United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 11-2008**
	)	**Issued: May 7, 2012**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, AK, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 1, 2011 appellant filed a timely appeal from a March 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to justify termination of appellant's wage-loss compensation for his accepted injury effective August 30, 2010.

FACTUAL HISTORY

On January 22, 1988 appellant, then a 39-year-old warehouse worker, was injured when a section of track that he was restacking collapsed and struck his ankle. OWCP accepted the claim for right ankle contusion, right leg abrasion, right astragalus fracture closed and a nonunion

[1] 5 U.S.C. §§ 8101-8193.

fracture. Appellant returned to work on January 25, 1988 and stopped on May 6, 1988.[2] It authorized surgery which was performed on June 23, 1992 and May 3, 1994.

Appellant was treated by Dr. Glen E. Feeback, a podiatrist, from July 1988 to June 20, 1990 for a work-related right ankle injury. Dr. Feeback diagnosed fracture of the posterior aspect of the talus right foot or fracture of os trigonum right foot and tarsal tunnel syndrome of the right foot. He noted that an x-ray of the right foot revealed a fracture of an os trigonum or possible fracture of the posterior aspect of the talus. Dr. Feeback recommended surgery and opined that appellant was totally disabled. Appellant was also treated by Dr. Michael Moore, a Board-certified orthopedist, from October 25, 1988 to December 30, 1991 for a right thumb injury. Dr. James J. Naples, a podiatrist, began treating appellant in 1992. On June 23, 1992 he performed an excision of os trigonum on the right and diagnosed fractured os trigonum right. On May 3, 1994 Dr. Naples performed an arthroscopic debridement with removal of cartilage from the talar dome and tibial plafond and diagnosed capsulitis/synovitis of the right ankle. On February 28, 1995 he noted treating appellant's right ankle injury since March 10, 1992. Dr. Naples opined that appellant developed a left knee injury as a result of favoring his right foot due to ankle pain. On April 29, 1996 he opined that appellant's sciatic nerve damage, back, leg and left knee pain were due to his abnormal gait that stemmed from his January 22, 1988 work injury and prevented him from performing sedentary work.[3]

Appellant continued to be treated by Dr. Naples, who, in reports dated September 17, 2004 to February 27, 2007, diagnosed degenerative joint disease, peroneal tendinitis, chronic ankle limitus and peripheral neuropathy. Dr. Naples advised that appellant reached maximum medical improvement. On March 19, 2008 he diagnosed degenerative joint disease due to trauma in the right ankle, peroneal tendinitis, chronic ankle limitus and peripheral neuropathy. Dr. Naples noted that appellant experienced joint crepitation, swelling and guarding on range of motion. He opined that appellant was totally and permanently disabled due to the January 22, 1988 injury.

OWCP referred appellant to Dr. Robert Holladay, IV, a Board-certified orthopedist, for a second opinion. In an April 10, 2008 report, Dr. Holladay indicated that he reviewed the records provided and examined appellant. He noted that examination of both knees revealed normal range of motion, no valgus, or varus angulation, no swelling, no medial or lateral joint line tenderness and no patella femoral crepitation. With regard to the ankles, Dr. Holladay noted that tender points on the right ankle, a three-centimeter scar, limited range of motion with no ligamentous instability, strength of the lower extremities was 4/5 bilaterally, normal sensory examination of the lower extremities, normal reflexes and straight leg raises were negative bilaterally. He diagnosed contusion of the right ankle post two surgeries. Dr. Holladay noted that on clinical examination there was an absence of significant findings around the right ankle. He indicated that some of the medical records implied a medial malleolar fracture and others a

[2] The matter was previously before the Board. In a decision dated May 2, 1991, the Board affirmed a December 12, 1989 OWCP hearing representative's decision which denied appellant's claim for continuation of pay. Docket No. 91-226 (issued May 2, 1991).

[3] On January 8, 1996 OWCP found that appellant's neurotic disorder was not caused or aggravated by his work injury.

fracture of the os trigonus. Dr. Holladay opined that even if appellant sustained a fracture to this area it was difficult to understand on an anatomical and physiological basis the degree of incapacity perceived by appellant. He advised that appellant self-limited his physical activities and appeared to have unrelated medical conditions that affected his overall health and ability to ambulate. Dr. Holladay advised that appellant would be unable to perform his usual job based on his general health condition but not based on the injury to his right ankle. He advised that appellant required no aggressive medical management with regards to the right ankle condition. In a duty status report, Dr. Holladay noted that appellant could return to work part time, four hours per day with restrictions.

OWCP found that a medical conflict existed between Dr. Naples, for appellant, and Dr. Holladay, the referral physician, who determined that appellant's work-related conditions had resolved and that his only restrictions were due to nonindustrial conditions.

On July 31, 2008 OWCP referred appellant to a referee physician, Dr. Bernie L. McCaskill, a Board-certified orthopedist, to resolve the conflict.[4] In a September 2, 2008 report, Dr. McCaskill indicated that he reviewed the records provided to him and examined appellant. He noted appellant's history. Dr. McCaskill reviewed appellant's job requirements, noted the work injury and reviewed treatment following the injury. He noted that during examination appellant walked with an inconsistent gait and at times walked with a normal gait. Dr. McCaskill noted that appellant was able to toe and heel walk on either lower extremity but in a dramatic fashion which was not physiologic and inconsistent with appellant's physical findings on examination. He noted no neurological abnormalities in either lower extremity, normal strength in all motor groups in both lower extremities and symmetrical and equal infrapatellar and tendoachilles reflexes. Dr. McCaskill noted no obvious swelling, atrophy or deformity in the legs, mid-calf or ankles, a well-healed scar on the right ankle, a dramatic limitation of active right ankle motion inconsistent with ankle motion previously demonstrated and no obvious right ankle ligamentous laxity. Right ankle x-rays were unremarkable. Dr. McCaskill diagnosed right ankle pain, chronic, anatomic etiology undetermined (by history). He indicated that appellant did not have significant abnormal physical or imaging findings referable to his right ankle complaints and advised that there was significant discrepancy between his examination findings and appellant's perceived inability to return to any type of work including sedentary work because of ongoing right ankle symptoms. Dr. McCaskill found no credible objective evidence of ongoing injury that would prevent appellant from returning to his preinjury work in relation to his work-related right ankle injury of January 22, 1988.

On September 16, 2008 OWCP issued a notice of proposed termination of wage-loss compensation on the grounds that Dr. McCaskill's report established that the injury-related condition no longer prevented appellant from returning to his date-of-injury job.

Appellant submitted statements dated September 25 and October 8, 2008 and disputed the findings of Drs. Holladay and McCaskill noting that neither physician performed a thorough examination. He asserted that he had residuals of his work injury and was totally disabled. Also

[4] OWCP provided a statement of accepted facts dated March 19, 2008 noting that appellant's claim was accepted for fracture of the medial malleolus of the right ankle. The statement did not note that he underwent surgeries on the right ankle.

submitted were reports from Dr. Naples, dated May 19, 1992 and April 29, 1996, who opined that appellant's sciatic nerve damage, back, leg and left knee pain were due to his abnormal gait that stemmed from his January 22, 1988 work injury and prevented him from performing sedentary work. Dr. Naples indicated that appellant's medical condition progressively worsened and was directly related to his January 22, 1988 work injury.

In a December 10, 2008 decision, OWCP terminated appellant's wage-loss compensation effective that date.

Appellant requested an oral hearing that was held on June 8, 2009. He submitted operative reports from Dr. Naples dated June 23, 1992 and May 3, 1994, previously of record. Also submitted were reports from Dr. Wes Hester, a Board-certified family practitioner, from February 4, 2008 to May 21, 2009, who treated appellant for degenerative joint disease of his left knee and allergies. Reports from Dr. John E. Hueter, a Board-certified neurologist, dated August 27, 2008 and May 26, 2009, noted treating appellant for herpetic neuralgia involving his frontal area and burning in his right foot. Dr. Hueter diagnosed right sural nerve distribution neuralgic pain, history of cervical disc disease, sciatica and migraine headaches, left meralgia paresthetica and bilateral carpal tunnel syndrome. He noted altered sensation on the sole of the right foot, tenderness to light touch of the toes and sensory loss on the lateral aspect of the right foot. An April 7, 2009 report from Dr. John White, a podiatrist, diagnosed neuropathy and neuritis of the right foot and leg. Dr. White noted that appellant's history was significant for nonunion surgery of the ankle and arthroscopic surgeries of the foot.

In a decision dated August 24, 2009, an OWCP hearing representative reversed the December 10, 2008 decision. He found that OWCP did not meet its burden to terminate wage-loss compensation for the accepted right ankle contusion, abrasion and fracture. The hearing representative specifically noted that OWCP failed to provide Dr. McCaskill with an accurate statement of accepted facts, rather, the statement did not correctly identify the accepted conditions and surgeries. He stated that Dr. McCaskill was not provided with the operative reports from the two surgeries performed in 1992 and 1994. The hearing representative advised that these deficiencies prevented Dr. McCaskill from providing a well-informed opinion. OWCP was instructed to revise the statement of accepted facts and augment the case record with the operative reports and new reports from Drs. White and Hueter and refer the matter to Dr. McCaskill for a supplemental report.

OWCP prepared a statement of accepted facts dated April 16, 2010 and noted appellant's claim was accepted for fracture of the medial malleolus of the right ankle, contusion of the right ankle, abrasion of the right ankle, enthesopathy of the os trigonum, right talus fracture and nonunion fracture. The statement further noted that appellant underwent surgery on June 28, 1988, June 23, 1992 and May 3, 1994.

On April 26, 2010 OWCP requested that Dr. McCaskill provide a supplemental report and reexamine appellant, if necessary. It provided an updated statement of accepted facts, a list of questions and additional medical records. In a June 22, 2010 report, Dr. McCaskill noted evaluating appellant on September 2, 2008 for injuries resulting from the January 22, 1988 work injury. He advised that there was no need to further examine appellant. Dr. McCaskill reviewed the additional medical records submitted over the past three years and opined that appellant

underwent no significant additional treatment and his condition was unchanged. He noted that the additional medical records provided no credible basis to change his opinions previously expressed.

On July 30, 2010 OWCP issued a notice of proposed termination of wage-loss compensation on the grounds that Dr. McCaskill's report established that the accepted injury no longer prevented appellant from performing his date-of-injury job.

By decision dated August 30, 2010, OWCP terminated appellant's wage-loss compensation effective the same date. It noted that its decision did not terminate medical benefits for necessary treatment of the accepted condition.

On September 13, 2010 appellant requested a review of the written record. In statements dated July 24 and August 24, 2010, he disputed the termination and asserted that Dr. McCaskill's evaluation was inadequate as he failed to run any tests and spent five minutes examining him. Appellant stated that he had residuals of his work injury and was totally disabled. He submitted reports from Dr. Moore, dated October 25, 1988 to December 30, 1991, who treated him for a March 29, 1988 right thumb injury. Also submitted was an April 29, 1996 report from Dr. Naples, previously of record. A July 8, 2010 left knee magnetic resonance imaging scan showed an extensive tear of the posterior horn of the medial meniscus. On July 16, 2010 appellant was treated by Dr. Douglas E. Thompson, a Board-certified orthopedist, for left knee pain and popping. Appellant reported having a broken right ankle which caused him to compensate with his left knee causing the current condition. Dr. Thompson diagnosed left medial meniscus tear and recommended surgery. In an August 18, 2010 report, Dr. Hueter treated appellant for a burning sensation involving the right foot and right meralgia paresthetica. He diagnosed right ankle fracture 1988 with limp, lumbar degenerative disc disease with sciatica, left knee degenerative arthritis with medial meniscus tear and meralgia paresthetica. Dr. Hueter noted that appellant's right ankle injury produced pain, sensory loss and abnormal gait mechanics which appellant believed caused his lumbar spine degenerative disc disease and sciatica. Appellant reported favoring his left leg due to his right foot injury which may have produced the degenerative disease and meniscal tear of the left knee. Dr. Hueter opined that appellant was totally and permanently disabled. On November 30, 2010 appellant was treated by Dr. Stacy Warner, a chiropractor, who prepared a work restriction evaluation noting that appellant reached maximum medical improvement and was totally and permanently disabled.

On March 10, 2011 an OWCP hearing representative affirmed the decision dated August 30, 2010.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] After it has determined that an employee has disability causally

[5] *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[6]

ANALYSIS

OWCP accepted appellant's claim for work-related right ankle contusion, right leg abrasion, right astragalus fracture closed and a nonunion fracture. It authorized surgery which was performed on June 23, 1992 and May 3, 1994. OWCP determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Naples, a podiatrist, who indicated that appellant was disabled due to his work-related injuries, and Dr. Holladay, an OWCP referral physician, who found no disability due to the work-related conditions. Consequently, it referred appellant to Dr. McCaskill to resolve the conflict.

The Board finds that, under the circumstances of this case, the opinion of Dr. McCaskill is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that disabling residuals of appellant's work-related conditions have ceased. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[7]

In his September 2, 2008 report, Dr. McCaskill reviewed appellant's history, reported findings and noted that appellant exhibited no objective complaints or findings due to the accepted conditions. He found no credible objective evidence of ongoing injury due to his work injury of January 22, 2008 which would prevent appellant from returning to his preinjury position. Dr. McCaskill explained that, throughout the examination, appellant exhibited inconsistent behavior. He specifically noted that appellant walked with an inconsistent gait, at times walking with a normal gait, and he was able to toe and heel walk on either lower extremity but in a dramatic fashion which was not physiologic and inconsistent with examination findings. Dr. McCaskill noted that appellant did not have significant abnormal physical or imaging findings referable to his right ankle complaints and advised that there was significant discrepancy between this and appellant's perceived inability to return to any type of work due to ongoing right ankle symptoms. He noted no abnormal neurological findings in either leg, normal strength in both legs and symmetrical reflexes. Dr. McCaskill opined that appellant could return to work subject to restrictions that were not due to the January 22, 1988 work injury but rather were due nonindustrial conditions. He opined that appellant required no treatment for the work-related injury. In a June 22, 2010 supplemental report, Dr. McCaskill noted reviewing the additional medical records submitted over the past three years and opined that appellant's condition was unchanged and there was no basis to change his previous opinion.[8]

[6] *Mary A. Lowe*, 52 ECAB 223 (2001).

[7] *Solomon Polen*, 51 ECAB 341 (2000). *See* 5 U.S.C. § 8123(a).

[8] *See Guiseppe Aversa*, 55 ECAB 164 (2003) (where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion).

The Board finds that Dr. McCaskill had full knowledge of the relevant facts and evaluated the course of appellant's condition. He is a specialist in the appropriate field. At the time wage-loss benefits were terminated, Dr. McCaskill clearly opined that appellant had no work-related reason for disability. His opinion as set forth in his reports of September 2, 2008 and June 22, 2010 are found to be probative evidence and reliable. The Board finds that Dr. McCaskill's opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of wage-loss benefits for the accepted conditions.

After Dr. McCaskill's examination, appellant submitted August 27, 2008 and May 26, 2009 reports from Dr. Hueter who diagnosed right sural nerve distribution neuralgic pain, history of cervical disc disease, sciatica and migraine headaches, left meralgia paresthetica and bilateral carpal tunnel syndrome. In an August 18, 2010 report, Dr. Hueter diagnosed right ankle fracture in 1988 with limp, lumbar degenerative disc disease with sciatica, left knee degenerative arthritis with medial meniscus tear and meralgia paresthetica and opined that appellant was totally disabled. He noted that appellant's right ankle injury produced pain, sensory loss and abnormal gait mechanics that appellant attributed to his lumbar spine degenerative disease and sciatica. Although Dr. Hueter supported that appellant's continuing symptoms were due to the work injury; his opinion on causal relationship was conclusory without any additional rationale as to how the accepted conditions caused continuing disability.[9] The Board also notes that OWCP did not accept lumbar spine degenerative disc disease, sciatica, left knee degenerative joint disease or meniscal tear of the left knee as being work related.[10]

Other reports from Dr. White dated April 7, 2009 noted appellant's treatment for right foot pain. He noted that appellant's history was significant for nonunion surgery of the ankle and arthroscopic surgeries of the foot and diagnosed neuropathy and neuritis of the right foot and leg. Likewise, on July 16, 2010 appellant was treated by Dr. Thompson who diagnosed left medial meniscus tear and recommended surgery. He reported having a broken right ankle which caused him to compensate with his left knee causing the current condition. However, none of Drs. White and Thompson's reports specifically addressed how any continuing disability was causally related to the accepted employment injuries of January 22, 1988. As noted above, OWCP did not accept left medial meniscus tear as work related.

Reports from Dr. Hester in 2008 and 2009 treated appellant for degenerative joint disease of his left knee and allergies, nonaccepted conditions and did not attribute continuing disability to the accepted conditions. Reports from Dr. Moore dated October 25, 1988 to December 30, 1991 treated appellant for a right thumb injury. Reports from Dr. Naples from June 23, 1992 to April 29, 1996, significantly predate the termination of wage-loss compensation. Other medical reports do not address continuing disability due to the accepted conditions.

On November 30, 2010 appellant was treated by Dr. Warner, a chiropractor, who opined that appellant was totally and permanently disabled.

[9] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[10] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (for conditions not accepted or approved by OWCP, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury).

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[11] Dr. Warner is not a physician as she did not diagnose a spinal subluxation demonstrated by x-ray. Furthermore, appellant's accepted conditions involve the right foot and leg and do not pertain to the spine. The Board has held that a chiropractor may only qualify as a physician in the diagnosis and treatment of spinal subluxation, his or her opinion is not considered competent medical evidence in evaluation of other disorders, including those of the extremities, although these disorders may originate in the spine.[12] Thus, Dr. Warner's opinion is not considered competent medical evidence under FECA.

Consequently, the medical evidence submitted after Dr. McCaskill's report is insufficient to overcome his report or to create another conflict in the medical evidence. The Board finds that Dr. McCaskill's opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of wage-loss benefits for appellant's accepted conditions. Appellant remains entitled to medical benefits for necessary treatment of his accepted conditions.

On appeal, appellant noted his medical treatment, asserted that he remains disabled and contended that Dr. McCaskill's opinion is insufficient. As explained, the weight of the medical evidence establishes that disability due to the accepted conditions has ceased.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate benefits effective August 30, 2010.

[11] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[12] *Pamela K. Guesford*, 53 ECAB 726 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2011 is affirmed.

Issued: May 7, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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