

FACTUAL HISTORY

On approximately November 23, 1996 the employee, then a 43-year-old housekeeping aid, filed a claim for occupational disease, number 03-229999, alleging that he developed chronic bilateral tarsal tunnel syndrome as a result of his employment duties, and as a result of the cumulative effect of the numerous injuries he sustained,² while working as a nurses aid and a housekeeping aid from 1974 to 1991.³ The employee last worked for the employing establishment on June 30, 1991.

In support of his claim, the employee submitted an October 22, 1997 medical report from Dr. James Stephenson, an attending Board-certified surgeon, who diagnosed bilateral tarsal tunnel syndrome and noted that the diagnosed condition was the result of repeated cumulative trauma, specifically, the multiple contusions, sprains, lacerations, strains and blunt injuries which occurred while the employee worked as a nurses aid and housekeeping aid.

In a decision dated December 30, 1997, the Office denied the employee's claim on the grounds that the claim was not timely filed. The employee requested an oral hearing, and in a decision dated July 9, 1998, an Office hearing representative reversed the Office's prior decision. The hearing representative found that the employee's claim had been timely filed and further found that he had submitted sufficient medical evidence to warrant further medical development of the claim. The hearing representative instructed the Office to combine all of the employee's case files into one record and to refer the employee, together with a statement of accepted facts and copies of the relevant medical evidence, to a Board-certified specialist for a second opinion evaluation.

On remand, the Office prepared a statement of accepted facts reflecting the employee's numerous accepted injuries. By letter dated August 13, 1998, it referred the employee to Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion. In a report dated September 16, 1998, Dr. Valentino noted that the employee

² The employee has filed approximately a dozen claims with the Office. As a result of these claims, the Office has accepted that the employee sustained a 1977 right ankle contusion, a 1981 right shoulder strain, a 1982 lumbar sprain, a 1985 contusion to his left leg and sprain of the left knee and leg, a 1988 laceration of his left foot and sprain of the left ankle, a 1989 lumbosacral sprain, and a 1990 right foot sprain.

³ The Board notes that several of the employee's claims have previously been before the Board. In its most recent decision, issued April 4, 2002, the Board reviewed an October 4, 2002 decision of the Office, in which the Office found that with respect to his claim number A02-84604, the employee had not established that his bilateral tarsal tunnel syndrome was causally related to the combined effects of all of his accepted employment injuries. The Board set aside the Office's decision on the grounds that the opinion of Dr. Gary Gordon, the impartial medical specialist selected by the Office to resolve the conflict in medical opinion, was not sufficiently rationalized or based on a complete factual background of the employee's case because the statement of accepted facts prepared by the Office was deficient in several respects. The Board remanded the case to the Office with instructions to prepare a new statement of accepted facts and a new list of questions to be answered indicating all of the conditions accepted by the Office as work related and to refer this information to Dr. Gordon for a supplemental report. The Board stated that Dr. Gordon should be asked to provide a reasoned medical opinion regarding whether the combined effect of all of the employee's employment-related conditions contributed to or caused his bilateral tarsal tunnel syndrome. The Board notes that the instant claim, involving the employee's claim number A03-229999, is following a parallel procedural path.

had fully recovered from his multiple work injuries without any ongoing positive findings, and that there was no evidence of any traumatically-induced tarsal tunnel condition related to the work injuries.

By decision dated October 29, 1998, the Office denied the employee's claim for occupationally-related tarsal tunnel syndrome.

The employee requested an oral hearing, and in a decision dated March 1, 1999, an Office hearing representative set aside the Office's prior decision, finding that a conflict in medical opinion existed between the employee's treating physician, Dr. Stevenson, and Dr. Valentino, the Office referral physician. The hearing representative instructed the Office to refer the employee, together with an updated statement of accepted facts and copies of the relevant medical evidence, to an impartial medical specialist for resolution of the conflict in medical opinion.

On remand, the Office prepared a statement of accepted facts reflecting the employee's numerous accepted injuries, and by letter dated April 22, 1999, referred the employee to Dr. Richard G. Traiman, a Board-certified orthopedic surgeon, for an impartial medical opinion. In a report dated May 18, 1999, Dr. Traiman noted that, while the medical records revealed the presence of borderline to mild tarsal tunnel syndrome in 1994, the employee had no current evidence of tarsal tunnel syndrome, and that the ongoing pain and paresthesias in his feet were related instead to chronic mild lumbosacral radiculopathy plus an alcoholic polyneuropathy related to his hepatitis C. The physician concluded that the employee had fully recovered from his work-related injuries, which may or may not have contributed to the tarsal tunnel syndrome.

By decision dated June 28, 1999, the Office denied the employee's claim for occupationally-related tarsal tunnel syndrome.

The employee requested an oral hearing. In a decision dated September 24, 1999, an Office hearing representative set aside the Office's June 28, 1999 decision, finding that Dr. Traiman's report was insufficient to resolve the conflict in medical opinion, as he had not adequately addressed whether the employee's multiple employment injuries had caused or aggravated the employee's tarsal tunnel syndrome before it resolved. The hearing representative instructed the Office to request a supplemental report from Dr. Traiman on this issue.

On remand, the Office asked Dr. Traiman to submit a supplemental report. In a report dated November 11, 1999, Dr. Traiman noted that there might have been a minor relationship between the employee's numerous employment injuries and his tarsal tunnel syndrome. By letter dated November 30, 1999, the Office asked the physician for a more conclusive opinion. In response, Dr. Traiman submitted a December 17, 1999 report in which he noted that there was no evidence that the employee's tarsal tunnel syndrome was the result of his multiple work injuries.

While the case was on remand, the employee submitted an October 20, 1999 medical report from Dr. Vincent Pongia, a treating podiatrist, who noted the employee's test results had clearly established the presence of bilateral tarsal tunnel syndrome, that this condition was

traumatically induced by the employee's multiple employment injuries, and that he knew of no relationship between tarsal tunnel syndrome and alcoholism or hepatitis C.

By decision dated January 14, 2000, the Office denied the employee's claim for occupationally-related tarsal tunnel syndrome.

An oral hearing was held on June 28, 2000 at the employee's request. By decision dated October 12, 2000 an Office hearing representative set aside the Office's January 14, 2000 decision, finding that a conflict in medical opinion existed between the employee's treating podiatrist, Dr. Pongia, and Dr. Traiman, the Office impartial medical specialist. The hearing representative instructed the Office to refer the employee, together with an updated statement of accepted facts and copies of the relevant medical evidence, to a new impartial medical specialist for resolution of the conflict in medical opinion.

On remand, the Office prepared a statement of accepted facts reflecting the employee's numerous accepted injuries, and by letter dated November 28, 2000, referred the employee to Dr. Mallory L. Eisenman, a podiatrist certified by the American Board of Podiatric Orthopedics, for an impartial medical opinion. The Office asked Dr. Eisenman to address whether the employee had developed any medical condition in any way causally related to his employment traumas and/or to factors of his federal employment. In a report dated January 12, 2001, Dr. Eisenman noted that early testing was positive for tarsal tunnel syndrome, but that current test results were negative. The physician explained that it was very rare for tarsal tunnel syndrome to exist, and that it was usually caused by direct penetrating trauma to the medial aspect of the ankle at the level where the retinaculum exits, such as to cause a swelling and entrapment of the posterior tibial nerve. Dr. Eisenman explained that tarsal tunnel syndrome can also be caused by repeated trauma such as strain and increased intracompartmental pressure about the nerve caused by extreme pronation. She further noted that the employee did display a flat foot deformity with pronation bilaterally. Dr. Eisenman concluded, however, that there was no direct evidence of bilateral medial ankle injuries related to the employee's work causing his tarsal tunnel syndrome and his current symptoms.

By decision dated February 22, 2001, the Office denied the employee's claim for occupationally-related tarsal tunnel syndrome. The employee requested an oral hearing, and in a decision dated July 3, 2001, an Office hearing representative set aside the Office's prior decision, finding that Dr. Eisenman's report was insufficient to resolve the conflict in medical opinion, as she might not have been provided with all of the relevant evidence of record, and further had not adequately addressed whether the employee's employment duties, which included mopping and standing at work, day after day, had caused or contributed to his tarsal tunnel syndrome. Finally, the hearing representative noted that, while Dr. Eisenman had recommended additional testing, none had been performed. The hearing representative instructed the Office to provide Dr. Eisenman with all of the relevant evidence of record, request that the employee obtain a new magnetic resonance imaging (MRI) scan and electromyography (EMG), and request a supplemental report from Dr. Eisenman on the issue of whether the employee's tarsal tunnel syndrome was ever causally related to either his multiple work-related traumatic injuries or the occupational daily factors of standing and mopping.

On remand, the Office referred the employee for additional medical testing, which was performed on October 4 and 6, 2001, and asked Dr. Eisenman to submit a supplemental opinion. In a report dated January 11, 2002, Dr. Eisenman noted that neither the recent EMG nor MRI scan showed any evidence of a distinct tarsal tunnel syndrome, and concluded that the totality of the evidence of record did “not substantiate [the employee’s] claim of chronic tarsal tunnel syndrome being causally related to his work duties.”

While the case was on remand, the employee submitted an October 26, 2001 medical report from Dr. Pongia, who noted that the employee continued to be incapable of any type of prolonged standing or ambulation.

By decision dated January 11, 2002, the Office denied the employee’s claim for occupationally-related tarsal tunnel syndrome.

The employee requested an oral hearing, and in a decision dated July 23, 2002 an Office hearing representative set aside the Office’s January 11, 2002 decision, finding that Dr. Eisenman’s report was insufficient to resolve the conflict in medical opinion, as she had not provided any medical rationale for her conclusions. The hearing representative instructed the Office to request a supplemental opinion, with supporting rationale, from Dr. Eisenman on the issue of the causal relationship between the employee’s tarsal tunnel syndrome and his employment.

On remand, the Office asked Dr. Eisenman to submit a supplemental report. In a report dated September 23, 2002, Dr. Eisenman explained that classically, the symptoms of tarsal tunnel syndrome are aggravated by multiple activities, such as prolonged standing or walking and noted that the employee’s job duties from the early 1980’s to 1991 required him to spend significant time on his feet. Dr. Eisenman concluded that the employee’s “condition may have been aggravated by his work activity” and added that the duration of the work-related aggravation would begin on the date the employee was diagnosed with tarsal tunnel syndrome. By letter dated October 28, 2002, the Office asked Dr. Eisenman for an unequivocal opinion as to whether the employee’s employment duties caused, aggravated, precipitated or accelerated the employee’s tarsal tunnel syndrome, and, if so, when the aggravation would have ceased. In response, Dr. Eisenman submitted a November 7, 2002 report in which she stated:

“It is my opinion that the claimant’s work aggravated [his] tarsal tunnel condition. It is well substantiated in medical literature that tarsal tunnel syndrome can be caused or aggravated by related trauma such as strain and increased intracompartmental pressure about the posterior tibial nerve. The duties that were assigned to [the employee] as a housekeeping aid caused increased strain about the medial ankle and, therefore, aggravated his tarsal tunnel syndrome. The date the aggravation ceased would have been his last date of employment.”

On November 13, 2002 the Office accepted the employee’s claim for temporary aggravation of the underlying condition of tarsal tunnel syndrome, for the period 1981 to June 30, 1991. In a separate decision also dated November 13, 2002, the Office denied the employee’s claim for compensation benefits beyond June 30, 1991, and further terminated entitlement to medical treatment beyond June 30, 1991.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,⁴ when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.⁵ When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.⁶

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.⁷ Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁸

The fact that the Office accepts the employee's claim for a specified period of disability does not shift the burden of proof to the employee to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability during the period subsequent to the date when compensation is terminated or modified.⁹ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

ANALYSIS

In this case, the Office based its denial of the employee's claim for compensation benefits for his accepted employment-related bilateral tarsal tunnel syndrome beyond June 30, 1991, on the opinion of Dr. Eisenman, the designated impartial specialist selected to resolve the conflict between the opinions of Drs. Traiman and Pongia.

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the

⁴ 5 U.S.C. §§ 8101-8193 (1974).

⁵ *Chris Wells*, 52 ECAB 445 (2001); *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁶ *Raymond W. Behrens*, *supra* note 5.

⁷ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁸ *Id.*

⁹ *Raymond W. Behrens*, *supra* note 5.

¹⁰ *Raymond W. Behrens*, *supra* note 5.

selected physician's opinion was biased or prejudiced.¹¹ These procedures, set forth in the Federal (FECA) Procedure Manual provide, in pertinent part, as follows:

“b. Selection of Physician. The [claims examiner] may use Form CA-19, Request for Specialist Referral (Exhibit 1 (Link to Image)), to initiate the referral. Unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories.... The Physicians' Directory System (PDS), including physicians listed in the American Board of Medical Specialties Directory and specialists certified by the American Osteopathic Association (AOA), should be used for this purpose....

(1) The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted. A physician who is not Board-certified may be used if he or she has special qualifications for performing the examination, but the MMA must document the reasons for the selection in the case record.”¹²

In the instant case, the Office properly found that there was a conflict between Drs. Traiman and Pongia. The Office referred the employee, along with the case record and a list of specific questions to Dr. Eisenman for an impartial medical examination pursuant to section 8123(a) of the Act.¹³ The opinion of such specialist, if sufficiently rationalized and based upon a proper factual background, is entitled to special weight.¹⁴ The Board finds, however, that Dr. Eisenman cannot be considered an impartial medical specialist as she is not Board-certified by either the American Board of Medical Specialties or the American Osteopathic Association. In addition, the Office did not establish that Dr. Eisenman possesses any special qualifications which would exempt her from the Board-certification requirement. Her opinion is therefore insufficient to justify termination of the employee's benefits beyond June 30, 1991.¹⁵ The Board therefore finds that the Office did not establish that the employee's entitlement to compensation benefits ceased as of June 30, 1991.

¹¹ *Charles M. David*, 48 ECAB 543 (1997).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003).

¹³ 5 U.S.C. § 8123(a); *Mary A. Moultry*, 48 ECAB 566 (1997).

¹⁴ *Mary A. Moultry*, *supra* note 13.

¹⁵ *Charles M. David*, *supra* note 11.

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate the employee's entitlement to compensation benefits as of June 30, 1991.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2002, terminating the employee's entitlement to compensation benefits beyond June 30, 1991, is reversed.

Issued: April 21, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
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Michael E. Groom
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