

FACTUAL HISTORY

On June 20, 2008 appellant, then a 48-year-old mail processor, filed an occupational disease claim alleging problems with his feet due to factors of his federal employment. OWCP accepted his claim for bilateral plantar fibromatosis. By decision dated June 1, 2009, it terminated appellant's entitlement to monetary compensation effective July 5, 2009 on the grounds that he refused an offer of suitable work under section 8106(c). Appellant returned to work on June 5, 2009. In a decision dated July 1, 2009, OWCP granted him schedule awards for a one percent impairment to each lower extremity.

An electromyogram (EMG) and nerve conduction study (NCS) performed on July 9, 2009 revealed bilateral posterior tarsal tunnel syndrome.

In disability certificates dated July 9 and September 3, 2009, Dr. Ellis advised that appellant was temporarily totally disabled from employment.

On August 28, 2009 OWCP noted that appellant had returned to work on June 5, 2009 but stopped work on June 25, 2009. It noted that it had issued a termination letter on June 1, 2009 due to his refusal of suitable work. OWCP stated:

“On June 19, 2009 [the employing establishment] reported *via* e-mail that you had actually returned to work on June 5, 2009. This return to work information superseded the above referenced June 1, 2009 [tele]phone call from your agency verifying you had not accepted the job offer and rendered the June 1, 2009 [f]inal [t]ermination [d]ecision [l]etter invalid.”

OWCP notified appellant that it found the position that he abandoned suitable and that he had 30 days to report to work or have his compensation terminated.

In a decision dated November 4, 2009, OWCP terminated appellant's compensation effective November 22, 2009 on the grounds that he abandoned suitable work.

On November 11, 2009 appellant requested a telephone hearing. In a decision dated April 28, 2010, OWCP's hearing representative reversed the November 4, 2009 termination. She found that appellant had attempted to return to work on October 27, 2009 but was sent home by the employing establishment. The hearing representative instructed OWCP to reinstate compensation retroactive to November 22, 2009.

On August 12, 2010 OWCP referred appellant to Dr. Donald M. Mauldin, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated August 31, 2010, Dr. Mauldin found no objective evidence of plantar fasciitis and only subjective complaints limiting activities. In an attached addendum, he opined that based on his review of a September 9, 2010 functional capacity evaluation, appellant could return to his usual employment.

On October 7, 2010 appellant filed a claim for compensation from July 19 to November 21, 2009.

By letter dated October 25, 2010, OWCP advised appellant that it proposed to terminate his compensation as the medical evidence established that he was no longer disabled due to his work injury.

In response, appellant submitted a March 16, 2010 report from Dr. Ellis, who diagnosed employment-related bilateral plantar fasciitis and posterior tarsal tunnel syndrome. Dr. Ellis found that appellant was totally disabled from June 25, 2009 onward due to his employment injury. In a work capacity evaluation dated January 4, 2010, he advised that appellant was totally disabled.²

By decision dated January 5, 2011, OWCP denied appellant's claim for compensation from July 19 to November 21, 2009 as the medical evidence was insufficient to establish that he was disabled from employment during this period. On February 1, 2011 appellant requested a telephone hearing.

On March 21, 2011 OWCP referred appellant to Dr. Bernie McCaskill, a Board-certified orthopedic surgeon, for an impartial medical examination. It found a conflict in medical opinion between Dr. Ellis and Dr. Mauldin regarding whether appellant had continued residuals of his work injury.

On March 28, 2011 appellant's attorney objected to the selection of Dr. McCaskill due to bias. In another letter dated March 28, 2011, counsel requested that OWCP provide the bypass pages showing the physicians who were not selected.³

Following a preliminary review of the record, OWCP's hearing representative set aside the January 5, 2011 decision denying compensation from July 18 through November 21, 2009. She noted that OWCP had previously terminated appellant's compensation for refusing suitable work in a June 1, 2009 decision and, consequently, he was not entitled to further wage-loss compensation. The hearing representative further found, however, that OWCP had scheduled an impartial medical examination to resolve the issue of appellant's disability. She instructed OWCP to have the impartial medical examiner address the question of disability from July to November 2009 even though there was no conflict on the issue to "avoid piecemeal adjudication and the possibility of inconsistent results." The hearing representative further determined that OWCP should "immediately cease any monetary payments to [appellant] as long as the June 1, 2009 decision stands."

In an e-mail message dated April 12, 2011, counsel asserted that on August 28, 2009 OWCP rescinded the June 1, 2009 decision terminating compensation under section 8106(c). He requested that the hearing representative issue an amended decision.

² In a report dated January 27, 2011, Dr. Ellis advised that the effects of appellant's work injury continued and that he required further treatment.

³ In a letter dated April 4, 2011, OWCP responded to the March 28, 2011 letter requesting documentation of the selection of the impartial medical examiner. Subsequently, counsel no longer alleged that the selection was not in accordance with OWCP's procedures.

In a report dated April 19, 2011, Dr. McCaskill discussed the history of injury and appellant's current complaints of diffuse foot pain that has increased overtime. On examination, he found that appellant was "diffusely tender over the plantar aspect of each foot over the medial and lateral aspect of each heel and over the medial aspect of each ankle including the subcutaneous surface of the medial malleolus." Dr. McCaskill measured full range of motion and pedal pulses with no callosities and a "slow but normal gait." He found no neurological abnormalities or loss of strength in the bilateral lower extremities. Dr. McCaskill reviewed the objective studies and noted that magnetic resonance imaging (MRI) scan studies from 2008 did not show clear abnormalities and that a July 2008 EMG revealed evidence of bilateral tarsal tunnel syndrome.⁴ He diagnosed chronic bilateral foot pain of undetermined etiology. Dr. McCaskill stated, "[Appellant] has no objective abnormal physical findings and his complaints are not consistent with any specific clinical diagnosis including tarsal tunnel syndrome." He found that appellant could return to his usual employment.

On May 25, 2011 OWCP advised appellant of the proposed termination of his compensation and medical benefits as the weight of the medical evidence established that he was no longer totally disabled.

In a report dated March 1, 2011, Dr. Ellis diagnosed bilateral calcaneal spurs, plantar fasciitis, tarsal tunnel syndrome and morton's neuromas, traumatic osteoarthritis of the feet and tendinitis of the medial malleolus bilaterally. He found that appellant was unable to work beginning June 25, 2009 due to his injury and was permanently disabled from his usual employment.⁵ In an April 26, 2011 work restriction evaluation, Dr. Ellis advised that appellant was totally disabled.

By decision dated June 27, 2011, OWCP terminated appellant's compensation and authorization for medical benefits effective July 3, 2011. It found that Dr. McCaskill's opinion represented the weight of the medical evidence and established that appellant had no further employment-related disability or need for further medical treatment.

In a letter dated June 28, 2011, OWCP requested that Dr. McCaskill address whether appellant was able to perform his modified employment from July to November 2009.

On July 5, 2011 appellant requested a telephone hearing.

In a supplemental report dated July 12, 2011, Dr. McCaskill reviewed the medical reports and diagnostic studies from June to November 2009. He opined that there was no "clinical change in [appellant's] complaints or condition from July to November 2009 and when seen by me for a required medical evaluation on April 19, 2011." Dr. McCaskill advised that appellant could perform his limited duty during the period in question.

⁴ A July 7, 2008 MRI scan of the right foot showed degenerative changes and "[p]rominent sharp spurring at the inferior aspect of the os calcis." A July 7, 2008 MRI scan study of the left foot showed degenerative changes and spurring at the os calcis inferior aspect.

⁵ Dr. Ellis submitted a similar report dated June 22, 2011.

By decision dated September 20, 2011, OWCP denied appellant's claim for disability compensation from July 18 to November 21, 2009.

At the telephonic hearing, held on October 13, 2011 appellant related that Dr. McCaskill performed a cursory examination and left the room multiple times to receive telephone calls. Counsel argued that Dr. Mauldin's report was insufficient to create a conflict in opinion and that Dr. McCaskill was biased.

By letter dated October 24, 2011, counsel maintained that Dr. Mauldin's report was insufficient to create a conflict in medical opinion as it lacked medical rationale and did not address the positive objective studies. He also argued that Dr. McCaskill did not consider all the medical evidence of record, including the results of a positive 2009 EMG and NCS. Counsel submitted a deposition obtained from Dr. McCaskill as a witness for a defendant and an evaluation of his performance as a resident in 1980. He noted that in the deposition Dr. McCaskill asserted that he primarily represented corporations defending claims and that he had accepted repremands by the state Board in 1992 and 2009 in complex malpractice cases.

In a decision dated December 19, 2011, OWCP's hearing representative affirmed the June 27, 2011 decision. She found that Dr. McCaskill's opinion represented the weight of the evidence and established that appellant had no further disability or condition due to his work injury. The hearing representative found insufficient evidence to establish bias.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁶ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹⁰

Section 8123(a) of FECA provides that, 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.¹¹ The implementing regulations

⁶ *Elaine Sneed*, 56 ECAB 373 (2005).

⁷ *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁸ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁹ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8123(a).

states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² In situations where there exist 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 upon a proper factual background, must be given special weight.¹³

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral plantar fibromatosis causally related to factors of his federal employment. In a decision dated June 1, 2009, it terminated his compensation under section 8106(c) effective July 5, 2009 for refusing suitable work. On August 28, 2009, however, OWCP noted that appellant had returned to work on June 5, 2009. It found that the June 1, 2009 decision was thus not valid. Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application.¹⁴ OWCP reopened appellant's case and found that its June 1, 2009 decision was invalid and effectively set aside the suitable work termination.

OWCP properly found that a conflict arose between Dr. Maudlin, a second opinion physician, and Dr. Ellis, appellant's attending physician, regarding whether he had any further employment-related condition or disability. It referred appellant to Dr. McCaskill for an impartial medical examination to resolve the conflict in opinion.

Where there exist 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 upon a proper factual background, must be given special weight.¹⁵ The Board finds that the opinion of Dr. McCaskill, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. McCaskill accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.¹⁶ In a report dated April 19, 2011, he reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. McCaskill found diffuse tenderness of both feet over the media and lateral heel and the medial aspect of each ankle. He measured full range of motion and found normal pedal pulses and no neurological abnormalities or loss of strength. Dr. McCaskill diagnosed bilateral foot pain of unknown etiology. He concluded that appellant

¹² 20 C.F.R. § 10.321.

¹³ *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹⁴ 5 U.S.C. § 8128.

¹⁵ *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁶ *Manuel Gill*, 52 ECAB 282 (2001).

could return to his usual employment. Dr. McCaskill provided rationale for his opinion by noting that the findings on examination were not consistent with any diagnosis.¹⁷ As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.¹⁸ OWCP thus met its proof to terminate appellant's compensation benefits for the accepted condition of bilateral plantar fibromatosis.

After OWCP advised appellant of its proposed termination, he submitted a March 1, 2011 report from Dr. Ellis, who diagnosed plantar fasciitis, tarsal tunnel syndrome, osteoarthritis of the feet and bilatearl medial tendinitis. Dr. Ellis reiterated that appellant was totally disabled from employment due to his accepted injury. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner, however, is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.¹⁹

Counsel alleged that Dr. McCaskill was biased. OWCP referred appellant to Dr. McCaskill on March 21, 2011. By letter dated March 28, 2011, counsel objected to the selection of Dr. McCaskill and contended bias. He did not, however, provide adequate documentation to support his allegation. Under the procedure manual, a claimant may request to participate in the selection of the referee physician or may object to the physician selected under the medical management application. Counsel must, however, provide a valid reason, including documented bias or unprofessional conduct by the selected physician.²⁰ He asserted only a general allegation of bias at the time he objected to Dr. McCaskill's selection and thus has not shown that he was unqualified to render an impartial medical opinion at the time he examined appellant.²¹

Subsequent to Dr. McCaskill's evaluation, counsel submitted a deposition from Dr. McCaskill, who testified that he primarily represented corporate defendants and described disciplinary actions taken against him by the state medical board and lawsuits by patients. There was no decision, however, finding bias by Dr. McCaskill or other evidence to establish bias or unprofessional conduct.²²

¹⁷ While, as argued by counsel at the hearing, 2008 and 2009 EMG studies revealed evidence of tarsal tunnel syndrome, the accepted condition is bilateral plantar fibromatosis.

¹⁸ See *J.M.*, *supra* note 15; *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁹ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

²⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(f) (July 2011).

²¹ See *A.H.*, Docket No. 11-2080 (issued July 26, 2012).

²² See *J.S.*, Docket No. 10-2198 (issued July 26, 2011) (finding that a state workers' compensation decision supported a finding of bias by an impartial medical examiner).

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.²³ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.²⁴

ANALYSIS -- ISSUE 2

OWCP met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. McCaskill, the impartial medical examiner, who found that appellant had no residuals of his accepted condition. Dr. McCaskill explained that based on his physical examination he did not show any evidence of a foot condition. As his opinion is detailed and well rationalized, it is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of his accepted employment injury.

LEGAL PRECEDENT -- ISSUE 3

The term disability as used in FECA²⁵ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.²⁶ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.²⁷ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.²⁸ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.²⁹

Section 8123(a) provides that, 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.³⁰

²³ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

²⁴ *Id.*

²⁵ *Supra* note 1; 20 C.F.R. § 10.5(f).

²⁶ *Paul E. Thams*, 56 ECAB 503 (2005).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

³⁰ 5 U.S.C. § 8123(a).

ANALYSIS -- ISSUE 3

On October 7, 2010 appellant filed a claim requesting compensation for total disability from July 19 to November 21, 2009. On July 9, 2009 Dr. Ellis found that appellant was disabled from employment. In reports dated March 16, 2010 and March 1, 2011, he opined that appellant was totally disabled beginning June 25, 2009 due to his accepted employment injury. In contrast, Dr. McCaskill, in a report dated July 12, 2011, found that there was no change in appellant's condition from June to November 2009 such that he was unable to perform his modified work duties.³¹ The Board, therefore, finds a conflict in medical opinion.

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.³² The case will be remanded for an impartial medical examiner to resolve the conflict in medical opinion. On remand, OWCP should refer appellant and a statement of accepted facts to an appropriate physician to examine him and evaluate the evidence pursuant to section 8123(a) of FECA. Following this and such further development as OWCP deems necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation and authorization for medical benefits effective July 3, 2011 on the grounds that he had no further disability or condition due to his accepted employment injury. The Board further finds that the case is not in posture for decision regarding whether he sustained employment-related disability from July 18 to November 21, 2009.

³¹ Dr. McCaskill was not an impartial medical examiner on the issue of disability from July 18 to November 21, 2009 as the record contained no conflict on this issue at the time of his examination.

³² 5 U.S.C. § 8123; *see also Charles S. Hamilton*, 52 ECAB 110 (2000).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed and the September 20, 2011 decision is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 4, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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