

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

N.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Union, NJ, Employer)

Docket No. 14-731
Issued: June 10, 2014

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 12, 2014 appellant, through her attorney, filed a timely appeal from the September 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 14, 2013 on the grounds that she had no residuals of her work injuries after that date.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 3, 2007 OWCP accepted that appellant, then a 52-year-old transportation security screener, sustained aggravation of left foot fibroma due to her work duties since August 2004, including standing on concrete floors for extended periods. It later accepted that she also sustained bilateral aggravation of plantar fibromatosis and bilateral foot sprain due to her work duties.²

On August 11, 2006 appellant underwent surgical excision of her left foot plantar fascia with stripping and removal of her left plantar fibromatoma. The surgery was authorized by OWCP and she stopped work at that time.³

OWCP undertook development of the medical evidence including referral of appellant in November 2007 to Dr. Ralph Ricciardi, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on continuing work-related residuals. In his November 15, 2007 report, Dr. Ricciardi indicated that appellant had sensitivity along her left foot surgical scar and noted that she would be able to work on a job which did not require more than two hours of standing or three hours of walking per day. Appellant began to participate in OWCP-sponsored vocational rehabilitation efforts but she did not return to work.

In an initial visit report dated December 18, 2007, Dr. Joel Lerner, an attending podiatrist, diagnosed severe plantar fasciitis bilaterally with mild postoperative adhesions of the left foot and status post excision of plantar fibromas of the left foot. He indicated that the neurological examination revealed sharp, dull, fine touch and two-point discrimination to be within normal limits in appellant's feet, but that her chief complaint was severe pain along the plantar fascial bands of both feet.⁴

In an April 21, 2008 magnetic resonance imaging (MRI) scan of appellant's left foot, the radiologist stated that there was a bulbous appearance of the plantar aponeurosis. He noted:

“It is difficult to differentiate postsurgical change versus residual fibroma. I will be glad to make a direct comparison to the preoperative films to assess for interval change. Otherwise, the underlying musculature and subcutaneous tissue within this region appears fairly well preserved. The bones of the mid foot reveal normal alignment. The joint spaces appear intact.”

In an October 22, 2008 report, Dr. Evangelos Megariotis, a Board-certified orthopedic surgeon serving as an impartial medical specialist, diagnosed recurrent fibromatosis and fibroma mass and concluded that appellant could work for 40 hours per week in a “sit down job” which

² In January 2006, appellant began working in a limited-duty position for the employing establishment. She received compensation on the periodic rolls for partial disability.

³ Appellant received compensation on the periodic rolls for work stoppages related to her surgery.

⁴ On August 4, 2008 Dr. Lerner performed OWCP-authorized foot extracorporeal shockwave lithotripsy on appellant's left foot.

only required her to walk for up to one hour per day and stand for up to one hour per day. He indicated that additional left foot surgery should be considered.

On April 3, 2009 Dr. Lerner performed radiofrequency nerve ablation of the inferior calcaneal and medial calcaneal nerves of appellant's left foot. The procedure was authorized by OWCP. On April 22, 2009 Dr. Lerner stated that appellant currently was disabled but that she should be able to begin a job search in six to eight weeks.

In a July 28, 2009 report, Dr. Andrew Hutter, a Board-certified orthopedic serving as an OWCP referral physician, diagnosed left foot plantar fibromatosis and stated that appellant had reached maximum medical improvement. He posited that appellant could perform a sedentary desk job which did not require her to stand for more than 30 minutes at a time.

The record does not contain additional medical evidence regarding appellant's feet until the production of an April 19, 2011 report in which Dr. Lerner indicated that she presented with severe left foot pain in the plantar fascial band and ingrown toenails on both great toes. Dr. Lerner diagnosed severe postoperative adhesions of the left plantar fascial band and chronic onychocryptosis of the lateral border of the left and right hallux (greater on the left). He indicated that appellant had reached maximum medical improvement with respect to her left foot plantar fascial pain and could return to a "sit down position" that did not require standing, lifting or bending. In an April 19, 2011 work restriction form, Dr. Lerner stated that appellant was unable to engage in walking, standing, bending, stooping, squatting, kneeling, climbing and lifting.⁵

In a March 8, 2012 work restrictions form, Dr. Michael Lerner, another attending podiatrist,⁶ stated that appellant was unable to engage in walking, standing, bending, stooping, squatting, kneeling, climbing and lifting.

Due to the lack of detailed current medical reports from attending physicians, OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for an examination and opinion on whether he had residuals of his accepted work injuries.

In an April 18, 2012 report, Dr. Lakin discussed appellant's accepted work injuries and the medical treatment of her foot condition, including surgical intervention.⁷ He reported the findings of his physical examination noting that sensation was intact and strength was 5/5 in appellant's lower extremities. Dr. Lakin indicated that appellant had a well-healed incision under the medial aspect of the left foot arch (four centimeters long) which had minimal

⁵ In April 2011, appellant underwent surgery to address the nonwork-related ingrown toenail on her left big toe. On May 24, 2011 Dr. Joel Lerner diagnosed mild postoperative cellulitis of her left hallux and multiple painful soft tissue neoplasms consistent with porokeratosis bilaterally. On June 28, 2011 he diagnosed cellulitis of lateral border of the left hallux.

⁶ Dr. Joel Lerner and Dr. Michael Lerner are members of the same practice group.

⁷ Dr. Lakin noted that a report of MRI scan testing of appellant's left foot showed a bulbous appearance of the plantar aponeurosis beneath the marker. He inadvertently listed the date of the report as August 22, 2009 but the report was actually dated August 21, 2008.

tenderness and “no masses palpable.” Motor examination upon dorsiflexion, plantar flexion, inversion and eversion was 5/5 in the left foot. Dr. Lakin noted that there was full motion of appellant’s feet and ankles and Tinel’s testing in the tarsal tunnels was negative. He indicated that the aggravation of appellant’s left foot fibroma and plantar fibromatosis had resolved, noting that appellant had surgical treatment and that the “mass was excised and there is no longer any mass present and it was just a temporary aggravation.” Dr. Lakin stated that appellant presently had no reason for disability or need for medical treatment and noted, “The patient has just minimal tenderness to the area of the incision. There are no masses present in the plantar aspect of the foot, [and she] has excellent strength and excellent motion...” Dr. Lakin indicated that appellant could perform her regular work and attached a form report that contained no work restrictions.

In a May 16, 2012 letter, OWCP advised appellant that it proposed to terminate her wage-loss and medical benefits on grounds that she ceased to have residuals of her accepted work injuries. It noted that the weight of the medical evidence with respect to this matter rested with the opinion of Dr. Lakin, OWCP’s referral physician. OWCP provided appellant 30 days to provide evidence and argument challenging the proposed termination action.

In a May 29, 2012 letter, counsel argued that clarification was necessary regarding Dr. Lakin’s discussion, in his April 18, 2012 report, of the MRI scan testing of appellant’s left foot. OWCP requested that Dr. Lakin provide a supplemental report further explaining his discussion of the MRI scan testing of appellant’s left foot.

In a June 27, 2012 report, Dr. Lakin indicated that the MRI scan testing that he reviewed was dated April 21, 2008 and noted that, although the testing showed a bulbous appearance of the plantar aponeurosis, appellant underwent surgery on August 11, 2006 for radical excision of plantar fascial stripping and removal of a plantar fibroma. He stated:

“Again, it should be noted on clinical examination the patient had no mass present. The patient has a four centimeter well-healed incision of the medial aspect of the arch. Patient was noted to have excellent motion of the left foot and ankle and had no masses palpable. The patient was also noted to have intact sensation and negative Tinel[’s] testing in the tarsal tunnel. Again, in this setting clinically there was no mass palpable. The patient’s MRI [scan] report might have reflected postoperative scarring. Again, my specialist in the field of orthopedics includes evaluating and treating disorders of the spine and extremities including the foot and ankle. Therefore, I hope this clarification helps, and my opinion remains unchanged that the claimant is in need of no further treatment and there is no work-related disability.”

In a February 14, 2013 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective February 14, 2013 noting that this action was justified by the well-rationalized opinion of Dr. Lakin.

Appellant requested a video hearing with an OWCP hearing representative. During the June 25, 2013 hearing, the hearing representative testified that she continued to have problems

with her feet and could not stand for extended periods due to pain. Appellant claimed that during his April 2012 examination Dr. Lakin did not have her take off her shoes.

Appellant submitted a March 4, 2013 report in which Dr. Joel Lerner provided an extensive discussion of the treatment of her foot condition. Dr. Lerner diagnosed chronic neuritis of the left foot secondary to postoperative adhesions and chronic plantar fasciitis. He argued that these conditions were directly related to appellant's accepted work injuries.

In a September 9, 2013 decision, OWCP affirmed the termination of appellant's wage-loss compensation and medical benefits effective February 14, 2013 based on the well-rationalized opinion of Dr. Lakin, OWCP's referral physician. It further determined that, after the proper termination of compensation, effective February 14, 2013, appellant submitted a March 4, 2013 report of Dr. Joel Lerner which now created a conflict in the medical evidence regarding appellant's work-related residuals after February 14, 2013. The case was remanded to OWCP for further development of this matter to include referral of appellant for an impartial medical examination.⁸

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁹ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹⁰ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹² In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

⁸ As the subject of this remand action is in an interlocutory posture, it is not before the Board. *See* 20 U.S.C. § 501.2(c)(2) (providing that there will be no appeal with respect to any interlocutory matter decided (or not decided) during the pendency of a case).

⁹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

¹⁰ *Id.*

¹¹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988). After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹² 5 U.S.C. § 8123(a).

¹³ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS

OWCP accepted that appellant sustained work-related aggravation of left foot fibroma, bilateral aggravation of plantar fibromatosis and bilateral foot sprain. On August 11, 2006 appellant underwent surgical excision of her left foot plantar fascia with stripping and removal of her left plantar fibroma. On April 3, 2009 she underwent radiofrequency nerve ablation of the inferior calcaneal and medial calcaneal nerves of her left foot. The procedures were authorized by OWCP. Effective February 14, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits based on the opinion of Dr. Lakin, a Board-certified orthopedic surgeon, who served as an OWCP referral physician.

OWCP properly referred appellant to Dr. Lakin for a second opinion regarding whether she had residuals of her work injury¹⁴ and the Board finds that the weight of the medical evidence regarding work-related residuals is represented by the thorough, well-rationalized opinion of Dr. Lakin. The April 18 and June 27, 2012 reports of Dr. Lakin establish that appellant had no disability due to her accepted work injuries after February 14, 2013.

In an April 18, 2012 report, Dr. Lakin discussed appellant's accepted work injuries and the medical treatment of her foot condition, including surgical intervention. He reported normal findings on range of motion, sensation and strength testing of appellant's lower extremities. Dr. Lakin indicated that appellant had a well-healed incision under the medial aspect of the left foot arch (four centimeters long) which had minimal tenderness and "no masses palpable." He stated that appellant could perform her regular work and noted, "The patient has just minimal tenderness to the area of the incision. There are no masses present in the plantar aspect of the foot, [and she] has excellent strength and excellent motion..." In a supplemental report dated June 27, 2012, Dr. Lakin indicated that, although a radiologist stated that diagnostic testing from April 2008 showed a bulbous appearance of the left plantar aponeurosis, he found no mass in the plantar area of appellant's left foot during his examination more than four years later.

The Board has carefully reviewed the opinion of Dr. Lakin and notes that it has sufficient reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Lakin provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹⁵ He provided medical rationale for his opinion by explaining that the medical evidence of record and his physical examination showed that the accepted work injuries had resolved. Dr. Lakin emphasized that there was no sign of any mass in the plantar area of appellant's left foot where she previously had a fibroma surgically removed.¹⁶

¹⁴ Before OWCP and on appeal, counsel argued that Dr. Lakin was not certified in the appropriate medical specialty to evaluate appellant's foot condition. However, as an orthopedic surgeon, Dr. Lakin was qualified to evaluate appellant's total musculoskeletal condition, including that involving her feet.

¹⁵ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁶ Appellant claimed that, during his examination, Dr. Lakin did not have her remove her shoes. However, a reading of his reports shows that Dr. Lakin did in fact perform testing which required close examination of her feet without shoes. Appellant did not present persuasive evidence to support her assertion.

Before OWCP and on appeal, counsel argued that there was a conflict in the medical evidence between the opinion of Dr. Lakin and the opinions of appellant's attending physicians. In an April 19, 2011 report, Dr. Joel Lerner, an attending podiatrist, diagnosed severe postoperative adhesions of the left plantar fascial band and chronic onychocryptosis of the lateral border of the left and right hallux (greater on the left) and indicated that appellant could return to a "sit down position" that did not require standing, lifting or bending. However, this report is of limited probative value on the relevant issue of this case because Dr. Lerner did not clearly indicate whether appellant's residuals or need for work restrictions were related to the accepted foot conditions versus her preexisting foot condition or some nonwork-related condition (such as ingrown toenails). The other attending physician reports from around the time of Dr. Lakin's reports are brief and failed to address work-related residuals or disability.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 14, 2013 on the grounds that she had no residuals of her work injuries after that date.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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