

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
London, KY, Employer**

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**Docket No. 11-86
Issued: December 13, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 14, 2010 appellant filed a timely appeal from the September 28, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration of her claim and the August 20, 2010 OWCP decision which terminated her compensation effective that date. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's medical and wage-loss benefits effective August 20, 2010; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 25, 2006 appellant, then a 39-year-old distribution clerk, filed an occupational disease claim alleging that her right heel, crushed seven years prior, was aggravated by work duties that included standing for long periods.² She did not stop work. OWCP accepted the claim for temporary aggravation of traumatic osteoarthritis of the subtalar joint of the right hind foot. Appellant received appropriate compensation benefits.

In an April 10, 2008 report, Dr. Jean-Maurice Page, a Board-certified orthopedic surgeon, treated appellant for a severe right calcaneal fracture that required surgery on August 18, 1999. He diagnosed traumatic osteoarthritis of the subtalar joint status post calcaneal fracture with comminution. Dr. Page advised that appellant had been on a limited-duty restriction since the injury but was informed that there was no longer any light-duty work available for her to perform. He opined that her condition was progressive and ongoing and would always require permanent limitations on her ability to do work-related activities. Dr. Page stated that appellant would require a triple arthrodesis of the hind foot in order to control the inversion, eversion and traumatic arthritis within the subtalar joint. He reviewed her job duties as a distribution clerk and opined that the repetitive nature of her work accelerated and aggravated the preexisting right ankle injury and traumatic arthritis. Dr. Page opined that appellant could no longer perform the duties of her job. On August 8, 2008 he noted her history and advised that she had a permanent aggravation of her underlying traumatic osteoarthritis of the subtalar joint and hind foot. Dr. Page explained that the disease process was accelerated by being required to stand, squat, bend, walk long distances and lift heavy objects. The aggravation, once alleviated, would not return to a preinjury status. Dr. Page noted that appellant would require a subtalar fusion of the hind foot. In reports dated October 31, 2008, he reiterated that she was disabled and required permanent restrictions.³

On January 16, 2009 OWCP referred appellant for a second opinion to Dr. Kirpal Sidhu, a Board-certified orthopedic surgeon, to determine whether the temporary aggravation of her ankle condition had ceased. In a report dated January 27, 2009, Dr. Sidhu described her history of injury and treatment. He determined that the temporary aggravation of appellant's ankle condition had ceased and that her continuing symptoms were due to the natural progression of her preexisting condition. Dr. Sidhu found that she could not return to her previous position; however, she was able to perform limited duty for eight hours per day and prescribed restrictions.

On March 16, 2009 OWCP provided a copy of Dr. Sidhu's report to Dr. Page for comment. In a March 27, 2009 report, Dr. Page disagreed with Dr. Sidhu and opined that appellant's aggravation was permanent.

OWCP found a conflict in medical opinion between Dr. Page and Dr. Sidhu. On August 24, 2009 it referred appellant to Dr. Gregory D'Angelo, a Board-certified orthopedic

² The record reflects that appellant sustained a nonwork fracture to her right ankle in 1999.

³ Dr. Page also submitted evidence with regard to appellant's claim for a schedule award. The matter of a schedule award is not before the Board on the present appeal.

surgeon, for an impartial medical evaluation to resolve the conflict in opinion regarding the resolution of appellant's accepted condition.

In an October 2, 2009 report, Dr. D'Angelo noted appellant's history of injury and medical treatment. On physical examination, he found a healed incision over the lateral aspect of the calcaneus and a small healed incision on the medial side of the right foot. There was minimal tenderness over the calcaneus; tenderness at the subtalar joint, both medially and laterally; the ability to invert and evert five degrees in each direction through the subtalar joint; symmetric motion; and slight numbness subjectively over the lateral side of the foot. Dr. D'Angelo found no tenderness above the ankle and no crepitus, redness, heat or effusion. The toes had normal movement and function. X-rays of the right foot and ankle showed evidence of an intact ankle mortise with no signs of arthritis and a healed fracture at the calcaneus with two screws in place. There was a good restoration of the angle of Gissane and Bohlers angle. Dr. D'Angelo stated that appellant had obvious subtalar joint arthritis and some early calcaneal cuboid arthritis with excellent restoration of the medial and lateral walls of the calcaneus with normal heel width. He addressed OWCP's inquiry concerning appellant's accepted temporary aggravation and noted that this was "an odd question." Dr. D'Angelo explained that the fracture was "well known for causing significant disability." He opined:

“[It was] unusual for a patient who has this type of fracture to return to a job that requires a lot of standing. It was easily predicted that from the day she returned to work that she was going to have problems with her ankle and that there was going to be a high probability that she would gradually lose her ability to walk for prolonged periods or to do heavy lifting or carrying. This would have happened whether she worked at the postal service or whether she stayed at home and simply ambulated at home.”

Dr. D'Angelo explained that the fracture was known to slowly develop traumatic subtalar joint arthritis. He opined that he was not sure how it could be accepted for a temporary aggravation, as appellant's condition was permanent, and that daily living, whether at work or home, would aggravate it. Dr. D'Angelo stated that her aggravation continued since she was still at work and work activities aggravated it. He advised that, "even if she was n[o]t at work, [appellant] would continually be aggravating this simply by walking around doing day to day activities." Dr. D'Angelo noted that her subjective complaints were consistent with her objective findings and her condition was a "significantly disabling injury." He opined that it was "quite remarkable that [appellant] was able to return to a job that required a lot of standing and walking with this type of injury. I think it is a complement to her fortitude and to Dr. Page's good job repairing the fracture." Dr. D'Angelo found that appellant did not have any permanent impairment rating related to a work injury. He stated that, while the medical records indicated that she had "right ankle traumatic arthropathy," she actually had "subtalar joint arthropathy on the right side and a normal ankle."

On November 9, 2009 OWCP requested clarification from Dr. D'Angelo. It noted that appellant had not worked at the employing establishment since October 17, 2008 and requested that he address whether her current symptoms and conditions were related to the factors of her employment and, if so, whether they caused a permanent worsening of the preexisting condition.

OWCP also inquired into whether the aggravation was temporary and, if so, whether it had ceased.

In a December 22, 2009 report, Dr. D'Angelo opined that appellant's current condition and symptoms were not related to employment factors. He noted that he did not understand how her claim was accepted for a temporary aggravation. Dr. D'Angelo opined that the duties that appellant performed while working did not cause a permanent worsening of the preexisting condition. He explained that his opinion was "based on the fact that whether she was working or not, she would have had this aggravation in her symptoms, as this is the natural history of this type of injury regardless of the type of activities in which the injured party engages."

On July 15, 2010 OWCP issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence, as represented by the report of Dr. D'Angelo, established that the residuals of the work injury of January 19, 2006 had ceased. Appellant did not respond.

In an August 20, 2010 decision, OWCP terminated appellant's wage-loss and medical benefits effective that date on the grounds that she had no continuing residuals of her employment injury.

Appellant requested reconsideration on September 8, 2010. OWCP received the following: prescriptions dated January 19, 2006 from Dr. Page who restricted alternating standing and seated positions during the workday and Celebrex; health certifications dated March 9, 2007 and March 18, 2008 with illegible signatures; a September 12, 2006 health certification from a nurse; a September 12, 2006 report from a physician's assistant; a September 12, 2006 report from Dr. Page who noted that standing and walking aggravated appellant's condition, along with age; a copy of Dr. Page's April 10 and August 8, 2008 reports; and an August 10, 2010 letter from appellant addressed to her senator and a September 8, 2010 letter to her congressman. In her letter to her senator, appellant asserted that she could no longer send her son to private school after OWCP terminated her compensation and she asserted that Dr. Page supported that her injury was permanent and that her job aggravated her condition.

In a September 28, 2010 decision, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵ The right to medical benefits for an accepted condition is not limited to the period

⁴ *Curtis Hall*, 45 ECAB 316 (1994).

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

of entitlement to compensation for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁷

Furthermore, FECA⁸ provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.⁹ In cases where OWCP 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.¹⁰

ANALYSIS -- ISSUE 1

OWCP determined that a conflict of medical opinion existed regarding the resolution of appellant's accepted condition based on the opinions of Dr. Page, appellant's physician, and Dr. Sidhu, an OWCP referral physician.¹¹ OWCP properly referred appellant to an impartial medical examiner, Dr. D'Angelo, to resolve the conflict in opinion between Drs. Page and Sidhu.

The Board finds that Dr. D'Angelo's October 2 and December 22, 2009 reports are not sufficiently detailed or well rationalized to constitute the weight of the medical opinion. The reports are insufficient to establish that appellant had no medical residuals of her accepted condition. The Board initially notes that it does not appear that OWCP provided Dr. D'Angelo with a description of her duties. It is unclear as to the factual basis on which he provided an opinion with regard to the amount of standing appellant did in her job.¹² Dr. D'Angelo noted that it was an "odd question" with regard to whether her accepted temporary aggravation had

⁶ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁷ *Calvin S. Mays*, 39 ECAB 993 (1988).

⁸ 5 U.S.C. §§ 8101-8193, 8123(a).

⁹ *Id.* at § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁰ *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹¹ As previously noted, Dr. Page reported that appellant's aggravation of her preexisting condition was permanent and that her disability was due to her work injury, while Dr. Sidhu indicated that the temporary aggravation had ceased and that appellant was able to perform limited duty for eight hours per day with restrictions.

¹² In a July 14, 2009 letter, OWCP posed questions to Dr. D'Angelo and referenced a statement of accepted facts but no statement of accepted facts appears in the record with the July 14, 2009 letter. The letter does not specify appellant's job duties or offer definitions of permanent and temporary aggravations. Dr. D'Angelo's reports also do not reference a review of a statement of accepted facts. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.2 (September 2009) (provides that a statement of accepted facts serves as the factual frame of reference for the medical specialist and is required for all issues requiring a medical opinion for resolution except for those which do not depend on the facts of the claim).

ceased.¹³ He explained that the type of fracture appellant had in 1999 was known to cause significant disability and advised that it would be unusual for a patient who had this type of fracture to return to a job that required much standing. He noted that “there was a high probability that she would gradually lose her ability to walk for prolonged periods or to do heavy lifting or carrying regardless of whether she was working or ambulating at home.” Dr. D’Angelo explained that the fracture was known to slowly develop traumatic subtalar joint arthritis. He opined that appellant’s condition was permanent and daily living, whether at work or home, aggravated it. The Board notes that this report provided an ambiguous opinion on causal relation as he indicated that work activities had aggravated her condition. OWCP requested clarification¹⁴ on November 9, 2009 and explained that appellant had not worked for the employing establishment since October 17, 2008, but Dr. D’Angelo’s December 22, 2009 supplemental report offered a conclusory opinion that appellant’s current condition and symptoms were not related to work factors. Dr. D’Angelo stated that, “based on the fact that whether she was working or not, she would have had this aggravation in her symptoms, as this is the natural history of this type of injury regardless of the type of activities in which the injured party engages.” He did not explain the medical basis for his conclusion regarding the “natural history” of appellant’s condition or otherwise explain the reasons why appellant’s traumatic osteoarthritis of subtalar joint of the right hind foot was be unaffected by her work duties. The Board finds that Dr. D’Angelo failed to provide sufficient reasoning to explain why all residuals of the accepted condition had resolved.

OWCP has the burden of proof to terminate appellant’s compensation benefits and relied on Dr. D’Angelo’s reports to meet this burden. Without adequate explanation of how he arrived at his conclusion, his reports cannot constitute the weight of the medical evidence and do not resolve the medical conflict regarding whether appellant has residuals of her accepted temporary aggravation of traumatic osteoarthritis of subtalar joint of the right hind foot. Due to these defects, OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in terminating appellant’s compensation benefits effective August 20, 2010.

¹³ In his December 22, 2009 report, Dr. D’Angelo sought to explain his comment noting that he did not understand how appellant’s claim was accepted for a temporary aggravation. The Board notes that it is the function of the medical expert to give an opinion only on medical questions, not to find facts. See *Barbara Bush*, 38 ECAB 710, 714 (1987).

¹⁴ When OWCP 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, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. *Roger W. Griffith*, 51 ECAB 491(2000).

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2010 decision of the Office of Workers' Compensation Programs is reversed.¹⁵

Issued: December 13, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁵ In light of the Board's finding, the second issue is moot.