



employment-related condition had resolved by September 20, 1992.<sup>2</sup> The Board noted that the evidence from Dr. Michael Lee, a podiatrist, was of diminished probative value because his opinion on causal relationship relied on an alleged fall at work in February 1997 that had not been factually established.

On November 26, 2002 the Board issued an order remanding the case on the grounds that the record was incomplete.<sup>3</sup> In an order dismissing appeal dated June 29, 2004, the Board noted that the Office had issued a decision pursuant to an emotional condition claim, but had not issued an appropriate decision with respect to a foot injury as directed by the Board in the November 26, 2002 order. The Office was directed to issue an appropriate decision with regard to the foot claim.

The evidence submitted following the last Office decision on the merits dated October 17, 1997 included a May 26, 2001 report from Dr. Lee. The history noted that appellant fell off a ladder in February 1997 and exacerbated a preexisting foot condition. Dr. Lee found that appellant had initially sustained foot injuries while in military service and his condition had been aggravated by employment. He stated in pertinent part:

“It is highly probable that [appellant] severely aggravated his pes planus condition in his former civil service occupation. Prolonged standing and walking with heavy loads in all likelihood triggered an acute condition of plantar fasciitis in both his arches. It has been well established that prolonged standing and walking can aggravate a pes planus condition as they can aggravate a tarsal tunnel syndrome and most certainly can trigger an acute condition of plantar fasciitis by causing additional microscopic tears. Each incidence of aggravation adds to these irreversible conditions, they never return to their previous state. I can say with a high degree of medical certainty that both of these conditions are now permanent, static and irreversible impairments.”

\* \* \*

“Question #1: Does the claimant continue to suffer residuals of the injury of the above date? Yes. Prolonged standing and walking and carrying heavy loads can initiate and also exacerbate any preexisting condition of plantar fasciitis whether or not the person has a planus or cavus foot. Once the plantar fascia becomes inflamed certain steps must be taken to reverse the condition. However, if further stress on the plantar fascia during the healing stage occurs, this can lead to a permanent worsening of the condition.

“In [appellant’s] case, adequate treatment to reverse the condition had not been taken. Therefore the aggravation of his condition, which first became manifestly evident in January 1989, became gradually worse after returning to work sometime in March 1989 and continued to deteriorate until he was forced again to

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<sup>2</sup> The accepted condition was a temporary aggravation of bilateral pes planus and plantar fasciitis.

<sup>3</sup> Docket No. 02-1171 (issued November 26, 2002).

leave work on April 3, 1990. Following this there was a period of continued decline until he reached a point where his condition bottomed out, so to speak, and it stabilized into a permanent condition.”

Dr. Lee concluded that appellant was disabled from April 3, 1990 and his employment-related aggravation had not resolved.

In a decision dated March 16, 2005, the Office reviewed the claim on its merits and denied modification. The Office found that Dr. Lee’s May 26, 2001 report did not overcome the prior inconsistencies noted by the Board. Appellant requested reconsideration and submitted an April 28, 2005 report from Dr. Lee, who stated that he disagreed with Dr. Gunderson and reiterated his opinion that appellant continued to have an employment-related condition. By decision dated May 11, 2005, the Office denied modification.

### **LEGAL PRECEDENT**

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.<sup>4</sup>

The Federal Employees’ Compensation Act provides that, if there is a 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 the examination.<sup>5</sup> The implementing regulation states that, if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>6</sup>

### **ANALYSIS**

In this case, appellant submitted a detailed report from Dr. Lee dated May 26, 2001. The Office found that the report did not overcome the prior inconsistencies noted by the Board in its May 17, 2000 decision. In that decision, it was noted that Dr. Lee had not explained how the accepted employment factors contributed to a permanent condition, and his opinion on causal relationship appeared to rely on a February 1987 incident that had not been factually established. The May 26, 2001 report, however, although it records a February 1987 fall in its history, does not rely on the alleged incident in its opinion on causal relationship with employment. The May 26, 2001 report provides medical reasoning for an opinion that the job duties caused an employment-related aggravation that caused disability after September 1992. Dr. Lee discussed

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<sup>4</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

<sup>5</sup> 5 U.S.C. § 8123(a).

<sup>6</sup> 20 C.F.R. § 10.321 (1999).

prolonged standing and walking and explained why he believed the job had resulted in a continuing aggravation.

The Board finds that the medical evidence is of sufficient probative value to create a conflict with Dr. Gunderson as to whether appellant's employment-related condition had resolved by September 20, 1992. The case will be remanded to the Office for referral to an appropriate impartial medical specialist to resolve the conflict. After such further development as the Office deems necessary, it should issue an appropriate decision.

**CONCLUSION**

The Board finds that the medical evidence created a conflict that must be resolved pursuant to 5 U.S.C. § 8123(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions dated May 11 and March 16, 2005 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 12, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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