



## **FACTUAL HISTORY**

On May 20, 2004 appellant, then a 36-year-old mail handler, filed a traumatic injury claim alleging that he sustained an injury in the performance of duty when a power jack fell on his left foot. The Office accepted the claim for left foot contusion, left ankle strain, left tarsal tunnel syndrome and lesion of the left plantar nerve. Appellant returned to work on a part-time basis in June 2005. He sustained a recurrence of disability on August 14, 2006 and was placed on the periodic rolls. Appellant underwent approved left foot surgery on May 14, 2007.

Appellant was treated by Dr. Alan Bushansky, a podiatrist, and Dr. Carol DeCosta, a Board-certified physiatrist. On July 31, 2007 Dr. Bushansky opined that appellant was disabled due to his accepted left foot injury. In a February 21, 2008 report, Dr. DeCosta also opined that appellant was disabled due to his May 19, 2004 left foot injury. Examination of the left foot revealed pain on palpation in the first metatarsal area, decreased sensation of the medial cutaneous nerve and a positive Tinel's sign at the dorsal aspect of the left foot.

The Office referred appellant to Dr. Andrew Weiss, an orthopedic surgeon, for a second opinion examination. In a report dated March 11, 2008, Dr. Weiss opined that appellant's accepted conditions, which included left ankle sprain, left foot contusion, left tarsal tunnel syndrome and lesion of plantar nerve, had fully resolved and he was capable of performing his usual duties with no restrictions. Active range of motion of the ankle and hindfoot were normal (dorsiflexion -- 20 degrees; plantar flexion -- 40 degrees; subtalar inversion -- 30 degrees and subtalar eversion -- 20 degrees). Strength was normal in all planes of motion about the ankle and hindfoot. No calf or ankle atrophy or hypertrophy was noted. Sensation was decreased in the first web space. Dr. Weiss opined that appellant had reached maximum medical improvement and required no further medical treatment.

On May 12, 2008 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Stanley Soren, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion evidence between Dr. Weiss and Drs. Bushansky and DeCosta as to whether he had any residuals or disability causally related to his employment injury. In a June 10, 2008 report, Dr. Soren provided a complete history of injury and treatment and concluded that appellant's accepted conditions had resolved. A physical examination revealed intact sensation and full range of motion in the left foot and ankle (dorsiflexion -- 20 degrees and plantar flexion -- 40 degrees). There was no ankle instability and trace decreased sensation in the first dorsal web space of the left foot. The left big toe was tender at the first metatarsophalangeal joint and metatarsal head. Appellant was unable to passively dorsiflex the left metatarsophalangeal joint above neutral. The right first metatarsophalangeal joint could extend (dorsiflex) 30 degrees above neutral. Based on history, Dr. Soren diagnosed contusions of the left foot, left ankle sprain, left tarsal tunnel syndrome and lesion of plantar nerve. He also diagnosed status post tarsal tunnel release, left side and status post neurolysis deep peroneal nerve, left foot. Dr. Soren found evidence of arthritis in the left big toe at the first metatarsophalangeal joint with clinical inability to passively dorsiflex the joint above neutral. He stated that there were no objective findings of a tarsal tunnel syndrome, or of any other accepted condition and that appellant's symptoms related to the preexisting arthritic changes in the first metatarsophalangeal joint. Dr. Soren opined that appellant had reached maximum

medical improvement and that he did not require any further medical treatment due to his May 2004 injury.

On October 2, 2008 the Office proposed to terminate appellant's compensation and medical benefits. It determined that, based on Dr. Soren's June 10, 2008 report, appellant's injury-related disability had ceased and that the accepted conditions had resolved. Appellant was afforded 30 days within which to submit any additional evidence.

In a May 29, 2008 report, Dr. DeCosta noted appellant's complaints of pain and numbness in the left foot and ankle. On examination of the left foot and ankle, he found decreased sensation in the left ankle, pain on depalpatation of the medial longitudinal fascia as well as in the area of the insertion at the posterior tibial tendon. Range of motion examination revealed dorsiflexion -- 5 degrees; plantar flexion -- 10 degrees; inversion -- 10 degrees and eversion -- 7 degrees. Dr. DeCosta opined that appellant was totally disabled. On June 26, 2008 she diagnosed lumbosacral radiculopathy and left foot pain secondary to neuropathy. Examination findings included pain on palpation of the left foot at the area of the metatarsal phalangeal joint and positive Tinel's sign at the medial malleolar area. There was pain on palpation of the lumbosacral paraspinal area. Dr. DeCosta recommended a magnetic resonance imaging (MRI) scan of the left foot to evaluate nerve damage and continued physical therapy.

In an August 21, 2008 attending physician's report, Dr. DeCosta diagnosed lumbosacral neuropathy and left foot pain due to neuropathy. In an October 2, 2008 work capacity evaluation, she opined that appellant could return to work with restrictions, which limited him to a four-hour day. Appellant was also precluded from bending, stooping, pushing, pulling, squatting, climbing, making repetitive movements with the wrist and elbow, lifting more than 30 pounds and kneeling for more than 20 minutes.

Appellant submitted an October 22, 2008 report from Dr. Carl M. Jean, a Board-certified surgeon, who stated that appellant continued to have arthralgia and discomfort in his left foot due to a May 19, 2004 injury. He indicated that "early post[-]traumatic changes may be likely as per serial x-rays of left ankle." Otherwise, appellant's condition was "grossly unchanged." The record also contains a May 4, 2007 operative report from Dr. Bushansky describing the left foot procedure performed on that date.

In an October 6, 2008 statement, appellant disagreed with Dr. Soren's June 10, 2008 report. He contended that Dr. Soren's diagnosis of arthritis was incorrect.

By decision dated November 6, 2008, the Office finalized the termination of appellant's compensation benefits effective that date. It found that the weight of the evidence rested with the opinion of Dr. Soren, the impartial medical examiner.

On April 9, 2009 appellant, through counsel, requested reconsideration. In support of his request, he submitted a note authorizing Thomas Ruther to represent him and copies of March 18, 2009 nerve conduction and electromyographic (NCS/EMG) studies of the lower extremities.

By decision dated June 18, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>1</sup> After it has been determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>4</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.<sup>5</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly terminated appellant's compensation and medical benefits effective November 6, 2008.

The Office correctly determined that a conflict in the medical opinion evidence arose between attending physicians, Dr. Bushansky and Dr. DeCosta, and the Office referral physician, Dr. Weiss, as to whether appellant had any continuing residuals or disability causally related to his accepted May 20, 2004 employment-related injury. Drs. Bushansky and DeCosta opined that appellant suffered from continuing employment-related residuals and total disability. On the other hand, Dr. Weiss opined that appellant's employment-related left foot contusion, left ankle strain, left tarsal tunnel syndrome and lesion of the left plantar nerve had resolved and that he could return to work with no restrictions.

Dr. Soren reviewed appellant's medical history, the history of injury and statement of accepted facts. In his June 10, 2008 referee report, he provided examination findings, which revealed intact sensation and full range of motion in the left foot and ankle and no ankle instability. Dr. Soren found no objective evidence of a tarsal tunnel syndrome, or of any other

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<sup>1</sup> A.W., 59 ECAB \_\_\_ (Docket No. 08-306, issued July 1, 2008).

<sup>2</sup> J.M., 58 ECAB 478 (2007).

<sup>3</sup> See *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>4</sup> T.P., 58 ECAB 524 (2007).

<sup>5</sup> I.J., 59 ECAB \_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>6</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

accepted condition. He opined that all of appellant's accepted conditions had resolved.<sup>7</sup> There was evidence of arthritis in the left big toe, which Dr. Soren opined was related to preexisting arthritic changes in the first metatarsophalangeal joint. Dr. Soren also opined that appellant had reached maximum medical improvement and did not require any further medical treatment due to his May 20, 2004 injury. The Board finds that Dr. Soren's June 10, 2008 medical report is comprehensive, well rationalized and based on an accurate factual and medical history. Therefore, it is entitled to the special weight of the medical opinion evidence afforded an impartial medical specialist.

Reports submitted in response to the Office's proposed termination are insufficient to surmount the weight given to Dr. Soren's opinion. In May 29, June 26 and August 21, 2008 reports, Dr. DeCosta reiterated her opinion that appellant was totally disabled. These reports generally repeat information contained in previous reports and are, therefore, insufficient to overcome the weight of medical evidence afforded the opinion of the impartial medical examiner, or to create a new conflict. On October 2, 2008 Dr. DeCosta opined that appellant could return to work with restrictions. This report does not support appellant's position, but rather provides support for Dr. Soren's opinion that appellant is no longer disabled.

In an October 22, 2008 report, Dr. Jean stated that appellant continued to have arthralgia and discomfort in his left foot due to a May 19, 2004 injury. He did not explain, however, how appellant's current condition is causally related to the accepted injury. Medical conclusions unsupported by rationale are of limited probative value.<sup>8</sup> In his May 4, 2007 operative report, Dr. Bushansky described the left foot procedure he performed on that date. As the report does not contain an opinion regarding the cause of appellant's condition, it is of diminished probative value.<sup>9</sup>

The Board finds that the weight of medical evidence rests with the well-rationalized report of the impartial medical examiner. The Board further finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits effective November 6, 2008.

On appeal, counsel contends that the Office's decision is contrary to fact and law. For reasons stated, the Board finds this argument to be without merit.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>10</sup> the Office regulations provide that the evidence or

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<sup>7</sup> By history, Dr. Soren diagnosed contusions of the left foot, left ankle sprain, left tarsal tunnel syndrome, lesion of plantar nerve, status post tarsal tunnel release, left side and status post neurolysis deep peroneal nerve, left foot.

<sup>8</sup> *Willa M. Frazier*, 55 ECAB 379 (2004).

<sup>9</sup> Medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>10</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>11</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>12</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>13</sup> The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's April 9, 2009 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted a note authorizing Thomas Ruther to represent him, as well as copies of March 18, 2009 nerve conduction and electromyographic (NCS/EMG) studies of the lower extremities. These documents are not relevant to the issues in this case, namely whether appellant's accepted conditions had resolved and whether he was disabled due to the accepted conditions. The Board finds that the documents submitted by appellant do not constitute relevant and pertinent new evidence not previously considered by the Office.<sup>15</sup> Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his April 9, 2009 request for reconsideration.

### **CONCLUSION**

The Board finds that the Office properly terminate appellant's wage-loss and medical benefits, effective November 6, 2008, on the grounds that he had no residuals or disability related to his accepted employment injury. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>11</sup> 20 C.F.R. § 10.606(b)(2).

<sup>12</sup> *Id.* at § 10.607(a).

<sup>13</sup> *Id.* at § 10.608(b).

<sup>14</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>15</sup> *See Susan A. Filkins*, 57 ECAB 630 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 18, 2009 and November 6, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 28, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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