

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

G.D., Appellant)	
)	
and)	Docket No. 12-254
)	Issued: June 1, 2012
U.S. POSTAL SERVICE, POST OFFICE,)	
Cincinnati, OH, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 17, 2011 appellant filed a timely appeal from an August 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied authorization for surgery. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly denied authorization for an Austin-type osteotomy surgery.

FACTUAL HISTORY

On January 31, 2011 appellant, then a 61-year-old supervisor of distribution operations, filed an occupational disease claim alleging that he sustained a painful bunion on his right foot as a result of 20 plus years of constant walking on concrete floors while wearing required dress

¹ 5 U.S.C. § 8101 *et seq.*

shoes in the performance of duty. He became aware of his illness or disease on July 13, 2010. OWCP accepted appellant's claim for aggravation of hallux valgus and aggravation of metatarsal varus on the right foot.

In a January 31, 2011 report, Dr. Rodney Roof, a podiatrist, examined appellant and determined that he had a moderate-to-severe right foot hallux deformity which was painful to palpation of the medial eminence or with range of motion (ROM). He noted that x-rays revealed that appellant had a moderate hallux valgus with a deformity noted with an increased angle and degenerative joint disease of last metatarsophalangeal (MTP) joint. Dr. Roof diagnosed hallux valgus on the right and metatarsus varus on the right. He advised that surgery was discussed.

In an April 12, 2011 telephone call memorandum, OWCP noted that appellant requested authorization for a bunionectomy. On April 28, 2011 Dr. Roof requested authorization for a hallux valgus, right and metatarsus varus on the right surgical procedure.

On May 24, 2011 OWCP requested an opinion from its medical adviser regarding whether the surgery to correct the bunion of the right foot was warranted and necessary to treat the accepted injury. It also advised Dr. Roof that OWCP's medical adviser would review the request for surgery before authorization was warranted.

In a report dated June 2, 2011, OWCP's medical adviser reviewed appellant's history of injury and treatment. He noted that Dr. Roof stated that x-rays of the right foot visualized a bunion deformity on the right big toe and recommended a surgical correction, Austin-type metatarsal osteotomy. The medical adviser explained that he was not familiar with the Austin-type metatarsal osteotomy and recommended a second opinion examination by a Board-certified orthopedic surgeon specialized in foot and ankle surgery before the surgery was authorized.

In a letter also dated July 20, 2011, OWCP referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record to Dr. Edward G. Fisher, a Board-certified orthopedic surgeon.

In an August 5, 2011 report, Dr. Fisher reviewed appellant's history of injury and medical treatment, and examined appellant's right foot. He determined that, while walking with and without his shoes, appellant had a slight antalgic limp on the right side secondary to pain over the medial side of the right forefoot. The right foot had a prominent bunion deformity over the medial side of the first MTP joint with a mild hallux valgus deformity, which was easily corrected by passive manipulation and a flexible hammer toe deformity over the second toe. Palpation caused tenderness and discomfort over the bunion on the medial side of the first metatarsal head. Appellant had decreased range of motion with crepitation and soreness over the MTP joint of the right great toe of 10 degrees of extension and 20 degrees of flexion as compared with the MTP joint of the left great toe of 20 degrees of extension and 40 degrees of flexion without discomfort or crepitation. The remaining examination of the right foot was normal. Appellant had normal motor power over the right foot and ankle, sensation was intact to light touch, and there was no pain or discomfort on palpation of the plantar surface of the heel, medial longitudinal arch or over the metatarsal heads.

Dr. Fisher advised that appellant had a hallux valgus deformity of the right great toe was easily corrected by passive manipulation, a painful/tender prominent bunion deformity over the first metatarsal head, and decreased range of motion with soreness and crepitation over the MTP joint of the right great toe. A review of right foot x-rays taken in January 2011 by Dr. Roof revealed a prominent bunion deformity over the first metatarsal head, hallux valgus deformity of the right great toe and the metatarsal varus primus deformity. The x-rays also showed decreased joint space and bony spurring of the MTP joint indicating osteoarthritis of the MTP joint of the great toe. Dr. Fisher diagnosed aggravation of preexisting hallux valgus deformity of the right great toe, an accepted work-related condition, aggravation of preexisting metatarsal varus primus deformity, and a painful bunion deformity of the MTP joint of the right great toe secondary to the two accepted work-related conditions although this was not an accepted condition in the claim. He explained that degenerative osteoarthritis of the MTP joint of the right great toe was not an accepted condition. Regarding the surgical procedure, Dr. Fisher explained that the Austin-type metatarsal osteotomy was a V-shaped osteotomy performed over the distal third of the first metatarsal to correct a hallux valgus deformity, the metatarsal varus primus deformity as well as to correct the bunion deformity. He advised that in the presence of osteoarthritis of the MTP joint and/or limitation of joint motion, the Austin-type metatarsal osteotomy was contraindicated and would not be successful. Because both of the conditions were present, the requested surgery was not medically indicated or warranted as a result of the accepted aggravation of appellant's preexisting right foot/toe condition. Dr. Fisher explained that appellant was a candidate for surgery for the right foot. He noted that there were various types of surgeries for aggravation of the preexisting hallux valgus, aggravation of the preexisting metatarsal varus primus deformity and the bunion deformity which was secondary to the first two conditions as an alternative to the one requested by Dr. Roof of an Austin-type metatarsal osteotomy. Dr. Fisher explained that appellant could be seen by an orthopedic surgeon who specialized in the foot or discuss further with Dr. Roof a recommendation for a proper procedure for the work accepted conditions.

By letter dated August 25, 2011, OWCP provided Dr. Roof with a copy of Dr. Fisher's August 5, 2011 report. It requested his comments and an opinion with regard to whether he agreed with Dr. Fisher's assessment. Dr. Roof did not respond.

By decision dated August 25, 2011, OWCP denied authorization for the proposed Austin-type metatarsal surgery. It found that the weight of the medical evidence did not establish that the Austin-type surgery was medically necessary.

LEGAL PRECEDENT

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.² OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad

² 5 U.S.C. § 8103(a).

administrative discretion in choosing means to achieve this goal.³ The only limitation on OWCP's authority is that of reasonableness.⁴

For a surgery to be authorized, a claimant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.⁵

ANALYSIS

Dr. Roof, appellant's treating physician, requested authorization for Austin-type metatarsal osteotomy on April 28, 2011. However, an OWCP medical adviser recommended a second opinion examination.

OWCP referred appellant for a second opinion examination with Dr. Fisher, a Board-certified orthopedic surgeon, to determine whether the surgery was warranted. In an August 5, 2011 report, Dr. Fisher examined appellant and noted that he had a palpable dorsal pedal, posterior tibia pulses bilaterally, and a prominent bunion deformity over the medial side of the first MTP joint with a mild hallux valgus deformity. He explained that this was easily corrected by passive manipulation and a flexible hammer toe deformity over the second toe. Dr. Fisher diagnosed aggravation of preexisting hallux valgus deformity of the right great toe, aggravation of preexisting metatarsal varus primus deformity, and a painful bunion deformity of the MTP joint of the right great toe secondary to the two accepted work-related conditions. He explained that degenerative osteoarthritis of the MTP joint of the right great toe was not an accepted work condition. Regarding the surgical procedure, Dr. Fisher explained what the Austin-type metatarsal osteotomy entailed and advised that, when osteoarthritis of the MTP joint and limited joint motion was present, the Austin-type metatarsal osteotomy was contraindicated and would not be successful. He explained that appellant had both of these conditions, thus this type of surgery was not medically indicated or warranted. Dr. Fisher further explained that appellant was a candidate for surgery for the right foot and there were other surgical alternatives that either an orthopedic surgeon or Dr. Roof could recommend. Thus, while he found that it was reasonable for appellant to have surgery secondary to his accepted conditions, the procedure requested by Dr. Roof was not medically warranted.

The Board finds that the weight of the medical evidence of file lies with Dr. Fisher, a Board-certified orthopedic surgeon, who provided a reasoned medical opinion explaining why the medical authorization in question should not be given. Dr. Fisher's opinion was based on the medical evidence in file and a physical examination which was performed in his office.

³ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

⁴ *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts).

⁵ *R.C.*, 58 ECAB 238 (2006).

Based on the evidence of record, OWCP did not abuse its discretion by finding the proposed surgery was not warranted. It did not abuse its discretion in denying authorization for the Austin-type metatarsal osteotomy surgery.

On appeal, appellant argues that both physicians agree that surgery is needed. The Board notes that the only issue in this appeal is whether the Austin-type metatarsal osteotomy surgery proposed by Dr. Roof was warranted. As noted above, Dr. Fisher found that this would not be successful for appellant. OWCP has not denied any other specific procedures and such matters are not presently before the Board.⁶ Appellant is not precluded from seeking authorization for other types of surgeries to his foot as suggested by the second opinion physician. He may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly exercised its discretion pursuant to 5 U.S.C. § 8103(a) in refusing to authorize appellant's request for Austin-type metatarsal osteotomy surgery.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁶ Following issuance of the August 25, 2011 decision, appellant submitted new evidence to OWCP. The Board may not consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).