

**United States Department of Labor
Employees' Compensation Appeals Board**

J.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 08-6
Issued: May 23, 2008**

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 July 2, 2007 appellant filed a timely appeal from a June 8, 2007 decision of the Office of Workers' Compensation Programs which affirmed an October 4, 2006 decision finding that she had no employment-related restrictions for work and denying her request for foot surgery and a wheelchair. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's employment-related work restrictions had ceased by October 3, 2006; and (2) whether the Office properly denied appellant's request for bilateral foot arthroplasty performed on December 9, 2005 and authorization for a wheelchair.

FACTUAL HISTORY

On January 20, 2003 appellant, then a 55-year-old manager, filed an occupational disease claim alleging that she developed bilateral hammertoe deformities as a result of the standing and

walking required by her position. She first became aware of her condition in October 2002. The Office accepted the claim for aggravation of bunions of both feet and authorized a left bunionectomy on December 4, 2002 and a right bunionectomy on January 8, 2003. Appellant stopped work on December 3, 2002, initially returned to limited duty on March 3, 2003, stopped again on May 15, 2003 and returned to limited-duty work on September 8, 2003. Appropriate compensation benefits were paid.¹

Appellant came under the treatment of Dr. David Amarnek, a podiatrist. In an operative report dated December 4, 2002, Dr. Amarnek performed a chevron bunionectomy of the left foot and arthroplasty of the fourth proximal interphalangeal joint of the left foot and diagnosed hallux valgus left and hammertoe fourth left. He noted that appellant had progressed well postoperatively with no pain or discomfort. On January 8, 2003 Dr. Amarnek performed a chevron bunionectomy of the right foot, arthroplasty of the second distal interphalangeal joint and fourth proximal interphalangeal joint of the right foot. He diagnosed hallux valgus, right, hammer toe of the second distal interphalangeal joint and fourth proximal interphalangeal joint on the right. In reports dated June 10 and August 13, 2003, Dr. Amarnek diagnosed hallux valgus and hammertoes and indicated that the condition was aggravated by her employment.

In a work capacity evaluation dated August 29, 2003, Dr. Amarnek returned appellant to work full time with restrictions on walking and standing more than 30 minutes per day. In reports dated January 28 to July 14, 2004, he noted appellant had limited range of motion at the first metatarsal phalangeal joint bilaterally and symptoms of metatarsalgia. Dr. Amarnek submitted a report dated July 6, 2005, which advised that appellant could continue to work with permanent restrictions of sitting 8 hours per day with no more than 15 minutes of walking per day with the use of a foot rest. In a report dated October 24, 2005, he advised that appellant had generalized lower extremity pain from the feet to the knees.

The employing establishment referred appellant to Dr. Donald H. Brancato, a Board-certified orthopedist, for a fitness-for-duty examination. In a report dated December 12, 2005, Dr. Brancato noted that x-rays of both feet were normal with no significant arthritic change. He opined that there were no objective findings to limit appellant's fitness-for-full duty. Dr. Brancato indicated that the bunion procedures were performed to improve appellant's quality of life. He noted that appellant wore two inch heels which could significantly aggravate her complaints.

In September 6 and November 29, 2005 reports, Dr. Amarnek advised that appellant had progressively painful hammertoe deformities of the third digit bilaterally. She was having more discomfort associated with her work duties, which involved prolonged weight-bearing beyond her restrictions and recommended surgery. In a December 9, 2005 operative report, Dr. Amarnek performed arthroplasty of the third distal and phalangeal joint bilaterally and

¹ Appellant also filed a claim for a schedule award. In a March 7, 2007 decision, the Office granted a schedule award for three percent permanent impairment of the right leg and five percent impairment of the left leg. Appellant appealed the schedule award decision to the Board. On November 5, 2007 the Board affirmed the Office's schedule award decision. Docket No. 07-1134 (issued November 5, 2007).

tenotomy and capsulotomy of the third metatarsophalangeal joint bilaterally and diagnosed hammertoe third digit bilaterally at the distal interphalangeal joint and contracted third metatarsophalangeal joint bilaterally.² Treatment notes indicated that appellant progressed well postoperatively and a January 5, 2006 note advised that she could return to work in one week. On February 7, 2006 Dr. Amarnek noted appellant's complaints of shooting pain from the foot to the knee bilaterally, pain in the longitudinal arch bilaterally with clinical symptoms suggestive of metatarsalgia and gastroc soleus equines deformity with a hype-pronated foot type. He advised that these conditions prevented appellant from being ambulatory for a sustained period. Dr. Amarnek noted that appellant could safely operate a power wheelchair and recommended a motorized wheelchair with a lift for an automobile.

On March 28, 2006 the Office referred appellant to Dr. John O. Krause, a Board-certified orthopedic surgery, to assess the residuals of her accepted condition. In an April 20, 2006 report, Dr. Krause noted a history of appellant's work condition and subsequent surgeries. He found that appellant had residuals from her accepted work-related bunions despite surgical correction and experienced significant hallux valgus deformities, increased intermetatarsal angle, left greater than right and medial foot pain. Dr. Krause advised that the bilateral hallux valgus deformities and hammertoes were not the result of standing on concrete surfaces. He opined that surgeries were warranted but there was no evidence that the surgeries were due to any work-related injury since appellant has been in a sitting position where standing was limited to 15 to 30 minutes per day since 2003. Dr. Krause opined that appellant could return to work in her previous position as a manager in distribution operations without restrictions and without the use of a wheelchair.

The Office found that a conflict of medical opinion arose between Dr. Amarnek, her treating physician, and Dr. Krause, an Office referral physician, who determined that appellant had residuals of her accepted bunions, but opined that the December 9, 2005 surgery was not work related and that appellant could return to her date-of-injury position without restrictions or the use of a power wheelchair.

The Office referred appellant to Dr. Marvin R. Mishkin, a Board-certified orthopedic surgeon, selected as the impartial medical referee. In an August 1, 2006 report, Dr. Mishkin noted appellant's history of injury and listed findings on physical examination. The right foot revealed a persistent hallux valgus of 40 degrees, surgical residuals in toes 2, 3 and 4, flexion contracture of the distal IP joint of the third toe, and normal sensation through the foot with passive motion of the toes causing no pain. Left foot examination revealed hallux valgus deformity of 30 degrees, contracture of the DIP joint of the third toe, valgus deviation, intact sensation and full range of motion of the ankles and knees. Dr. Mishkin diagnosed bilateral hallux valgus deformity and hammertoe deformities preexisting appellant's occupational duties starting in 1987 and persisting, status post surgical treatment of hallux valgus and hammertoes with multiple operations, clinical and x-ray evidence of bilateral osteoarthritis of the hips and pes planus alignment of both feet. He opined that within a reasonable degree of medical certainty appellant had bilateral foot problems for many years that were present before she started working for the employing establishment in 1987. This included the preexisting bilateral hallux valgus

² The Office did not authorize the December 9, 2005 foot surgery.

deformity and hammer toes deformities. Dr. Mishkin indicated that these conditions were not the result of appellant's work duties or caused by any specific incident which occurred in October 2002. He further indicated that there was no basis to assume appellant's occupational duties aggravated her preexisting conditions. Dr. Mishkin opined that the December 9, 2005 surgery was not related to or a result from her occupational duties nor was the procedure related to any specific work injury. Appellant's surgeries were associated with the preexisting deformity of both feet present before her employment in 1987. Dr. Mishkin advised that a power wheelchair was not necessary or recommended for appellant to perform her work duties. He opined that appellant could return to her date-of-injury position without restrictions.

By decision dated October 4, 2006, the Office found that appellant had no total or partial disability due to her accepted employment conditions and that she could return to work without restrictions. The Office further noted that the weight of the medical evidence established that the December 9, 2005 surgery was not work related and that a wheelchair was not warranted. The Office advised that its decision did not terminate her medical benefits.

Appellant requested an oral hearing that was held on March 27, 2007. She submitted a March 30, 2007 report from Dr. Amarnek, who noted that appellant continued to have restricted range of motion and pain at the first metatarsal-phalangeal joint bilaterally. In an April 3, 2007 report, Dr. Amarnek noted appellant's complaints of worsening symptoms in the left first metatarsal-phalangeal joint. He stated that x-rays revealed residual hallux valgus deformity with degenerative changes and recommended additional surgery.

In a decision dated June 8, 2007, the hearing representative affirmed the October 3, 2006 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for aggravation of bunions of both feet. The Office reviewed the medical evidence and determined that a conflict in medical opinion was created between Dr. Amarnek, appellant's attending physician who disagreed with the Office referral physician, Dr. Klause, a Board-certified orthopedist, concerning whether appellant had

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223 (2001).

any disabling residuals of her work-related condition. Consequently, the Office referred appellant to Dr. Mishkin to resolve the conflict.⁵

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.⁶

In his August 1, 2006 report, Dr. Mishkin reviewed appellant's history, reported findings and noted that appellant exhibited no objective complaints or definite work-related abnormality in her condition. He diagnosed bilateral hallux valgus deformity and hammertoe deformities preexisting appellant's occupational duties starting in 1987 and persisting, status postsurgical treatment of hallux valgus and hammertoes with multiple operations, clinical and x-ray evidence of bilateral osteoarthritis of the hips and pes planus alignment of both feet. Dr. Mishkin opined that appellant's bilateral hallux valgus deformity and hammer toes deformities preexisted appellant's employment and were not caused or aggravated by appellant's work duties or any specific incident which occurred in October 2002. He further noted that the December 9, 2005 surgery was not work related but was associated with a preexisting deformity of both feet present prior to her employment in 1987 and that a motor wheelchair was not medically warranted. Dr. Mishkin opined that, based on the absence of objective findings on examination and from a review of the medical records and diagnostic studies, appellant was able to return to work full time without restriction.

The Board finds Dr. Mishkin 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 benefits were terminated Dr. Mishkin clearly opined that appellant had no work-related residuals that caused any degree of disability. His opinion as set forth in his report of August 1, 2006 is found to be probative evidence and reliable.⁷ The Board finds that Dr. Mishkin's opinion constitutes the weight of the medical evidence and supports the Office's finding that appellant had no disability for work.

Following the Office's decision appellant submitted reports from Dr. Amarnek dated March 30 and April 3, 2007 who noted appellant's continuing symptoms. However, Dr. Amarnek did not provide a rationalized opinion specifically addressing how any continuing medical restrictions were causally related to the accepted employment injury.⁸ He was on one side of a conflict that was resolved by Dr. Mishkin, and his reports do not provide new findings or medical rationale sufficient to establish that any continuing condition or disability was

⁵ See 5 U.S.C. § 8123(a).

⁶ *Solomon Polen*, 51 ECAB 341 (2000).

⁷ 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 specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

⁸ See *Jimmie H. Duckett*, 52 ECAB 332 (2001).

causally related to the accepted work injury.⁹ Therefore, the reports from Dr. Amarnek are insufficient to overcome that of Dr. Mishkin or to create a new medical conflict.

None of the reports submitted by appellant after the denial of continuing employment-related work restrictions included a rationalized opinion regarding the causal relationship between any current restrictions and her accepted work-related injury.¹⁰ Therefore, appellant has not established that she has any continuing degree of disability causally related to her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of the Federal Employees' Compensation Act¹¹ provides that the United States shall furnish to an employee, who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.¹²

In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible, in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.¹³ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹⁴

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence. Thus, in order for foot surgery to be authorized, appellant must submit evidence to show that these are for a condition causally related to the employment injury and that these were medically warranted. Both of these criteria must be met in order for the Office to authorize payment.¹⁵

⁹ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Amarnnek's report did not contain new findings or rationale upon which a new conflict might be based.

¹⁰ See *Jimmie H. Duckett*, *supra* note 8.

¹¹ 5 U.S.C. §§ 8101-8193.

¹² 5 U.S.C. § 8103(a).

¹³ *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

¹⁴ See *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁵ *Cathy B. Mullin*, 51 ECAB 331 (2000). See also *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006) (to be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition).

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for aggravation of bunions of both feet and authorized a left bunionectomy on December 4, 2002 and a right bunionectomy on January 8, 2003. The Office reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Amarnek, and the Office referral physician, Dr. Klause, concerning whether the December 9, 2005 bilateral foot surgery was work related and whether a motorized wheelchair was medically necessary. Consequently, the Office referred appellant to Dr. Mishkin to resolve the conflict.¹⁶

As noted, the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Mishkin, who found that appellant's bilateral hallux valgus deformity and hammertoe deformities preexisted her occupational duties starting in 1987 and were not caused or aggravated by her work duties. Dr. Mishkin determined that the need for the December 9, 2005 surgery did not arise from appellant's employment but was due to her preexisting condition. He noted that appellant's conditions were not due to any work duties or to any incident occurring in October 2002. Dr. Mishkin based his opinion on an examination of appellant and a review of the record, including a review of diagnostic testing. He found that appellant did not require a motorized wheelchair due to the accepted employment injury. Dr. Mishkin opined that appellant was able to return to work full time without restrictions. He provided an opinion that is sufficiently well rationalized and based upon a proper factual background such that it is given special weight.¹⁷

After Dr. Mishkin's report, appellant submitted reports from Dr. Amarnek dated March 30 and April 3, 2007, which noted her symptoms. However, Dr. Amarnek's reports did not address whether the December 9, 2005 foot surgery was medically warranted or the medical necessity of a motorized wheelchair.

The Board finds that, under the circumstances of this case, the opinion of Dr. Mishkin is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence and established that the requested surgery and motorized wheelchair were not necessary. Accordingly, the Board finds that the Office acted within its discretion in denying authorization for the requested surgery and the motorized wheelchair.

CONCLUSION

The Board finds that the Office properly determined that appellant's employment-related work restrictions had ceased by October 4, 2006. The Board further finds that the Office did not abuse its discretion in denying appellant's claim for authorization of bilateral foot surgery and payment for a motorized wheelchair.

¹⁶ See *supra*, notes 5, 6 (regarding medical conflicts and the weight accorded to an impartial report).

¹⁷ *David Alan Patrick*, 46 ECAB 1020, 1023 (1995) (impartial medical examiner's opinion was based on a complete review of the medical record and a thorough examination and was sufficiently rationalized to establish that appellant had no work-related residuals of his diagnosed; thus his opinion was entitled to special weight).

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2007 and October 4, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 23, 2008
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