

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

D.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Niles, OH, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 09-1472
Issued: February 18, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal of a May 1, 2009 decision of the Office of Workers' Compensation Programs affirming the October 16, 2008 termination of his compensation benefits. Pursuant to 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 the Office met its burden of proof to terminate appellant's compensation benefits effective October 16, 2008.

FACTUAL HISTORY

On February 10, 2004 appellant, then a 37-year-old letter carrier, filed an occupational disease claim alleging that he developed tendinitis in his right ankle while walking and delivering mail during an increased work assignment. He stopped work following surgery on June 13, 2006 and returned to light duty on August 28, 2006. The Office accepted appellant's

claim for right ankle tendinitis and authorized surgery. It subsequently accepted deep venous thrombosis. The Office paid appellant appropriate compensation.

The reports of Dr. Joseph Osti, a podiatrist, found split peroneus brevis tendon of the right ankle and diagnosed right ankle tendinitis. On June 13, 2006 Dr. Osti performed a repair of the split peroneus brevis tendon of the right leg and he remodeled the lateral calcaneus of the right foot. In an August 17, 2006 attending physician's report, he advised that appellant would be totally disabled between June 13 and August 27, 2006. Appellant could return to light duty on August 28, 2006 with no mail delivery and limited weight bearing. Dr. Osti's subsequent duty status reports dated between August 24 and November 22, 2006 noted that appellant could continue working with restrictions. His July 25, 2006 work capacity evaluation noted that appellant could not perform his usual job as he had undergone surgery for his right ankle condition; however, he was able to work eight hours per day with restrictions.

On December 28, 2006 Dr. Rao Sudheendra, a vascular surgeon, noted appellant's complaint of right calf swelling and diagnosed extensive deep venous thrombosis of the right superficial femoral vein of the right leg.

On February 8, 2007 the Office referred appellant, with a statement of accepted facts, to Dr. Michael J. Jurenovich, an osteopath and orthopedic surgeon, for a second opinion evaluation. In a March 21, 2007 report, Dr. Jurenovich summarized appellant's history of injury and medical treatment. Upon examination, he found a well-healed scar along the lateral side of appellant's ankle, good flexion in all toes and no atrophy in the foot or ankle area. Dr. Jurenovich opined that appellant's accepted condition had long since resolved as he sustained the injury four years prior and he was nine months prior surgery. He stated that treatment of deep venous thrombosis would likely end within a few months. Dr. Jurenovich noted that appellant's examination was unremarkable. In a work capacity evaluation, he found that appellant could perform his usual job without restrictions and that he had reached maximum medical improvement.

In an April 12, 2007 report, Dr. Osti disagreed with Dr. Jurenovich. He stated that, although appellant's foot was healing nicely, a blood clot in his upper thigh prevented him "from doing much." Dr. Osti noted that appellant could eventually return to full duty but that it would take some time. He recommended incrementally decreasing appellant's work restrictions instead of immediate release to full duty as this would exacerbate appellant's condition. In reports dated June 7 to October 22, 2007, Dr Osti advised that appellant could continue working eight hours per day but could not perform any overtime.

The Office found conflict in medical opinion between Drs. Osti and Jurenovich regarding the extent of appellant's work-related condition and disability. On November 6, 2007 it referred appellant, together with a statement of accepted facts, to Dr. James David Brodell, a Board-certified orthopedic surgeon, for a referee examination.

In a November 19, 2007 report, Dr. Brodell reviewed and summarized appellant's medical history. Upon examination, he found that the right ankle was normal appearing with a healed incisional scar behind the lateral malleolus and no visible or palpable swelling. Minimal palpation of the surgical scar elicited groaning and moaning as appellant withdrew. Dr. Brodell also found that active and passive ankle and foot motion was equal and symmetrical to the

opposite side with no demonstrable instability, no calf tenderness, no distal varicosities and no abnormal neurovascular findings. X-rays of appellant's right ankle showed scattered degenerative changes, specifically irregularity and sclerosis about the medial and lateral malleoli, osteophytes projecting from the superior surface of the talar neck and small osteophytes extending from the anterior and posterior aspect of the distal tibia. Dr. Brodell diagnosed osteoarthritis, status postsurgical debridement and repair of the degenerative peroneus brevis right ankle tendon and resolved ipsilateral deep venous thrombosis. He indicated that appellant's right ankle skeletal and soft tissue degenerative condition was age related. Dr. Brodell also opined that appellant had no residual disability of his accepted conditions noting that these conditions had resolved long ago. He advised that there were no physical limitations or restrictions imposed by residuals from the work injury and that there was no medical indication that additional diagnostic testing or treatment was necessary. In a work capacity evaluation of the same date, Dr. Brodell indicated that appellant could work eight hours per day without restrictions.

Dr. Osti submitted additional medical reports. On November 5, 2007 he noted that appellant's work-related diagnoses consisted of right ankle sprain, tendinitis, blood clot, peripheral neuritis, nerve entrapment, deep venous thrombosis and right split peroneus brevis tendon. Dr. Osti advised that residuals of appellant's injury had not resolved and that the expected recovery date was unknown. In a November 30, 2007 duty status report, he indicated that appellant was able to perform his regular work full time. Dr. Osti did not list any restrictions. On March 27, 2008 he noted appellant's complaint of right ankle pain. Dr. Osti stated that a magnetic resonance imaging scan revealed partial tear of the anterior talofibular ligament. He indicated that appellant attributed this condition to minor slippage on ice and snow. Dr. Osti opined that appellant could not work more than he had been and advised further activity restrictions. On May 5, 2008 he noted that appellant had been walking somewhat abnormally for the last several years due to imbalance from injury to the peroneal tendons and that he had stretched out his ligament. In work status forms dated May 22 and June 24, 2008, Dr. Osti advised that appellant's work restrictions remain the same until further notice.

On August 29, 2008 the Office issued a notice of proposed termination of compensation benefits, finding that the weight of the medical evidence, resting with Dr. Brodell, established that the accepted medical condition had resolved without the need for additional treatment.

In an October 16, 2008 decision, the Office terminated appellant's compensation benefits effective that day finding that Dr. Brodell, who represented the weight of medical evidence, found that appellant had no continued residuals or disability and that no other evidence was submitted to alter this recommendation.

On October 24, 2008 appellant, through his representative, requested an oral hearing which was held on February 9, 2009. In an October 13, 2008 report, Dr. Osti noted appellant's complaint of right foot pain along the lateral side upon direct palpation. He noted that appellant reported to continue working but that he was unable to perform duties within the last few hours of delivering mail. Dr. Osti advised that appellant reached maximum medical improvement but might need further surgery to alleviate additional exacerbations of his condition, including scar tissue release of both tendons and possible nerve tissue. He disagreed with the finding of Dr. Brodell stating that appellant had a clot in his right upper thigh that developed the previous

year. Dr. Osti advised that restrictions should be applied to his work duties and that he should not work more than eight hours per day without any additional routes.

In a May 1, 2009 decision, an Office hearing representative affirmed the October 16, 2008 decision, finding that the weight of the medical evidence properly rested with Dr. Brodell.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has determined that, an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁴

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 an examination.⁵

ANALYSIS

The Office accepted that appellant's work injury caused a right ankle condition. It paid him appropriate compensation before terminating his compensation benefits effective October 16, 2008. The Board finds that the Office met its burden to establish that all residuals of appellant's accepted employment condition had resolved effective October 16, 2008.

The Office properly determined that a conflict arose in the medical evidence as to whether appellant had any disability or residuals due to his accepted right ankle condition. Dr. Osti, a treating physician, submitted reports advising that appellant had continuing residuals of his accepted work injury and that he work with restrictions. On the other hand, Dr. Jurenovich, the second opinion physician, opined that the accepted conditions had resolved and that no work restrictions were necessary.

The Office properly referred appellant to Dr. Brodell for a referee evaluation to resolve the conflict in medical opinion between Drs. Osti and Jurenovich as to whether appellant had any

¹ *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

² *Vivien L. Minor*, 37 ECAB 541 (1986).

³ *T.P.*, 58 ECAB 377 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁴ *E.J.*, 59 ECAB ____ (Docket No. 08-1350, issued September 8, 2008).

⁵ 5 U.S.C. § 8123(a).

disability or residuals due to the accepted right ankle condition. In a November 19, 2007 report, Dr. Brodell provided rationale for his opinion that appellant ceased to have any residuals due to his employment duties. His review of the medical record in addition to his own examination revealed that appellant's right ankle appeared normal with no visible or palpable swelling. Dr. Brodell also found equal and symmetrical active and passive ankle and foot motion with no calf tenderness, no distal varicosities and no abnormal neurovascular findings. Based on these findings, he determined that appellant's right ankle condition and deep vein thrombosis had resolved long ago with no residuals or disability and, therefore, appellant could perform his regular work duties without any restrictions or further treatment. Although Dr. Brodell noted that x-rays revealed scattered degenerative changes in appellant's right ankle, he explained that this was an age-related condition and not work related. His opinion was based on a proper factual and medical history as he had a statement of accepted facts and his report accurately summarized the relevant medical evidence. Moreover, Dr. Brodell analyzed the case record and his own findings on examination to support his conclusion regarding appellant's ankle condition.⁶ He noted his examination findings and determined that appellant's disability and residuals of appellant's accepted condition had ceased. Dr. Brodell found that there was no need for further medical treatment. The Board finds that his opinion is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight⁷ and established that residuals of appellant's accepted right ankle condition have resolved without residuals or disability.

Appellant, thereafter, did not submit sufficient medical evidence to overcome the weight of Dr. Brodell's opinion. Reports from Dr. Osti, who was on one side of the conflict that, Dr. Brodell resolved, provided no new rationale in support of continuing residuals or disability for appellant's right ankle condition or deep vein thrombosis and are insufficient to create a new conflict or overcome Dr. Brodell's report.⁸ The Board finds that the weight of the medical evidence rests with Dr. Brodell. As the impartial specialist, he found that appellant had no continued disability or residuals due to the accepted right ankle condition. Therefore, the Office met its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 16, 2008.

⁶ See *Naomi Lilly*, 10 ECAB 560 (1959) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are factors which enter into the weight of an evaluation).

⁷ See *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008) (when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight).

⁸ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); see also *Dorothy Sidwell*, 41 ECAB 857 (1990) (the Board notes that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated May 1, 2009 and October 16, 2008 are affirmed.

Issued: February 18, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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