

affirmed the April 21, 2004 decision. The facts of this case, as set forth in the prior Board decision, are herein incorporated by reference.

On January 10, 2002 appellant, then a 53-year-old food inspector, filed an occupational disease claim alleging that on December 3, 2001 she sustained tarsal tunnel syndrome and plantar fasciitis of her feet due to the prolonged standing required in her job. She stopped work on December 26, 2001.² The Office accepted appellant's claim for a temporary aggravation of bilateral tarsal tunnel syndrome with no disability after January 26, 2002.

In its April 21, 2004 decision, the Office denied appellant's claim for disability after January 26, 2002 based on the March 22, 2004 report of Dr. Scott B. Neff, a Board-certified orthopedic surgeon selected to resolve a conflict in the medical opinion evidence. Dr. Neff determined that she had no residual disability after January 26, 2002 causally related to her accepted temporary aggravation of preexisting mild tarsal tunnel syndrome.

On August 10, 2006 appellant requested reconsideration and submitted additional evidence, including a copy of a June 30, 2006 letter she received from the Iowa Board of Medical Examiners (the medical board) and a June 30, 2006 settlement agreement between the medical board and Dr. Neff.³ The medical board informed her that it was instituting disciplinary action against Dr. Neff for three incidents: failing to evaluate a patient in a timely manner following her admission to a hospital, failing to appropriately manage the postoperative care of a knee replacement patient in 1999, and failing to perform a proper examination and assessment of a patient. Under the terms of a settlement agreement, Dr. Neff received a reprimand, was assessed a \$12,500.00 civil penalty and was required to complete 12 hours of continuing medical education. He was also required to personally evaluate all patients admitted to a hospital under his care in a timely manner, perform appropriate and thorough histories and physical examinations and ensure that his medical records accurately reflected all examinations that he performed. Dr. Neff was also subject to certain monitoring requirements for a period of two years. Neither the medical board's letter to appellant, nor the June 30, 2006 settlement agreement between Dr. Neff and the medical board, identifies the patients involved in the medical board's decision to take disciplinary action taken against Dr. Neff.

By decision dated July 19, 2007, the Office denied modification of its denial of appellant's claim for disability after January 26, 2002.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as the result of an employment injury.⁵ Monetary compensation

² The record shows that appellant began working for the employing establishment on July 16, 2001.

³ Appellant filed a complaint with the state medical board against Dr. Neff in 2004. She also filed a complaint with the Office regarding her March 22, 2004 impartial medical examination performed by Dr. Neff.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Thomas M. Petroski*, 53 ECAB 484 (2002).

benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁶ Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.⁷

Under the Act, 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.⁸ 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.⁹

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination.¹⁰ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹¹

ANALYSIS

The Board finds that this case is not in posture for a decision. Appellant has submitted documents regarding disciplinary action taken against Dr. Neff by the state medical board. She asserts that the action taken by the medical board raises the issue of whether he conducted a thorough examination and evaluation of her on March 22, 2004 and whether his opinion that she had no work-related disability after January 26, 2002 is still entitled to special weight.

In *Geraldine Foster*,¹² appellant asserted that the report of an impartial medical specialist selected by the Office in her case was not entitled to special weight. She submitted copies of state court decisions in which judges found that the physician had provided false testimony and engaged in other unprofessional conduct. The Board reversed the termination of appellant's compensation benefits, in part, because the evidence indicated that the physician was not an appropriate choice for an impartial medical specialist resolving a conflict of medical opinion in a claim under the Act.

⁶ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁷ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8123(a); see also *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

¹¹ See *Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

¹² 54 ECAB 435 (2003).

The instant case involves a state medical oversight board rather than a court. The situation in this case is similar to *Foster* in that there are incidents where the conduct of a physician were determined to be inappropriate and unprofessional. The June 30, 2006 settlement agreement between Dr. Neff and the medical board includes a finding that he failed to perform a proper examination and assessment of an unidentified patient. On appeal, counsel contends that this reference in the notice of disciplinary action pertains to Dr. Neff's examination of appellant. There is insufficient evidence of record to establish that appellant is the patient whose examination was found by the medical board to be improper. On remand, the Office should further develop the evidence on the issue of whether Dr. Neff's March 22, 2004 report is entitled to special weight in light of the new evidence from the state medical board. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should further develop the evidence on the issue of whether Dr. Neff's March 22, 2004 medical report is entitled to special weight.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 19, 2007 is set aside and the case remanded for further action consistent with this decision.

Issued: April 8, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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