

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

J.P., Appellant

and

**U.S. POSTAL SERVICE, WESTVILLE POST
OFFICE, Westville, NJ, Employer**

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**Docket No. 09-2137
Issued: June 24, 2010**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2009 appellant, through his attorney, filed a timely appeal from September 10, 2008 and May 14, 2009 merit decisions of the Office of Workers' Compensation Programs terminating his medical and wage-loss benefits. 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 and wage-loss benefits effective September 10, 2008 on the grounds that he no longer continued to experience any residuals or disability causally related to his employment injury.

On appeal, appellant's representative contends that the Office's second opinion physician, Dr. Zohar Stark, a Board-certified orthopedic surgeon, did not provide a rationalized medical opinion explaining how appellant had reached maximum medical improvement and could return to work despite his findings that appellant was receiving physical therapy three times per week and that he had an equinus gait that produced pain around the great toe. In the

alternative, appellant's representative argued that a conflict of medical opinion existed between Dr. Stark and appellant's treating physician, Dr. Michael H. Shinder, a podiatrist.

FACTUAL HISTORY

The Office accepted that on October 15, 2007 appellant, then a 28-year-old carrier, sustained a closed injury to the right foot phalanges after he fell down stairs while delivering mail. Appellant sought medical attention on October 17, 2007 and stopped working that day. On October 31, 2007 he accepted a limited-duty position and worked until February 28, 2008 when he underwent an authorized excision of bone fragments from the proximal phalanx of the hallux. The Office accepted that appellant experienced a February 28, 2008 recurrence of disability and began paying wage-loss compensation.¹ It placed appellant on the periodic rolls on May 11, 2008.

On April 11, 2008 appellant was terminated from his position due to allegations of mail theft. He subsequently filed a grievance, which was determined through arbitration to be without merit and resolved.

On April 29, 2008 appellant's treating physician, Dr. Michael H. Shinder, a podiatrist, released appellant to full-time light duty. In a May 14, 2008 report, Dr. Shinder stated that appellant was still in the postoperative period from the excision of a fracture fragment in his first toe. He reported that appellant had benefited from weekly physical therapy but had not yet achieved all his functional goals. Dr. Shinder recommended appellant continue physical therapy for an additional four weeks.

The Office determined that a second opinion evaluation was required and referred appellant, together with a statement of accepted facts and a copy of his record, to Dr. Zohar Stark, a Board-certified orthopedic surgeon. In a May 29, 2008 medical report, Dr. Stark reviewed appellant's occupational and medical history. On physical examination, appellant was able to walk with a reciprocating heel to toe gait. However, walking in equinus gait produced pain in the area of the great toe. Examination further revealed a healed operative scar over the dorsomedial aspect of the first metacarpophalangeal (MP) joint with some localized tenderness on palpation. Motion of the MP and interphalangeal (IP) joints of the first toe were normal. Dr. Stark noted that a March 27, 2008 x-ray showed a completely healed fracture. He diagnosed healed fracture of the right first proximal phalanx, caused by the October 15, 2007 work-related incident. Dr. Stark opined that appellant was capable of performing his date-of-injury duty as a letter carrier with no restrictions. He further opined that appellant had recovered from his work injury and that no further medical treatment, physical therapy, diagnostic studies or surgical treatments were required.

In a June 24, 2008 medical note, Dr. Shinder reported that appellant was improving and able to walk for longer periods. Physical examination revealed tenderness at the operative site and pain with range of movement. Dr. Shinder stated that appellant could not walk without pain and recommended continued physical therapy.

¹ Appellant submitted several claims for wage-loss compensation for the period February 28 through May 8, 2008.

On August 7, 2008 the Office proposed to terminate appellant's medical and wage-loss benefits on the grounds that Dr. Stark's medical opinion, that appellant no longer had any ongoing disability or medical condition related to the employment injury, represented the weight of the medical evidence.

In an August 14, 2008 letter, appellant, through his attorney, objected to the proposed termination of benefits. He argued that Dr. Stark's medical report confirmed that appellant continued to experience pain from his work injury.

By decision dated September 10, 2008, the Office terminated appellant's medical and wage-loss benefits effective September 10, 2008. It found that Dr. Stark's report established that appellant did not continue to experience residuals or disability from his employment injury and that appellant did not submit sufficient evidence to contradict this opinion.

On September 16, 2008 appellant, through his representative, filed a request for an oral hearing before an Office hearing representative. The oral hearing took place on January 12, 2009.

By decision dated May 14, 2009, the Office hearing representative affirmed the September 10, 2008 termination of benefits on the grounds that the weight of the medical evidence rested with Dr. Stark, who determined that appellant did not continue to experience any residuals from his employment injury and could return to his date-of-injury position.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS

The Office accepted that appellant sustained a closed injury to the right foot phalanges on October 15, 2007 after falling down stairs at work. Appellant worked light duty from October 31, 2007 until February 28, 2008, when he experienced a recurrence of disability after undergoing surgery to remove bone fragments due to his injury. The Office began paying wage-loss compensation and on May 11, 2008 it placed appellant on the periodic rolls. The issue is whether the Office properly terminated appellant's medical and wage-loss benefits effective September 10, 2008 on the grounds that his employment-related injury had resolved.

² *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

³ *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

In reports dated April 29 through June 24, 2008, appellant's treating physician, Dr. Shinder, consistently found that appellant was partially disabled and that he could not walk without pain. He continued to prescribe physical therapy and reported that appellant's condition had not completely resolved.

The Office subsequently referred appellant to Dr. Stark for a second opinion evaluation. In a May 29, 2008 report, Dr. Stark opined that appellant had completely recovered from his employment injury and was capable of working his date-of-injury position. However, his findings on physical examination included pain in the great toe area while walking in equinus gait and tenderness with palpation over the operative scar. Dr. Stark did not explain the inconsistency between his findings of pain and tenderness and his opinion that appellant's employment-related condition had resolved.⁵ He did not opine that these were solely subjective symptoms unsupported by any objective findings. Further, Dr. Stark did not describe appellant's employment duties or explain why he believed that appellant could return to a full-duty mail carrier position despite his pain while walking.⁶ As he did not provide a rationalized medical opinion supporting his findings that appellant was no longer disabled and that his employment-related condition had resolved, his opinion is of diminished probative value.⁷

The record does not contain a fully rationalized medical opinion that appellant was able to return to his date-of-injury position or that he no longer experienced residuals from his employment-related injury. Therefore, the Board finds that the Office improperly terminated appellant's benefits.⁸

CONCLUSION

The Board finds that the Office improperly terminated appellant's medical and wage-loss benefits effective September 10, 2008 on the grounds that he no longer continued to experience residuals or disability causally related to his employment injury.

⁵ See *Robert C. Pearson*, 32 ECAB 403 (1980).

⁶ See *Leslie C. Moore*, 52 ECAB 132 (2000); *id.*

⁷ See *Theodore Parker*, 50 ECAB 542 (1999).

⁸ See *Douglas M. McQuaid*, 52 ECAB 382 (2001). See also *Tressia Lewis*, Docket No. 02-56 (issued August 1, 2002).

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2009 and September 10, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: June 24, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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