

On appeal, appellant contends that the evidence is sufficient to show that she was unable to work from July 17, 1994 through January 24, 1995² and from December 20, 1995 through August 31, 2004. She particularly directs the Board's attention to the report of Dr. Sanjay Ghosh, a Board-certified internist, which she contends is supported by medical rationale.

FACTUAL HISTORY

On January 7, 1994 appellant, then a 28-year-old rural carrier associate, filed a traumatic injury claim alleging that on that date she slipped on snow exiting her vehicle to deliver mail and fractured her left ankle. The Office accepted her claim for trimalleolar fracture of the left ankle and open reduction internal fixation left medial and lateral malleoli. Appellant returned to work with the employing establishment on January 13, 1994 with a restriction that she required help in loading her vehicle. She was released to full duty on July 8, 1994. Appellant's employment with the employing establishment terminated on August 2, 1994 after which time she performed nonfederal employment as a cashier, deli worker and stocker from September 30 through October 15, 1994.

In a March 27, 1995 report, Dr. Thomas J. Fox, appellant's treating Board-certified orthopedic surgeon, noted that despite his attempts to have appellant do her own therapy, she was not progressing satisfactorily and recommended formal physical therapy. In a May 24, 1995 report, he indicated that she was doing better and had minimal swelling about her ankle and mild intermittent crepitation with motion. Dr. Fox noted full plantar flexion although appellant lacked full dorsiflexion by a few degrees. He noted that she probably reached maximum medical improvement and noted that he informed her that as of June 1, 1995 he was releasing her to full unrestricted duty. Dr. Fox noted that he did not need to see appellant again unless there were problems. In an October 25, 1995 report, he indicated that she has been under his care for a left ankle fracture since January 1994. Dr. Fox noted that appellant originally underwent surgery to fix the fracture and then had a second surgery in January 1995 for removal of hardware. He noted that because of her previous fracture and surgery, she has some permanent residual discomfort in the ankle and anything that would lessen the stress to that ankle is advisable.

On February 13, 1996 the Office issued appellant a schedule award for 10 percent impairment of her left lower extremity. The period this award ran was from June 1 through December 19, 1995.

X-rays taken on July 8, 2005 were interpreted by Dr. William M. Ursprung, a chiropractor, as evincing spondylosis of the lumbar spine and postural subluxations. In reaching this conclusion, he noted that there was no evidence of compression fracture, lytic or blastic lesion. Dr. Ursprung noted that degenerative spurring is present at multiple vertebral levels and that the intervertebral disc spaces, joint spaces and soft tissues are unremarkable. He also noted that the lumbar spine is rotated and convex to the right.

² The Board's jurisdiction is limited to decisions of the Office within 180 days of appellant filing the appeal. 20 C.F.R. § 501.3(e). There is no decision issued by the Office during this time period addressing the issue of entitlement to compensation for disability for the period July 17, 1994 through January 24, 1995. Accordingly, the Board does not have jurisdiction over this issue. *See* 20 C.F.R. § 501.2(c).

In a November 21, 2005 report, Dr. David E. Chalk, appellant's treating Board-certified orthopedic surgeon, noted that he last saw appellant in September 2004 at which time she was having severe pain with weather change with her main complaint being plano abductovalgus foot deformity from her old ankle fracture, which was the bimalleolar ankle fracture treated in 1994. He noted that she never fully recovered from her original disability and that he saw her in July 2003 with an osteophyte of the anterior aspect of the ankle that was consistent with the post-traumatic course of an ankle fracture that occurred in 1994. Dr. Chalk noted that appellant's lingering symptoms at this point included pain in the ankle with weather changes as well as pain with the deformity of her foot from her original ankle fracture. He opined that her current diagnosis of ankle pain and post-traumatic ankle osteophytes and resultant plano abductovagus foot deformity from posterior tibial tendon pathology was related to the original injury, but was not the same diagnosis as the original injury, which was a bimalleolar ankle fracture. Dr. Chalk noted that in this case, many bimalleolar ankle fractures are prone to posterior tibial tendon pathology and resultant foot deformity and that is what he believed occurred in appellant's situation, noting that the only precipitating factor that may have caused the subsequent foot deformity that exists in her was her greater than normal body weight. In summary, he concluded that her current symptoms are related to the ankle fracture and its subsequent course back in 1994.

On May 1, 2006 the Office referred appellant to Dr. Robert Sciortino, a Board-certified orthopedic surgeon, for a second opinion. In a May 16, 2006 report, Dr. Sciortino listed his impression as post-traumatic arthritis left ankle with posterior tibial tendon dysfunction. He opined that there was a relationship between appellant's work injury of January 1994 and the current ankle condition. Dr. Sciortino noted that she had a relatively severe trimalleolar ankle fracture which appeared to have healed relatively well, however, often with this type of injury there is some residual joint incongruity posteriorly which can lead to post-traumatic arthritis and that he believed that her symptoms are due to post-traumatic arthritis. He also noted that appellant seemed to have some element of posterior tibial tendon dysfunction which has a multifactorial etiology and is most likely caused in part by her weight and in part by her prior injury. Dr. Sciortino indicated that she had permanent restrictions and could work zero to two hours sitting and walking; and zero to four hours pushing and pulling up to 40 pounds; and lift up to 20 pounds zero to four hours a day. In a June 20, 2006 supplemental report, he noted that he had no evidence that appellant either did or did not suffer a recurrence on September 15 or August 19, 2005. Dr. Sciortino indicated that she sustained a recurrence of disability sometime around September 2004.

On June 26, 2006 the Office reopened appellant's case and expanded it to include post-traumatic arthritis of the left ankle with posterior tibial tendon dysfunction.

On February 22, 2007 the Office issued appellant an additional five percent schedule award for impairment of the left leg (ankle). This decision was affirmed by an Office hearing representative on July 17, 2007.

On December 5, 2007 the Office accepted appellant's claim for late effect of fracture of lower extremities, left.

In an undated note received on March 3, 2008, Dr. Chalk stated that appellant was his patient and that he has been treating her for flat-footedness, posterior tibial tendon dysfunction and painful ankle arthritis. He further opined that within a reasonable degree of medical certainty that the low back condition for which she was being treated would assist in the recovery of her posterior tibial tendon dysfunction. In a March 18, 2008 report, Dr. Chalk noted that he treated appellant back in 2003 for post-traumatic arthritis of the left ankle. He noted that, by his history, she stated that back in 1994 she suffered a twisting injury to her left ankle sustaining a bimalleolar ankle fracture. Dr. Chalk noted that appellant has had persistent pain and swelling in the ankle and was seen numerous times in 2004 for a primary complaint of posterior tibial tendon dysfunctional post-traumatic ankle arthritis. He further noted that she stated in an office visit in 2007 that she was having some low back pain. Dr. Chalk noted that appellant had a congenital condition of spondylosis of the lumbar spine. He opined that the work injury of 1994 exacerbated the underlying spinal condition but was not the primary causative event.

In an undated note received by the Office on April 4, 2008, Dr. Joe R. Moore, a chiropractor, indicated that he has treating appellant for subluxation of the lumbar spine caused by posterior tibial tendon dysfunction and painful left ankle arthritis. He opined that, due to pain from the left ankle arthritis and the posterior tibial tendon dysfunction, she developed an altered gait and altered weight-bearing pattern from her ankle to her lumbar spine.

In an April 14, 2008 report, Dr. Myles McKinsey, a chiropractor, stated that he originally saw appellant on June 4, 2001 with a complaint of low back pain. He noted that his examination at that time revealed lumbar muscle hypertonicity, right low pelvis and left sacroiliac tenderness. Dr. McKinsey also noted straight leg raise was positive on the right and pain radiates in to thoracic spine and at times into cervical spine as well. He noted that appellant suffered a left ankle injury in the past that sometimes caused her pain.

In a June 12, 2008 work capacity evaluation, Dr. Chalk opined that appellant was able to work eight hours a day with restrictions of walking and standing limited to two to four hours, pushing and pulling of up to 40 pounds for zero to four hours, lifting for zero to four hours, climbing for zero to two hours and squatting for two to four hours.

On June 17, 2008 appellant filed a claim for compensation for the period January 7, 1994 until present. In a time analysis form she indicated that she was asking for compensation from June 11, 1994 through January 24, 1995; December 20, 1995 through August 31, 2004; and June 8, 2008 through present.

In a letter dated June 20, 2008, the Office informed appellant that it had paid compensation for part of the time period for which she filed. It noted that she had never considered compensation for the period December 20, 1995 through August 31, 2004. The Office advised that the medical evidence of record failed to establish entitlement to compensation for the periods claimed and asked for further evidence.

On June 26, 2008 the Office referred appellant to Dr. Donald H. Brancato, a Board-certified orthopedic surgeon, for a second opinion. In a July 22, 2008 report, Dr. Brancato noted that she had a history of injury in 1994 when she sustained a trimalleoli fracture in the left ankle for which she underwent open reduction/internal fixation of the left ankle. He noted that there

was presently no objective criteria to validate her subjective complaints of her pain in her back. Dr. Brancato requested new x-rays of the spine. He found that the left ankle as compared to the right was more stable in the collateral ligament integrity than the unoperated right ankle. Dr. Brancato found no crepitus in the ankle and full range of motion in the left ankle. He concluded that, without additional evidence connecting the subjective complaint in appellant's lumbar spine to her previous ankle injury, there was no objective reason to limit her work activity based on physical examination. In a July 24, 2008 report, Dr. Brancato noted a totally normal neurological examination. In an October 13, 2008 addendum, he stated that appellant's x-rays of her lumbosacral spine were completed and the report showed only mild spondylitic changes and no acute bony abnormality. Dr. Brancato opined that these findings have nothing to do with her work-related accident, nor any aggravation according to any work problem. He noted that his final diagnosis was subjective complaint of low back pain, mild degenerative spine disease, marked overweight and status post fracture of the previously reported left ankle. Dr. Brancato opined that appellant had no residual from her accident that would prevent her from performing her previous work activity and that any complaints of pain were contributed to by her marked overweight condition.

By decision dated December 23, 2008, the Office denied appellant's claim for wage-loss compensation from December 20, 1995 through August 31, 2004 as the medical evidence failed to establish a link between the January 7, 1994 employment injury and the claimed period of disability.

On January 9, 2009 appellant requested review of the written record by an Office hearing representative.

In a January 24, 1996 report, Dr. John A. Gragnani, a Board-certified physiatrist, diagnosed appellant with status post trimalleolar fracture of the left ankle. He recommended 10 percent impairment rating of the left lower extremity.

In a decision dated April 7, 2009, the hearing representative found that appellant had failed to prove that she was entitled to compensation for disability for the period December 20, 1995 through August 31, 2004.

Appellant submitted a March 21, 1997 report wherein Dr. Ghosh indicated that he examined her on that date. Dr. Ghosh found right shoulder pain with torn right serratus anterior muscles; left ankle fracture with surgeries for which she still has some pain; and bilateral knee pain. He recommended that appellant use pain medication. Dr. Ghosh noted that, with regard to work restrictions, she had no restrictions in handling objects, hearing, speaking or traveling, but that there were some restriction in prolonged walking and standing, lifting and carrying. However, he noted that these restrictions should improve with pain medication.

In a May 11, 2009 report, Dr. Chalk stated that he had not physically examined appellant for almost two years, so that any narrative with regard to her current condition is outdated. However, he indicated that she did appear to continue, by her account and from other health care providers, to experience residuals effects from her January 7, 1994 employment injury secondary to her post-traumatic arthritis after her bimalleolar ankle fracture and subsequent hardware removal and posterior tibial tendon dysfunction.

In an October 8, 2009 report, Dr. Adam LaBore, a Board-certified physiatrist, indicated that appellant's present condition was consistent with combined chronic ankle deconditioning and frequent pain with post-traumatic osteoarthritis as well as what appears to be mild lumbar radiculopathy in the setting of multilevel degenerative spondylotic changes in the lumbar spine. He recommended repeat x-rays and follow up treatment which may include physical therapy, anti-inflammatory medications as well as possible epidural steroid injections.³

By decision dated December 16, 2009, the Office found that the evidence submitted by appellant was insufficient to warrant modification of the April 7, 2009 Office hearing representative's decision.

LEGAL PRECEDENT

The term "disability" as used in the Act means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of the injury.⁴ In other words, if an employee is unable to perform the required duties of the job in which she was employed when injured, the employee is disabled.⁵ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁶

For each period of disability claimed, appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury.⁷ The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. Appellant's burden of proving she was disabled on particular dates requires that she furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is

³ By decision dated August 26, 2009, the Office terminated appellant's wage-loss compensation benefits effective August 30, 2009. As the August 26, 2009 decision was issued outside of 180 days from the filing of the current appeal, the Board has no jurisdiction to review it. In a November 6, 2009 decision, the Office denied reconsideration of the merits of the August 26, 2009 decision. As appellant has not filed an appeal from this decision, it is not before the Board. See 20 C.F.R. § 501.3(a).

⁴ *Patricia A. Keller*, 45 ECAB 278, 286 (1993).

⁵ *Id.*

⁶ See *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁷ *Fereidoon Kharabi*, 52 ECAB 291 (2001); see also *David H. Goss*, 32 ECAB 24 (1980).

⁸ *Fereidoon Kharabi, id.*

causally related to the employment injury and support that conclusion with medical reasoning.⁹ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁰

ANALYSIS

The Office has accepted that as a result of a January 7, 1994 work injury, appellant sustained a trimalleolar fracture of the left ankle open reduction internal fixation left medial and lateral malleoli, post-traumatic arthritis of the left ankle with posterior tibial tendon dysfunction and late effect of fracture of left lower extremities. Appellant returned to work on January 13, 1994 with limitations and was released to full duty on July 8, 1994. Her employment with the employing establishment was terminated on August 2, 1994. Following the end of her schedule award on December 19, 1995 appellant claimed compensation for lost wages for the period December 20, 1995 through August 31, 2004. The Board finds that she failed to submit sufficient probative medical evidence demonstrating total disability for this period of time due to her accepted conditions.

Dr. Fox released appellant to return to unrestricted duty effective June 1, 1995. Although he noted in his October 25, 1995 report that she had some permanent residual discomfort in the ankle and that he would advise lessening stress to the ankle, he did not address whether she was capable of performing her usual employment. There is no indication in the record that appellant consulted with any physician from March 21, 1997 until July 7, 2003 when she began seeing Dr. Chalk. Accordingly, there is no contemporary medical evidence indicating that she was disabled from work during this time.

Dr. Chalk indicated that he first saw appellant in July 2003 with an osteophyte of the anterior aspect of the ankle that was consistent with the post-traumatic course of ankle fracture that occurred in 1994. He noted that she had lingering symptoms. In Dr. Chalk's November 21, 2005 report, he opined that appellant's current diagnosis of ankle pain and post-traumatic ankle osteophytes and resultant plano-abductorvagus foot deformity from posterior tibial tendon pathology was related to her work injury and subsequent course back in 1994. He noted in his March 18, 2008 report that her work injury of 1994 exacerbated her underlying spinal condition but was not the primary causative effect. Dr. Chalk also noted that appellant had persistent pain and swelling in the left ankle. He noted in his November 21, 2005 report that she had severe pain with weather change and never fully recovered from her original disability. However, Dr. Chalk did render an opinion as to whether appellant was able to perform her usual work at any time between July 17, 1994 and August 31, 2004. The restrictions that he placed on her in his June 12, 2008 work capacity evaluation were unrelated to the claimed period of disability.

Dr. Sciortino, a second opinion orthopedic surgeon, opined in his May 16, 2006 report that appellant had post-traumatic arthritis in the left ankle with posterior tibial tendon dysfunction that was related to her January 1994 work injury. He also noted that she had an element of posterior tibial tendon dysfunction which was most likely caused by her weight and,

⁹ *Ronald E. Eldridge*, 53 ECAB 218 (2001).

¹⁰ *Mary A. Ceglia*, 55 ECAB 626 (2004).

in part, by her work injury. Dr. Sciortino placed work restrictions on appellant. However, he also never addressed her ability to work between July 17, 1994 and August 31, 2004.

Appellant also saw Dr. Brancato for a second opinion. In his July 22, 2008 report, Dr. Brancato noted that she had a history of injury in 1994 when she sustained a trimalleoli fracture in the left ankle for which she underwent open reduction/internal fixation of the ankle. He noted no objective criteria to validate her subjective complaints of pain in her back. Dr. Brancato found the left ankle was actually more stable than the right ankle and that there was no crepitus in the ankle and full range of motion in the left ankle. He noted that there was no objective reason to limit her work activity based on his physical examination, a finding he reiterated in his October 13, 2008 report. Accordingly, Dr. Brancato found no disability related to the work injury at the time of his June 26, 2008 report and does not address the period from July 17, 1994 through August 31, 2004.

With regard to the report of Dr. Moore, a chiropractor, the Act provides that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.¹¹ He indicated that he treated appellant for subluxation of the lumbar spine caused by posterior tibial tendon dysfunction and painful left ankle arthritis. However, Dr. Moore never noted that he made this diagnosis as a result of an x-ray, nor is there any evidence in the record that he ordered x-rays prior to making this diagnosis. Accordingly, he cannot be treated as a physician under the Act and his reports do not constitute competent medical evidence.

With regard to Dr. Ursprung, also a chiropractor, the Board finds that he is also not considered a physician under the Act. The Office's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays."¹² Although Dr. Ursprung diagnosed spondylosis of the spine and postural subluxations, there is no indication in his report that this diagnosis matched the diagnosis as set forth in the Office's regulations, *i.e.*, there is no indication of an incomplete dislocation, off centering, misalignment, fixation or abnormal spacing of the vertebrae. In fact, he noted that the intervertebral disc spaces, joint spaces and soft tissues are unremarkable. Accordingly, Dr. Ursprung's opinion is of no probative value and, as such, does not establish disability.

Dr. McKinsey, a chiropractor, did not diagnose subluxation as demonstrated by x-rays to exist. Thus, as he is not a physician under the Act, his report does not constitute competent medical opinion evidence.

The Board further finds that the evidence appellant submitted on reconsideration does not establish disability from December 20, 1995 through August 31, 2004. Dr. Ghosh opined that she had right shoulder pain with torn right serratus anterior muscles and left ankle fracture with

¹¹ 5 U.S.C. § 8102(2); *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹² 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

surgeries for which she still had some pain and bilateral knee pain. The Board notes that the Office did not accept appellant's claim for any injury to her right shoulder, so any disability related to this would not be covered under the Act as causally related to the January 7, 1994 employment injury. Dr. Ghosh does not specifically state that she is totally disabled due to her accepted work-related conditions. He notes that appellant has certain restrictions, but indicates that these restrictions will be improved with more pain medication and that she should be evaluated after taking this medication. With regard to specific disability due to the accepted condition of left ankle fracture with surgeries, Dr. Ghosh noted that appellant still had some pain. However, the fact that appellant still had pain does not indicate that she was disabled from work due to this pain. With regard to her ability to walk, Dr. Ghosh simply reiterated her statement that she cannot stand or walk for prolonged periods of time due to pain.

Dr. LaBore, in his October 8, 2009 report, did not address appellant's condition from December 20, 1995 through August 31, 2004.

Accordingly, as appellant did not submit any rationalized medical opinion indicating that she was disabled from December 20, 1995 through August 31, 2004. The Board finds that she has not established her entitlement to wage-loss compensation from December 20, 1995 through August 31, 2004.

CONCLUSION

The Board finds that appellant has not established that she was entitled to wage-loss compensation from December 20, 1995 to August 31, 2004.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2009 is affirmed.

Issued: April 26, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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