

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

---

M.K., Appellant

and

U.S. POSTAL SERVICE, NORTHERN OHIO  
PERFORMANCE CLUSTER, Cleveland, OH,  
Employer

---

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

**Docket No. 12-724  
Issued: October 26, 2012**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 14, 2012 appellant, through her attorney, filed a timely appeal from a January 13, 2012 merit decision. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 appellant met her burden of proof to establish that she had any continuing residual disability or medical condition on or after October 6, 2009 causally related to her June 24, 1997 employment injury.

Appellant, through her attorney, contends that the decision is contrary to fact and law.

**FACTUAL HISTORY**

OWCP accepted that appellant, then a 39-year-old casual clerk, sustained right leg contusion/laceration, tear of the Achilles tendon, tendinitis and right leg cellulitis. It paid

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

compensation benefits, including surgery on October 23, 2000 to repair her right Achilles tendon. This case has previously been before the Board. On prior appeal the Board, by decision dated May 23, 2011, affirmed a May 6, 2010 OWCP decision terminating appellant's wage-loss compensation and certain medical benefits effective October 6, 2009.<sup>2</sup> The Board found that the special weight of the medical evidence was with Dr. Timothy Nice, a Board-certified orthopedic surgeon, who was selected as an impartial medical examiner to resolve the conflict in medical opinion between appellant's attending physician, Dr. Franklin B. Price, a Board-certified internist, hematologist and medical oncologist, and Dr. Robert M. Furnich, a second opinion physician, regarding whether there was any employment-related disability and appellant's capacity to work. The facts as set forth in the Board's prior decision are hereby incorporated by reference.

On October 10, 2011 appellant, through counsel, filed a request for reconsideration. In support of her request, appellant submitted a September 17, 2011 report from Dr. Price who opined that appellant's ankle remained weak and unstable and that she walked with an antalgic gait and falls. Dr. Price noted that when he examined her on November 24, 2010 her right ankle and foot were quite swollen, her right Achilles tendon was swollen and tender, her right foot was swollen and nontender and she had diminished dorsi and plantar flexion of the right foot at the right ankle by 50 degrees. He also noted that these symptoms made appellant depressed and caused her to overeat and have poor control of her diabetes. Dr. Price noted that she had residual pain and weakness in her right ankle from the poorly repaired severed Achilles tendon which caused her to fall, walk with an antalgic gait and have weakness of dorsi and plantar flexion of the right foot. Appellant submitted a September 17, 2011 report from Dr. Price with her request for reconsideration. Dr. Price continued to submit monthly progress reports, which indicate that she was disabled due to continued pain and weakness from her severed Achilles tendon on the right ankle. Furthermore, he suggested that appellant should consider filing a claim for psychiatric care for conditions resulting from her employment injury.

Dr. Shana Miskovsky, a Board-certified treating orthopedic surgeon, submitted a report dated April 11, 2011 stating that appellant apparently had a reinjury episode on February 17, 2011 when she fell onto her knees after stepping in a hole in the parking lot at the employing establishment. She diagnosed an exacerbation of preexisting bilateral knee arthritis and recommended physical therapy.

By decision dated January 13, 2012, OWCP denied modification.

### **LEGAL PRECEDENT**

As OWCP met its burden of proof to terminate appellant's compensation and certain medical benefits<sup>3</sup> the burden shifted to the claimant to establish a medical condition causally

---

<sup>2</sup> Docket No. 10-1572 (issued May 23, 2011) (The Board found that OWCP met its burden of proof to terminate appellant's compensation and all medical benefits except for treatment of hypersensitivity of the scar tissue. OWCP had previously accepted appellant's claim for right leg/contusion/laceration, tear of the Achilles tendon, tendinitis and right leg cellulitis as a result of an employment-related traumatic injury that occurred on June 24, 1997).

<sup>3</sup> By its May 23, 2011 decision, the Board found that OWCP met its burden of proof to terminate appellant's compensation and certain medical benefits effective October 6, 2009. A decision by the Board is final upon expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d). There is no indication in the case record that appellant filed a petition for reconsideration of the Board's May 23, 2011 decision pursuant to 20 C.F.R. § 501.7, which was granted. *See M.G.*, Docket No. 11-2121 (issued May 9, 2012).

related to her accepted injuries.<sup>4</sup> In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.<sup>5</sup>

### ANALYSIS

The Board finds that appellant has not established that she has any continuing residuals of her accepted conditions of right leg contusion/laceration, tear of the Achilles tendon, tendinitis and right leg cellulitis. The Board previously found that these conditions had resolved by October 6, 2009 when affirming OWCP's termination of compensation benefits.

After termination of most medical and wage-loss compensation benefits, appellant submitted additional medical evidence to support his claim for continuing compensation for employment-related residuals. As previously noted, this appeal only concerns the issue of continued residuals from appellant's accepted employment injuries.

In support of his request for reconsideration, appellant submitted a report from Dr. Price wherein he stated that appellant had residual pain and weakness in her right ankle from the poorly repaired severed Achilles tendon which caused her to fall, walk with an antalgic gait and have weakness of dorsi and plantar flexion of the right foot. Dr. Price also submitted additional reports monitoring appellant's progress. These reports are essentially repetitive of his earlier reports which stated that appellant had continuing residuals and was disabled, which also assisted in forming the basis for the conflict. As the Board found in the prior decision, the special weight of the medical evidence rested with the opinion of Dr. Nice, the impartial medical examiner, who determined that appellant was no longer disabled from her accepted employment condition.<sup>6</sup> The reports of Dr. Price do not constitute new evidence indicating that appellant had continuing disability as they are repetitive of prior reports and thus do not give rise to a new conflict.<sup>7</sup>

Further, the new report of Dr. Miskovksy does not address the accepted injury; rather this report addresses a new injury of exacerbated bilateral knee arthritis as a result of stepping in a hole. Accordingly, appellant has not met her burden of proof to establish that she has continuing employment-related disability or continued medical residuals after the termination of compensation of benefits.

Appellant's counsel argued that the decision is contrary to fact and law. However, in the absence of a well-reasoned medical opinion explaining how or why appellant's accepted medical

---

<sup>4</sup> *J.C.*, Docket No. 11-1245 (issued February 6, 2012); *Manuel Gill*, 52 ECAB 282 (2001); *Talmadge Miller*, 47 ECAB 673 (1996).

<sup>5</sup> See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101 (1992).

<sup>66</sup> Section 8123(a) of FECA provides in pertinent part: if there is 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 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006). Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight. *E.J.*, Docket No. 11-1 672 (issued July 20, 2012); *V.G.*, 49 ECAB 635 (2008).

<sup>7</sup> See *T.C.*, Docket No. 12-444 (issued August 1, 2012).

conditions continued past the period authorized by OWCP, she has failed to meet her burden of proof.

Appellant 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 appellant has not met her burden of proof to establish that she had any continued disability or medical condition on or after October 6, 2009 causally related to her June 24, 1997 employment injury.<sup>8</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 13, 2012 is affirmed.

Issued: October 26, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

---

<sup>8</sup> The medical conditions that were terminated do not include continuing treatment for hypersensitivity of the scar tissue.