United States Department of Labor
Employees' Compensation Appeals Board

K.G., Appellant	)	
and	)	**Docket No. 12-1867**
	)	**Issued: April 5, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Neptune, NJ, Employer	)	

Appearances:
Jason S. Lomax, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 13, 2012 appellant, through her attorney, filed a timely appeal from the March 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to 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 this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss and medical compensation benefits effective September 6, 2011; and (2) whether appellant has met her burden of proof to establish a stress fracture and avascular necrosis (AVN) as a result of her June 26, 2010 work injury. Counsel argues that the decision of March 30, 2012 was based on flawed findings of facts and conclusions of law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On June 26, 2010 appellant, then a 43-year-old city carrier, injured her right foot when she stepped down hard off stairs while delivering mail. She stopped work June 29, 2010 and did not return. OWCP accepted a right metatarsophalangeal joint (MPJ) sprain and paid compensation benefits. Appellant was previously out of work for three months due to a nonwork-related right bunion and hammertoe surgery on the second digit. The employment injury was sustained about two months after she returned to full-duty work.

On June 28, 2010 Dr. Alison DeWaters, a podiatrist, noted appellant's January 20, 2010 surgery along with the history of injury. Examination findings were noted and an impression of MPJ sprain and right edema was provided. Appellant was fitted with an ankle boot and held off work. On July 12, 2012 Dr. DeWaters noted x-ray findings of nondisplaced stress fracture to the second metatarsal neck.

On August 9, 2010 Dr. DeWaters noted that appellant reported that she had tripped over a toolbox at home. A September 16, 2010 right foot magnetic resonance imaging (MRI) scan revealed postsurgical changes in the first metatarsal bone with some bone marrow edema. There also were marrow signal changes in the medial sesamoid bone with a differential including stress reaction, infection or sesamoiditis. In the second metatarsal, a surgical screw or tack was present from the previous surgery with either an advanced arthritis process at the joint space or AVN of the metatarsal head. In the second proximal phalanx, there was bone marrow edema present with either a healing fracture or osteotomy site. In her September 23, 2010 report, Dr. DeWater's reported that the stress fracture had healed but the MRI scan showed AVN to the second metatarsal head. She requested a bone-healing device. OWCP authorized the bone healing treatments.

On March 28, 2011 appellant underwent another MRI scan, which showed improvement in the first metatarsal bone with some indication of a small area of bone infarction or AVN. In the second metatarsal head, "some of the findings described previously are mildly improved but there is still subtle cortical irregularity along the articular surface and an area of enhancing marrow signal along the plantar surface of the second metatarsal head with a differential including AVN or arthritis … no stress fractures are present."

In an April 4, 2011 report, Dr. David Rubinfeld, a Board-certified orthopedic surgeon and an OWCP referral physician, noted the history of injury, his review of the medical records and statement of accepted facts and presented examination findings. He diagnosed status post January 2010 bunionectomy and hammertoe corrective surgery. Dr. Rubinfeld stated that appellant did not have residuals of the accepted condition of right MPJ sprain, noting the examination was unremarkable with no objective findings. He further stated that no additional conditions were found on examination and opined that she could work without restrictions or disability. Dr. Rubinfeld found that appellant reached maximum medical improvement on April 4, 2011.

On May 2, 2011 OWCP issued a notice of proposed termination of benefits based on Dr. Rubinfeld's second opinion evaluation. In a May 16, 2011 statement, appellant took issue with Dr. Rubinfeld's opinion. She requested another examination as the opinions of

Drs. DeWaters and Rubinfeld differed so greatly. In a May 10, 2011 letter, Dr. DeWaters noted that the September 16, 2010 and March 28, 2011 MRI scans indicated AVN of the second metatarsal, for which she recommended surgery. She stated that Dr. Rubinfeld failed to mention the AVN in his report. In other progress reports, Dr. DeWaters continued to opine that appellant had AVN of second MPJ of right side and neuroma.

OWCP determined a conflict in medical opinion existed between Dr. DeWaters and Dr. Rubinfeld and referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial opinion. In a July 25, 2011 report, Dr. Dennis noted his review of the medical record, the statement of accepted facts and the history of injury. He noted appellant's prior nonwork-related right bunion and hammertoe of the second digit with surgery on January 20, 2010 and her tripping over a toolbox at home in August 2010. Dr. Dennis acknowledged her two previous left foot claims for injuries that had resolved as well as a left foot fracture in June 2011. Appellant was able to get up onto the examination table and did not walk with a definite limp even though there was some acute left foot swelling consistent with a probable resolving hairline fracture. Dr. Dennis noted evidence of slight hallux rigidus on the great toe, which was part of the need for bunion surgery and stiffness of the second toe as a result of the fusion. Appellant refused to tip-toe walk or stand on her toes or heels. Dr. Dennis noted bilateral flatfeet with normal alignment of the heel and no plantar fasciitis. Right foot examination showed scarring over surgical sites. There was very little, if any, motion of the MPJ of the second toe and no swelling or indurations on either the second or great toe of the right foot. Appellant could bend her toes fairly well except for the second toe which was stiff but straight. The ankles were normal with some mild pes planus. Minimal tenderness was noted under the second metatarsal of the right foot with no tenderness under the first metatarsal.

Dr. Dennis noted that the actual x-rays or MRI scan reports were not available except for a compact disc (CD) of the March 28, 2011 MRI scan but the radiologist reports of the previous scans were reviewed. The March 28, 2011 MRI scan showed artifact of two screws in the neck of the first metatarsal and one screw in the neck of the second metatarsal. Dr. Dennis stated:

> "[W]hat initially may have looked like [AVN] was not … the bony structures were intact. What looked like possible metatarsalgia was not, as there was no tenderness specifically under the metatarsal head. What looked like an abnormality of the joint was actually artifact from the screw. There was no fracture seen whatsoever on any of the metatarsals or toes. No bone scan was available."

He stated that there was no evidence of fracture or AVN. Dr. Dennis stated that there was no need to proceed with any artificial joint installation of appellant's right foot as it would only make the situation worse. He stated that he was unimpressed with any evidence of a limp and felt that she was able to resume the activities she was doing before her injury.

Dr. Dennis noted that the injury was well healed and there was no indication that appellant was in any worse condition than she was on the day prior to the injury. He opined that the bunion surgery was properly done and that the fused second toe may be somewhat symptomatic, but it was not associated with a fracture or any disruption of the screw that was inserted previously. Dr. Dennis opined that appellant's continuing right foot problems were

sequelae of the elective surgery for the bunion and second toe. Even giving appellant the benefit of doubt of a sensation deficit, he stated that the metatarsalgia and residuals of the preexisting condition, along with the previous unrelated surgery, were the cause of appellant's discomforts. Dr. Dennis opined that those discomforts did not rise to the level of debilitation and did not preclude her from returning to her prior job because she had returned to that job after surgery and there was no substantial change caused by the injury. He diagnosed status post bunionectomy and hammertoe correction surgery, January 2010; MPJ (resolved); alleged fracture second MPJ, not confirmed by MRI scan that he saw or by history; AVN, second MPJ, not confirmed by history or MRI scan that he saw; bilateral bunions; and bilateral pes planus. Dr. Dennis opined that the accepted sprain had resolved with no residuals. He found no evidence of AVN or fracture, noting the artifact from the screw from the elective postoperative surgery was the only abnormality on MRI scan. Dr. Dennis opined that appellant had fully recovered from the work injury, that she could return to full duty and no further treatment was needed. He stated that the mild metatarsalgia which she may have was not due to her injury. Dr. Dennis stated that surgery was not needed. He further stated that her diagnosed conditions would likely persist if she returned to work as a letter carrier.

On August 5, 2011 OWCP proposed to terminate appellant's compensation benefits based on Dr. Dennis' impartial opinion. In an August 26, 2011 statement, appellant disagreed with OWCP's proposed action, but submitted no new evidence. By decision dated September 8, 2011, OWCP finalized the termination effective September 6, 2011.

Appellant's attorney requested a telephonic hearing before an OWCP hearing representative, which was held January 5, 2012. Appellant testified as to her injury and course of treatment. She stated that Dr. DeWaters' diagnosis never changed and she had not returned to her preinjury status. Appellant's attorney argued the claim should be expanded to include a resolved stress fracture and AVN. He noted that OWCP had authorized the bone-stimulator treatment for the AVN but never accepted the condition. Appellant's attorney stated that Dr. Dennis may have missed the diagnosis of stress fracture as he did not have the x-ray films or earlier MRI scans to review. He also argued that Dr. Dennis could not release appellant to work full duty as a letter carrier as he stated that her problems would persist.

By decision dated March 30, 2012, an OWCP hearing representative affirmed the termination decision. She also found no evidence to expand the claim to include a stress fracture and AVN.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted 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, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3] The right to medical benefits for an accepted condition is not limited to the period

[2] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[3] *Id.*

of entitlement to compensation for disability.[4] To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.[5] Once it has properly modified or terminated benefits, the burden of reinstating benefits shifts to the employee.[6]

FECA provides that, if there is disagreement between an OWCP-designated examining physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[7] For a conflict to arise the opposing physicians viewpoints must be of virtually equal weight and rationale.[8] Where OWCP has referred the case 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.[9]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right MPJ sprain and paid benefits including authorizing bone-healing treatments. It determined that a conflict in medical opinion evidence arose between the attending physician, Dr. DeWaters, and OWCP's referral physician, Dr. Rubinfeld, as to whether appellant had any continuing residuals or disability causally related to her accepted June 26, 2010 employment injury. Dr. DeWaters' opined that appellant had a healed stress fracture but developed AVN to the second metatarsal head. Dr. Rubinfeld opined that appellant's work-related right MPJ sprain had resolved and she could return to work without restrictions. He also found there were no additional conditions. Consequently, OWCP properly referred her to Dr. Dennis to resolve the conflict.

In his report of July 25, 2011, Dr. Dennis provided a comprehensive review of appellant's history, including the fact that she had a nonwork-related right bunion and hammertoe surgery of the second digit on January 20, 2010, that she tripped over a toolbox at home in August 2010 and fractured her left foot in June 2011 and set forth extensive findings from examination and review of available x-ray and MRI scan reports. He noted diagnoses and opined that the accepted sprain had resolved with no residuals. Dr. Dennis found no evidence of AVN or fracture, noting that the artifact from the screw from the elective postoperative surgery was the only abnormality evidenced on MRI scan. He opined that appellant could return to full duty and no further treatment was needed from the employment injury. Dr. Dennis indicated that the mild metatarsalgia was not work related but sequelae of the elective surgery regarding the bunion and second toe. He opined that the discomfort appellant had did not rise to the level of

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

[5] *Calvin S. Mays*, 39 ECAB 993 (1988).

[6] *Joseph A. Brown, Jr.*, 55 ECAB 542, 544 n.5 (2004).

[7] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[8] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

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

debilitation or preclude her from returning to work as she had returned to her job after her elective surgery and there had been no substantial change caused by the work-related injury.

The Board finds that Dr. Dennis had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Dennis is a specialist in the appropriate field. He offered no basis to support that appellant had residuals or work-related disability from the accepted condition. Dr. Dennis' opinion as set forth in his report of July 25, 2011 is found to be probative evidence and reliable. While appellant's attorney has contended that Dr. Dennis' report was not prepared under FECA procedures and that he was biased he offered no evidence to support his allegations. The Board has held that an impartial specialist properly selected under OWCP's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias.[10] The Board finds that, under the circumstances of this case, the opinion of Dr. Dennis is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related conditions had ceased.

As the weight of the medical evidence establishes that appellant's June 26, 2010 employment injury has resolved, OWCP properly terminated her wage-loss compensation and medical benefits.[11]

LEGAL PRECEDENT -- ISSUE 2

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[12] To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a casual relationship.[13] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[14] Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the diagnosed condition and the specific employment factors identified by the claimant.[15] Neither, the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease

[10] *Geraldine Foster*, 54 ECAB 435 (2003); *William Fidurski*, 54 ECAB 146 (2002).

[11] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. *Supra* note 6.

[12] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[13] *See M.W.,* 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[14] *See D.E.*, 58 ECAB 448 (2007); *Mary J. Summers*, 55 ECAB 730 (2004).

[15] *See Phillip L. Barnes*, 55 ECAB 426 (2004); *Leslie C. Moore*, 52 ECAB 132 (2000).

or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[16]

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional misconduct.[17] Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[18]

ANALYSIS -- ISSUE 2

Appellant has argued that the claim should have been expanded to include a stress fracture and the AVN. For conditions not accepted by OWCP as employment related, she has the burden of proof to establish causal relationship.[19] An OWCP's hearing representative found that the evidence of record did not support an expansion of the claim and the Board agrees. Dr. Dennis found that neither the stress fracture nor the AVN condition was firmly diagnosed. The September 16, 2010 MRI scan report showed a surgical screw or tack present in the second metatarsal with either an advanced arthritis process at the joint space or AVN of the metatarsal head. The March 28, 2011 MRI scan on CD showed no stress fractures present and in the area of the second metatarsal head there was either arthritis or AVN, which had not progressed since the prior study. While Dr. DeWaters diagnosed both a stress fracture and the AVN, Dr. Dennis interpreted the results from the x-ray and MRI scan reports as well as his review of the March 28, 2011 MRI scan on CD as hardware from appellant's prior surgery. Appellant's attorney has argued that Dr. Dennis' conclusions lacked probative value as he did not have the actual x-ray or MRI scan films to review. The hearing representative noted that actual films are not required when reports of the studies are provided, as was the case here. As Dr. Dennis did not question any of the reports pertaining to the objective tests, the evidence fails to support appellant's contention of error on the part of OWCP. Thus the evidence of record does not support the expansion of the claim to include a stress fracture and the AVN. The fact that the bone-stimulator treatment was authorized by OWCP does not establish that OWCP accepted either of those conditions.

While appellant's counsel argues the decision is contrary to fact and law, the medical evidence fails to support any residuals or disability due to the accepted condition.

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.

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[16] *See V.W.,* 58 ECAB 428 (2007); *Ernest St. Pierre*, 51 ECAB 623 (2000).

[17] *Mary Poller*, 55 ECAB 483, 487 (2004).

[18] *Susanne W. Underwood (Randall L. Underwood),* 53 ECAB 139, 141 n.7 (2001).

[19] *See supra* note 12.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation effective September 6, 2011 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injury. Appellant also has not established that she sustained a work-related stress fracture and AVN as a result of the work injury.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 30, 2012 is affirmed.

Issued: April 5, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board