

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

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**W.R., Appellant**

**and**

**U.S. POSTAL SERVICE, WEST FARMS  
STATION, Bronx, NY, Employer**

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**Docket No. 09-1742  
Issued: June 1, 2010**

*Appearances:*  
*Thomas R. Uliase, 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 June 30, 2009 appellant, through her representative, filed a timely appeal from a January 8, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether the Office properly terminated appellant's medical benefits effective May 1, 2008 on the grounds that she no longer experienced disability or residuals of her employment injury.

On appeal, appellant's representative contends that the medical report of the impartial medical examiner is not entitled to special weight because he was not properly selected, did not demonstrate knowledge of appellant's full-duty job requirements or provide medical rationale for his opinion that appellant no longer had any residuals or disability from her employment injury. He also argued that the statement of accepted facts was deficient because it did not include appellant's prior work-related left ankle injury.

## **FACTUAL HISTORY**

On April 28, 2005 appellant, then a 36-year-old letter carrier, experienced pain and swelling in her left ankle while walking her mail route.<sup>1</sup> The Office accepted the traumatic injury claim for strain of the lateral collateral ligament of the left ankle. Appellant stopped work on April 30, 2005 and received continuation of pay and wage-loss compensation. On October 19, 2005 the Office placed her on the periodic rolls. On December 23, 2005 appellant underwent an authorized left ankle arthroscopy, debridement of the osteochondral injury talar dome and anterior lateral impingement lesion, synovectomy and repair of the anterior talar fibular ligament complex.

On June 16, 2006 appellant's treating physician, Dr. Michael Palmeri, a Board-certified orthopedic surgeon, released her to light duty, restricting walking and standing to two hours a day and sitting, bending and stopping to one hour a day. He noted that appellant's left ankle was not fully rehabilitated after surgery and he recommended additional physical therapy. In subsequent medical reports, Dr. Palmeri continued to find that appellant had not fully recovered from her work injury and surgery. Appellant continued to experience left ankle pain, weakness and swelling and could only work limited duty with restrictions on standing and walking.<sup>2</sup>

On December 8, 2006 the employing establishment offered appellant a full-time, light-duty position, which she accepted on December 12, 2006. Appellant returned to light duty on January 11, 2007.

The Office determined that a second opinion evaluation of appellant's residuals and disability from her employment injury was required. It referred her, together with a copy of her medical record and statement of accepted facts, to Dr. Robert Israel, a Board-certified orthopedic surgeon.

In a May 15, 2007 medical report, Dr. Israel reviewed appellant's medical history and listed her left ankle symptoms. Physical examination of the left foot and ankle was normal with full range of motion, normal muscle strength, no atrophy and no tenderness to palpation. Dr. Israel diagnosed status post, healed arthroscopy of the left ankle. He opined that there were no objective findings in the left ankle and that appellant was not disabled from any medical condition, either related or not related to her April 28, 2005 employment injury. Dr. Israel found that appellant could work full-time, full duty as a letter carrier without restrictions.

In medical reports dated June 19 through August 28, 2007, Dr. Palmeri stated that appellant continued to have residuals of left ankle pain secondary to Achilles tendinitis and incomplete rehabilitation after surgery. He recommended continued physical therapy and a

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<sup>1</sup> The record reveals that appellant has a separate claim for a prior left ankle injury on October 29, 2004 under Office file number xxxxxx332. Appellant had returned to full mail carrier duties on April 28, 2005 when she sustained the current left ankle injury.

<sup>2</sup> Dr. Palmeri first released appellant to light duty on March 18, 2006, however, he rescinded this release due to continued ankle pain.

home exercise program. Dr. Palmeri reiterated that appellant could work limited duty with no standing or walking for more than two hours.

The Office determined that a conflict of medical opinion arose between Drs. Israel and Palmeri regarding appellant's current residuals and disability due to her employment injury. It referred her, together with a statement of accepted facts and a copy of her medical record, to Dr. Michael J. Katz, a Board-certified orthopedic surgeon.

In a November 7, 2007 medical report, Dr. Katz reviewed appellant's medical and occupational history. He reported her complaint of occasional pain in the left ankle while standing. Physical examination of the left ankle revealed normal dorsiflexion and plantar flexion. Inversion and eversion were present and a normal 20 degrees. No joint line tenderness, erythema, induration or crepitation was present. Anterior and posterior drawer signs were negative. The dorsalis pedis and posterior tibial pulses were 2+ and symmetric. The tibialis anterior, tibialis posterior and peroneal muscles were five out of five in strength. No tenderness or contracture at the plantar fascia was present. Arthroscopic portals were well healed. Dr. Katz diagnosed status post left ankle sprain with resultant, successful arthroscopy. He stated that appellant did not have any indication of Achilles tendinitis or any indication of incomplete rehabilitation. Dr. Katz opined that appellant was fully rehabilitated and that she did not have any ongoing disability. He noted that appellant's injury appeared to be an aggravation of an October 29, 2004 employment injury. Dr. Katz concluded that appellant was no longer disabled and was capable of full-time, full-duty work as a letter carrier without restrictions.

Appellant's representative subsequently submitted a December 5, 2007 medical report from Dr. David Weiss, Board-certified in family medicine, providing an impairment rating of appellant's left lower and upper extremities. Dr. Weiss reported appellant's complaints of swelling and intermittent pain and stiffness in the left ankle, which worsened with weather changes. Manual muscle testing revealed inversion graded at three out of five and eversion graded at four out of five. Physical examination of the left ankle revealed swelling over the lateral malleolus, tenderness over the anterior talofibular ligament, lateral gutter, the deltoid ligament and the medial malleolus. Dr. Weiss noted a minimal lateral impingement sign. He diagnosed chronic post-traumatic left ankle strain and sprain with involvement of the anterior talofibular ligament and deltoid ligament, post-traumatic lateral impingement syndrome to the left ankle joint and status post arthroscopic surgery to the left ankle. Dr. Weiss stated that the competent producing factor for appellant's subjective and objective findings were her employment duties and the October 29, 2004 and April 28, 2005 employment injuries.

On March 21, 2008 the Office notified appellant of a proposal to terminate her medical benefits on the grounds that Dr. Katz's finding, that her accepted medical conditions had ceased, represented the weight of the medical evidence. It notified her that she had 30 days to submit additional evidence.

In an April 3, 2008 letter, appellant's representative contended that Dr. Katz's medical report was not well rationalized as he did not demonstrate any knowledge of the physical requirements of appellant's position or medical treatment of appellant's prior left ankle injury on October 29, 2004. He also contended that Dr. Katz did not address whether appellant

experienced any residuals from her work-related left ankle surgery and had not performed a full examination.

By decision dated May 1, 2008, the Office terminated appellant's medical benefits effective that day on the grounds that Dr. Katz's medical opinion represented the weight of the medical evidence. It noted that Dr. Weiss did not render an opinion on disability or the continuing need for treatment and that his findings were largely subjective. The Office also found that the arguments raised by appellant's counsel were not supported by the medical evidence of record.

On May 6, 2008 appellant, through her representative, filed a request for an oral hearing before an Office hearing representative. The oral hearing took place on September 25, 2008. Counsel again contended that Dr. Katz was not selected as an impartial medical examiner through proper Office procedures.

In a September 24, 2008 note, appellant stated that she experienced difficulty, including swelling and pain, with her left ankle while standing and walking. She claimed that her left ankle injury made her daily routine uncomfortable and that she could not wear shoes with heels when the weather changed.

By decision dated January 8, 2009, the Office hearing representative affirmed the Office's termination of medical benefits on the grounds that Dr. Katz's medical opinion was well rationalized and based on an accurate factual and medical background. Thus, it was entitled to special weight. The hearing representative further found that there was no evidence to support that the Office had improperly selected Dr. Katz or that the statement of accepted facts provided the physician was inaccurate.

### **LEGAL PRECEDENT**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup> The burden of proof on the Office includes the necessity of furnishing rationalized medical opinion evidence which is based on a proper factual and medical history.<sup>4</sup>

Section 8123(a) of the Federal Employees' Compensation Act<sup>5</sup> 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 an examination.<sup>6</sup> When the case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist will be given special

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<sup>3</sup> *David W. Pickett*, 54 ECAB 272 (2002); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>4</sup> *Daniel F. O'Donnell*, 54 ECAB 456 (2003); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8123(a). See *Elsie L. Price*, 54 ECAB 734 (2003); *Raymond J. Brown*, 52 ECAB 192 (2001).

weight when based on a proper factual and medical background and sufficiently well rationalized on the issue presented.<sup>7</sup>

### ANALYSIS

The Office accepted that on April 28, 2005 appellant sustained a strain of the lateral collateral ligament of the left ankle while walking her mail route. It authorized a December 23, 2005 left ankle arthroscopy, debridement, synovectomy and ligament repair. Appellant was disabled from April 30, 2005 through January 11, 2007, when she returned to full-time light duty. The issue is whether the Office properly terminated her medical benefits effective May 1, 2008 on the grounds that she no longer had any residuals of her employment injury.

On June 16, 2006 appellant's treating physician, Dr. Palmeri, stated that appellant's left ankle was not fully rehabilitated after surgery and that she continued to experience pain, swelling and weakness. He released appellant to light duty. Dr. Palmeri subsequently opined that appellant's pain was secondary to Achilles tendinitis and incomplete surgical rehabilitation and continued to recommend light duty.

The Office referred appellant to Dr. Israel for a second opinion evaluation. In a May 15, 2007 medical report, Dr. Israel documented normal findings from a physical examination and diagnosed status post, healed left ankle arthroscopy. He opined that appellant did not suffer from any related or nonrelated medical condition and that she could return to full duty as a letter carrier without restrictions.

Based on this evidence, the Office properly determined that a conflict in medical opinion arose between Drs. Palmeri and Israel regarding whether appellant continued to experience residuals from her employment-related injury.<sup>8</sup> It properly referred appellant to Dr. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical opinion.<sup>9</sup>

In a November 7, 2007 medical report, Dr. Katz reviewed appellant's medical and occupational history. He performed a full physical examination, which did not reveal any objective findings of a current medical condition. Dr. Katz noted that he did not find any indication of Achilles tendinitis or any indication of incomplete rehabilitation. He diagnosed status post left ankle sprain with successful arthroscopy. Dr. Katz opined that appellant was fully rehabilitated and, accordingly, she was no longer disabled from any employment injury and that she was capable of returning to full-duty work as a mail carrier.

When a case is referred to an impartial medical examiner to resolve a conflict in medical evidence, the opinion of such physician will be given special weight by the Board when based on an accurate factual and medical history and with a well-rationalized explanation for the

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<sup>7</sup> See *Bernadine P. Taylor*, 54 ECAB 342 (2003); *Anna M. Delaney*, 53 ECAB 284 (2002).

<sup>8</sup> See *J.M.*, 58 ECAB 478 (2007); *Willa M. Frazier*, 55 ECAB 379 (2004).

<sup>9</sup> See *id.*

conclusions reached.<sup>10</sup> Dr. Katz provided a thorough review of the factual and medical evidence, detailed his findings on physical examination of appellant and provided a rationalized explanation for the conclusions he reached. The Board finds his report represents the weight of the medical evidence and establishes that appellant was no longer experiencing any residuals or disabilities due to her accepted conditions.

The Board further finds that appellant did not submit sufficient evidence to overcome the weight of Dr. Katz's opinion or create a new conflict of medical opinion. The only medical evidence submitted after Dr. Katz's examination is the December 5, 2007 report of Dr. Weiss, who provided an impairment rating of her lower and upper extremities. Although Dr. Weiss listed some abnormal findings on physical examination of the left ankle, including swelling and a minimal lateral impingement sign, he did not provide a comprehensive medical opinion explaining how these findings were related to residuals from appellant's April 28, 2005 employment injury. As he did not provide a rationalized medical opinion addressing whether appellant continued to experience residuals or disability due to her accepted left ankle ligament strain, his report is of diminished probative value.<sup>11</sup>

On appeal, appellant's representative contends that Dr. Katz was not selected through proper Office procedures.<sup>12</sup> The Office provided PDS logs regarding Dr. Katz's selection as the impartial medical specialist. These logs show that the Office left messages for four physicians prior to scheduling the examination with Dr. Katz. There is no evidence that the Office did not select Dr. Katz from the PDS or that it failed to comply with its rotational procedures.<sup>13</sup> Appellant did not provide any probative evidence to demonstrate bias on the part of the doctor. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.<sup>14</sup> Accordingly, the evidence does not establish an error in the selection of Dr. Katz as an impartial medical examiner.

Further, appellant's representative argued that the statement of accepted facts did not provide a description of appellant's prior left ankle injury and that Dr. Katz did not demonstrate

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<sup>10</sup> See *Jaja K. Asaramo*, 55 ECAB 200 (2006).

<sup>11</sup> See *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Daniel F. O'Donnell*, 54 ECAB 456 (2003).

<sup>12</sup> To ensure the complete independence of physicians that are selected as impartial medical specialists, the Office developed specific procedures to safeguard against any possible appearance that the selected physician's opinion is biased or prejudiced. Impartial medical specialists are selected from among Board-certified specialists in the appropriate geographical area on a strict rotating basis to negate the appearance that any preferential treatment exists between a particular physician and the Office. The Federal (FECA) Procedure Manual provides that the selection of an impartial medical specialist is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the Physicians Directory System (PDS) should be used for this purpose wherever possible. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). See also *Willie M. Miller*, 53 ECAB 697 (2002).

<sup>13</sup> See *W.R.*, Docket No. 09-6011 (issued October 2, 2009) (where the Board upheld the selection of the impartial medical examiner after the Office bypassed several physicians after leaving telephone messages).

<sup>14</sup> See *L.W.*, 59 ECAB \_\_\_\_ (Docket No. 07-1346, issued April 23, 2008).

any knowledge of appellant's full-duty requirements. Dr. Katz reviewed appellant's medical treatment and specifically addressed the accepted 2004 injury.<sup>15</sup> Further, he did not describe appellant's employment duties because he did not find any objective evidence of a continuing medical condition that would cause disability. The Board finds that Dr. Katz's medical report is based on an accurate medical and factual background and his opinion represents the special weight of the medical evidence.<sup>16</sup>

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's medical benefits effective May 1, 2008 on the grounds that she was no longer experiencing disability or residuals of her employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 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

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<sup>15</sup> See *K.H.*, 61 ECAB \_\_\_\_ (Docket No. 09-341, issued December 30, 2009).

<sup>16</sup> See *Charles A. Jackson*, 53 ECAB 671 (2002).