restrictions were permanent and that she was capable of working 8 to 10 hours a day, with no more than 1 to 4 hours combined of standing, reaching and walking.

On August 26, 2003 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Richard Brennan, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Drs. Dalenberg and Van Wyngarden regarding the issue on causality of appellant's medical condition and treatment.

In an October 16, 2003 report, Dr. Prem Parmer, a physician of unknown specialty, noted that appellant came in for treatment of her left knee and related that she was squatting at work with a load of letters or materials and felt a popping and tearing in her knee, which swelled up after a couple of hours and worsened later in the day. He also noted that she indicated that it was aggravated by hanging her leg down and improved by having her leg elevated and that she described a catching and clicking on the inside part of her knee. Dr. Parmer diagnosed a knee strain.

In an October 28, 2003 report, Dr. Brennan noted appellant's history of injury and treatment, which included pain in both feet prior to a right ankle sprain at her home in 2001 from which she recovered. He also indicated that appellant related that her "foot had hurt for years." Dr. Brennan indicated that appellant's present complaints were that her right foot was tender to the touch on the medial side with shooting pain in the ankle, with a tingling sensation in the foot and the toes. He also advised that appellant had the same symptoms on the left side to a lesser degree, which were present before the ankle sprain. Dr. Brennan conducted a physical examination and stated that appellant weighed over 300 pounds and that her primary complaints related to both feet. He indicated that appellant walked unassisted without significant evidence of an antalgic gait, that she had no evidence of low back pain and that she could heel and toe walk without difficulty. Dr. Brennan also took measurements utilizing a goniometer for flexion, extension and two-point discrimination. He also noted that appellant continued to complain of persistent symptoms in the right foot and first sought medical care in March 2001, and from a podiatrist in May 2000, and related that appellant did not recall a specific incident at work associated with work symptoms. Dr. Brennan noted that appellant was placed on work restrictions and that she had not had any type of surgery or even an EMG of the right lower extremities. He diagnosed posterior tibial tendinitis and tarsal tunnel syndrome on the right. Dr. Brennan also advised that appellant's examination was noteworthy for findings of tenderness

along the entire posterior tibial tendon with significant findings related to tarsal tunnel. He explained that appellant did not complain of any changes in symptoms by elevating nor lowering the extremity, or tenderness of the tibial nerve beneath the flexor retinaculum, or changes in temperature, sweating pattern or skin abnormalities. Dr. Brennan advised that appellant had no evidence of dryness or scaliness of the skin, only over the lateral plantar nerve distribution but this symptom was inconsistent. He noted that, while appellant had noninvasive testing by Dr. Dalenberg, an electromyography (EMG) of the right lower extremity should be performed. Dr. Brennan further advised that, while appellant had complaints of bilateral valgus of the feet, this was a developmental problem. He explained that the history of injury to appellant's right ankle could be a predisposing factor which led to her tarsal tunnel syndrome because of the pain and the swelling, associated with the injury. Dr. Brennan also explained that appellant's excessive weight contributed to her lower extremity problems when she was on her feet. He diagnosed posterior tibial tendinitis and tarsal tunnel syndrome and advised that her most likely diagnosis was tarsal tunnel syndrome, although he would await the EMG to confirm this. The symptomatology involved in the posterior tibial tendinitis was definite and conducive to his diagnosis. Dr. Brennan advised that he felt her *pes planus* was a contributing factor to the development of posterior tibial tendinitis. Further he advised that the ankle sprain was a predisposing cause of the onset of the tarsal tunnel syndrome and that her excess weight was a contributing factor. Dr. Brennan advised that the accepted right foot tendinitis or right tarsal tunnel syndrome conditions had not resolved, on a subjective basis, as appellant remained symptomatic with pain and tenderness in the right foot. However, he explained that he could not find objective findings such as atrophy or skin changes and advised that appellant was capable of performing her position as a clerk, with restrictions due to her nonwork-related condition and they were permanent.

On December 10, 2003 the Office authorized an electromyogram (EMG) and nerve conduction study. However, by letter dated December 11, 2003, the Office rescinded the authorization and requested that Dr. Brennan provide clarification with regard to which specific right foot conditions were related to appellant's work factors, and which were related to nonwork factors. The Office also requested clarification with regard to whether appellant's tarsal tunnel syndrome was related to work factors or nonwork factors. In addition, the Office requested clarification with regard to whether the recommended EMG and nerve conduction studies were related to work-related or nonwork-related conditions.

In a January 26, 2004 addendum report, Dr. Brennan opined that appellant's foot problems were not related to work; rather, he opined that her posterior tibial tendinitis and probable tarsal tunnel syndrome was chronic and the result of *pes planus* and other developmental changes. He further indicated that he thought her foot bothered her on the right because of the ankle sprain. Dr. Brennan also advised that the recommended EMG and nerve conduction studies were not related to the work-related conditions.

By letter dated March 25, 2004, the Office requested additional information regarding whether appellant's accepted employment-related conditions had resolved. On June 2, 2004 Dr. Brennan advised that appellant's work-related conditions had resolved.

In an April 28, 2004 report, Dr. George G. Robinson, appellant's Board-certified orthopedic surgeon, diagnosed left knee pain, likely patellofemoral syndrome and medial capsular strain.

On June 9, 2004 the Office issued a notice of proposed termination of appellant's compensation benefits on the basis that the weight of the medical evidence, as represented by the reports of Dr. Brennan, the impartial medical examiner, established that the residuals of the work injury had ceased.

On June 21, 2004 Dr. Robinson advised that he treated appellant for her knee and to clarify work restrictions with regard to bending and her standing tolerance.

By decision dated July 14, 2004, the Office terminated appellant's wage-loss and medical compensation benefits effective that day.

On August 9, 2004 appellant requested reconsideration. No additional evidence or argument accompanied her request.

By decision dated August 19, 2004, the Office denied appellant's request for a merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3]

Furthermore, the Federal Employees' Compensation Act[4] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[5] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

[2] *Curtis Hall*, 45 ECAB 316 (1994).

[3] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[4] 5 U.S.C. §§ 8101-8193, 8123(a).

[5] 5 U.S.C. § 8123(a); *Shirley. Steib*, 46 ECAB 309, 317 (1994).

[6] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

ANALYSIS -- ISSUE 1

The Office determined that a conflict of medical opinion existed regarding the nature and extent of any ongoing residuals of the accepted injury based on the opinions of Dr. Van Wyngarden, appellant's physician, who supported an ongoing employment-related condition and disability, and Dr. Dalenberg, an Office referral physician, who opined that the employment-related condition had resolved. Therefore, the Office properly referred appellant to Dr. Brennan, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In an October 28, 2003 report, Dr. Brennan noted appellant's history of injury and indicated that she could not recall a specific incident at work associated with her symptoms. He conducted a physical examination and noted that appellant walked unassisted without significant evidence of an antalgic gait, that she had no evidence of low back pain and that she could heel and toe walk without difficulty. Dr. Brennan advised that, despite the ankle sprain in 2001, from which she had recovered, she continued to complain of persistent right foot symptoms. He advised that appellant had no objective findings such as evidence of dryness or scaliness of the skin, with the exception of the lateral plantar nerve distribution but this symptom was inconsistent. Dr. Brennan also recommended an EMG study of the right lower extremity. He explained that appellant's bilateral complaints of plano-valgus of the foot were not an occupational disease but rather a developmental problem. Dr. Brennan noted that appellant's excessive weight contributed to her lower extremity problems. He further advised that appellant's *pes planus* was a contributing factor to the development of posterior tibial tendinitis, that her ankle sprain was a predisposing cause of the onset of the tarsal tunnel syndrome and that her excess weight was a contributing factor. Dr. Brennan advised that the accepted right foot tendinitis or right tarsal tunnel syndrome conditions had not resolved on a subjective basis as appellant continued to complain of pain and tenderness in the right foot whenever she was on her feet for any long period of time. However, he could find no objective findings such as evidence of atrophy or skin changes. Dr. Brennan also advised that appellant was capable of performing her position as a clerk, with restrictions due to her nonwork-related condition and they were permanent.

By letter dated December 11, 2003, the Office requested clarification with regard to whether appellant's employment-related injury had resolved and whether she could return to her date-of-injury position. When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[7] As the Office needed clarification from the doctor regarding whether the employment-related condition had resolved, it properly requested clarification from Dr. Brennan.

In his supplemental report dated January 26, 2004, Dr. Brennan opined that appellant's foot problems were not work related, but rather the result of *pes planus* and that the current pain and disability were due to appellant's preexisting conditions, which included an ankle sprain at

[7] *Roger W. Griffith*, 51 ECAB 491 (2000).

home in 2001 and her excessive weight. He further explained that the request for an EMG and nerve conduction studies were not related to the work-related conditions. The Office requested clarification once more on March 25, 2004 regarding whether the accepted conditions had resolved and Dr. Brennan responded that they had resolved.

The Board finds that Dr. Brennan's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Brennan examined appellant, reviewed her medical records, and reported accurate medical and employment histories. Dr. Brennan indicated that the work-related conditions had resolved, that there were no objective findings such as evidence of atrophy or skin changes and appellant's conditions were due to her nonwork-related condition, for which her excessive weight and *pes planus* were contributing factors. He also noted that there were only subjective complaints of pain and tenderness. In addition, Dr. Brennan advised that appellant was capable of performing her clerical duties, with restrictions related to her nonwork-related conditions. In his supplemental report, the physician emphasized that he did not believe appellant's symptoms were related to work, as she had a history of posterior tibial tendinitis and chronic tarsal tunnel syndrome. When asked for clarification as to whether the employment injury had resolved, he responded that they had resolved. Accordingly, the Office met its burden of proof to justify termination of benefits.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case under section 8128(a) of the Act,[8] section 10.608(a) of the implementing regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[9] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[10] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11]

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.608(a).

[10] 20 C.F.R. § 10.608(b)(1) and (2).

[11] 20 C.F.R. § 10.608(b).

When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[12]

ANALYSIS -- ISSUE 2

Appellant did not submit any new evidence or advance a legal argument in support of her August 9, 2004 request for reconsideration. Accordingly, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, she was not entitled to a merit review.

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective July 14, 2004. Further, the Board finds that the Office properly denied appellant's request to have her case reopened for merit review.

[12] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

ORDER

IT IS HEREBY ORDERED THAT the August 19 and July 14, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member