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

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| **D.F., Appellant** | ) | |
| **and** | ) | **Docket No. 14-30** |
| | ) | **Issued: August 26, 2014** |
| **U.S. POSTAL SERVICE, POST OFFICE, Nashville, TN, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*No appearance,* for the Director

Oral Argument June 19, 2014

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 13, 2013 appellant filed a timely appeal from July 24 and October 2, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 16, 2012 on the grounds that he had no residuals of a July 22, 2011 employment injury; and (2) whether appellant established that he had any continuing employment-related disability or condition after July 16, 2012 due to the accepted conditions.

On appeal and at oral argument, appellant asserted that a conflict in medical evidence was created between Dr. W. Carl Dyer, an attending Board-certified orthopedic surgeon, and

[1] 5 U.S.C. §§ 8101-8193.

Dr. Carl S. Carlson, Jr., an orthopedic surgeon and OWCP referral physician. He also questioned whether Dr. Carlson was qualified to render an opinion and argued that leading questions had been posed by OWCP. Further, an additional claim for an April 2013 ankle injury should be combined with the present case.

## ***FACTUAL HISTORY***

On July 22, 2011 appellant, then a 42-year-old transitional city carrier, sustained an employment-related right ankle sprain and closed fracture of the right calcaneus. He stopped work that day. Appellant received continuation of pay and wage-loss compensation. He came under the care of Dr. Dyer. The August 12, 2011 magnetic resonance imaging (MRI) scans of the right foot and ankle demonstrated an accessory navicular with superimposed acute injury and posterior tibial tendinopathy. A November 16, 2011 right foot MRI scan study demonstrated the accessory navicular with mild reactive and degenerative changes and no visible ligament tear, tendinopathy or occult fracture.

In a January 12, 2012 treatment note, Dr. Dyer stated that appellant had pain and stiffness after retwisting his ankle while using crutches in his garage. He diagnosed a sprained right ankle, flexion contracture of the right foot and ankle, possible fractured calcaneous, right Achilles tendinitis, right foot degenerative arthritis and possible reflex sympathetic dystrophy. Dr. Dyer advised that appellant could return to a driving route with no standing or walking more than 30 minutes at a time. In a January 12, 2012 duty status report, he indicated that appellant could work a driving route with sedentary duties. On February 2, 2012 Dr. Dyer indicated that appellant had no restrictions but in a February 3, 2012 duty status report he indicated that appellant could stick mail, could not walk a route, could not stand or walk more than 30 minutes at a time and could drive a route. A February 17, 2012 three-phrase bone scan of the right ankle demonstrated an un-united accessory ossicle of the tarsal navicular which could be degenerative and/or inflammatory uptake.

The employing establishment dismissed appellant for cause effective March 17, 2012.[2]

On March 8, 2012 Dr. Dyer noted swelling, restricted range of motion and tenderness to palpation of the foot and ankle. He advised that appellant could return to sedentary duty.

On March 13, 2012 Dr. Daniel L. Kingloff, a Board-certified orthopedic surgeon, noted the history of injury. The right foot and ankle appeared slightly reddened and swollen on physical examination and were painful to light touch. Dr. Kingloff indicated that perhaps appellant had a regional pain syndrome.

On March 28, 2012 Dr. Dyer explained that the February 3, 2012 duty status report correctly described appellant's restrictions. He indicated that appellant's injury had not resolved and that he could be developing an early reflex sympathetic dystrophy, noting that he had

[2] A January 30, 2012 notice of proposed removal indicated that appellant was being removed because he failed to properly report the July 22, 2011 injury and for unsatisfactory attendance on March 7, 10 and July 12, 2011. The removal was finalized in a letter of decision dated February 23, 2012.

continued pain and swelling. Dr. Dyer opined that appellant was capable of returning to limited, sedentary activity with intermittent weight-bearing and no prolonged standing.

OWCP referred appellant to Dr. Carlson for a second opinion evaluation. In a March 29, 2012 report, Dr. Carlson advised that appellant demonstrated pain and histrionic behavior. He complained of pain with most maneuvers and did not appear to be exerting full effort. No atrophy was present and ankle range of motion was essentially normal. Appellant was very sensitive to light touch. Dr. Carlson noted the accessory navicular but did not think it was problematic. He advised that the July 22, 2011 ankle sprain should have resolved and that there was never a right calcaneous fracture, based on his review of the diagnostic studies. Dr. Carlson concluded that appellant's subjective complaints outweighed the objective findings and that he should attempt to return to his date-of-injury position. On an attached work capacity evaluation, he indicated that appellant had no restrictions.

On April 19, 2012 Dr. Dyer advised that appellant continued to have generalized aches and pains about the feet and had slight bilateral edema and generalized pain with manipulation. He reiterated his diagnoses.

In a supplemental report dated May 10, 2012, Dr. Carlson noted that the accessory navicular was a separate bone, usually present from birth. He advised that appellant's employment-related ankle sprain should have resolved in 8 to 12 weeks and that any swelling seen was most likely related to recent activity of weight-bearing and not due to the July 22, 2011 employment injury. Dr. Carlson reiterated that appellant was capable of returning to full duty.

On June 14, 2012 OWCP proposed to terminate appellant's wage-loss and medical benefits as the medical evidence established that he had no residuals or disability of the July 22, 2011 work injury.

Appellant disagreed with the proposed termination. In a June 14, 2012 report, Dr. Dyer noted appellant's complaint of continued pain and stiffness of the right ankle. Physical examination showed tenderness, edema and diminished dorsiflexion of the right foot. Dr. Dyer advised appellant to push to increase range of motion as residual stiffness was most likely due to reflex guarding and pain and insufficient walking. He stated that appellant was a statistical outlier but he continued to have ankle problems related to the work injury that had not resolved. Dr. Dyer reiterated his opinion on June 21, 2012.

By decision dated July 16, 2012, OWCP finalized the termination of wage-loss compensation and medical benefits.

Appellant timely requested a hearing and submitted July, 2012 reports in which Dr. Dyer noted right ankle swelling and restricted ankle range of motion. At the December 18, 2012 hearing, he maintained that there was a conflict in medical evidence between the opinions of Drs. Carlson and Dyer. Dr. Carlson submitted a September 18, 2012 report in which he reiterated his findings and conclusions. On December 28, 2012 Dr. Kingloff noted that appellant had continued right ankle pain and slight swelling. He diagnosed right foot and ankle pain and possible regional pain syndrome and recommended that appellant be seen by a foot and ankle orthopedic specialist.

By decision dated March 4, 2013, an OWCP hearing representative affirmed the July 16, 2012 decision. She found that the weight of medical evidence was represented by Dr. Carlson.

On March 20, 2013 appellant requested reconsideration and submitted a March 11, 2013 MRI scan study of the right leg that showed an accessory navicular Type 2 with bone marrow edema and movement, mild tibial tenosynovitis, plantar fasciitis, bipartite medial cuneiform with movement at the site of synchondrosis and small effusions of the first, fourth and fifth tarsometatarsal joints. On March 19, 2013 Dr. Kingloff reviewed the MRI scan study and advised that the increased activity shown revealed some abnormal activity, with a high likelihood that it could have come from an injury. He again recommended that appellant be seen by a foot and ankle orthopedic specialist.

On March 26, 2013 counsel filed an appeal with the Board, but subsequently withdrew the appeal. In an order dated May 22, 2013, the Board dismissed the appeal.[3] Appellant's reconsideration request was reinstated.

Appellant returned to work at the employing establishment in March 2013 and reinjured his right ankle on April 9, 2013. He filed a separate claim for this injury. In an April 30, 2013 report, Dr. Paul V. Spiegl, a Board-certified orthopedic surgeon, reported that appellant had two employment right ankle injuries, on July 22, 2011 and April 9, 2013. He provided physical examination findings, noting that x-rays were unremarkable except for the accessory navicular. Dr. Spiegl diagnosed tibialis tendinitis and advised that appellant could only do sedentary work and recommended an MRI scan study. On July 8, 2013 he indicated that appellant could only be on his feet for 15 minutes each hour, was unable to climb and was unable to drive.

In a merit decision dated July 24, 2013, OWCP denied modification of the March 4, 2013 decision.[4]

On August 27, 2013 appellant requested reconsideration. He submitted a July 29, 2013 right foot MRI scan study that demonstrated degenerative arthropathy without evidence of an acute internal derangement. A July 29, 2013 MRI scan right ankle study showed a mild partial posterior tibial tendon tear and a Type 2 accessory navicular. On August 19, 2013 Dr. Kingloff noted the MRI scan findings and described appellant's treatment. Appellant had synchondrosis of the accessory navicular and a posterior tibial tendon tear which were initiated by the July 22, 2011 employment injury. On August 27, 2013 Dr. Kingloff provided an impairment rating of appellant's right lower extremity.

In a decision dated October 2, 2013, OWCP denied modification of the prior decisions.

[3] Docket No. 13-1143 (issued May 22, 2013).

[4] A decision was initially issued on July 9, 2013 but was returned to OWCP as undeliverable.

## ***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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] 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.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.[7]

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

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation on July 16, 2012. The accepted conditions in this case are right ankle sprain and closed fracture of the right calcaneus.

The medical evidence includes reports by Dr. Dyer, appellant's attending orthopedic surgeon, dated January 12 to June 14, 2012. Dr. Dyer provided physical restrictions but indicated that appellant could drive a route. In the June 14, 2012 report, he advised that appellant should push to increase his range of motion. In his March 13, 2012 report, Dr. Kingloff did not provide any opinion regarding appellant's work capabilities.

Dr. Carlson, an OWCP referral orthopedic surgeon, advised on March 29, 2012 that appellant's subjective complaints outweighed the objective physical findings. He stated that appellant had no work restrictions. On May 12, 2012 Dr. Carlson advised that the accepted ankle sprain resolved in 8 to 12 weeks of injury and that appellant was capable of returning to full duty.

The Board finds that the weight of medical evidence as represented by Dr. Carlson supports that appellant had no disability due to the July 22, 2011 employment injury as of July 16, 2012. OWCP properly terminated his monetary compensation on that day.[8]

The Board finds, however, that the medical evidence is insufficient to establish that appellant no longer had residuals of the accepted right ankle sprain and closed fracture of the right calcaneus due to a conflict in medical opinion.

[5] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[6] *Id.*

[7] *T.P.*, 58 ECAB 524 (2007).

[8] *Supra* note 5.

In a duty status report dated February 3, 2012, Dr. Dyer, the attending orthopedic surgeon, provided restrictions that appellant could not walk a route and could not stand or walk more than 30 minutes at a time but could drive a route. A February 17, 2012 3-phrase bone scan of the right ankle demonstrated an un-united accessory ossicle of the tarsal navicular which could be degenerative and/or inflammatory uptake. On March 28, 2012 Dr. Dyer indicated that appellant's injury had not resolved and that he could be developing an early reflex sympathetic dystrophy, noting that he had continued pain and swelling.

Dr. Carlson, OWCP's referral orthopedic surgeon, advised on March 29, 2012 that the July 22, 2011 ankle sprain should have resolved and that there was never a right calcaneous fracture, based on his review of the diagnostic studies. He concluded that appellant's subjective complaints outweighed the objective findings.

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability and OWCP must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment prior to termination of medical benefits.[9]

If there is disagreement between OWCP's medical adviser and the employee's physician, OWCP will appoint a third physician who shall make an examination.[10] For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.[11] The Board finds the opinions of Dr. Dyer and Dr. Carlson to be of equal weight as to whether appellant has residuals of the July 22, 2011 right ankle sprain after his wage-loss compensation was terminated on July 16, 2012. Each physician explained his conclusion regarding appellant's right ankle condition. The Board will set aside the July 24 and October 2, 2013 decisions and remand the case for OWCP to refer appellant to an impartial medical specialist to resolve whether he has residuals of the accepted July 22, 2011 right ankle sprain.

As there is an unresolved conflict of medical opinion regarding whether appellant had residuals of the July 22, 2011 right ankle injury, OWCP did not meet its burden of proof to terminate his medical benefits on July 12, 2012. The October 2, 2013 OWCP decision will be reversed regarding this issue.

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

As OWCP met its burden of proof to terminate appellant's wage-loss compensation on July 16, 2012, the burden shifted to him to establish that he had any disability causally related to the accepted right ankle sprain.[12] Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the

[9] *Supra* note 7.

[10] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[11] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[12] *See Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13]

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

The Board finds that appellant submitted insufficient medical evidence to establish that he continued to be disabled after July 16, 2012 due to the July 22, 2011 right ankle sprain such that he would be entitled to wage-loss compensation.

The July 29, 2013 MRI scan studies of the right foot and ankle are not probative on the issue of continuing disability, as medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[14]

In reports dated July 26 and September 18, 2012, Dr. Dyer merely reiterated his previous findings and conclusions. In a December 28, 2012 report, Dr. Kingloff noted that appellant had continued right ankle pain and slight swelling. He diagnosed right foot and ankle pain and possible regional pain syndrome and recommended that appellant see a foot and ankle orthopedic specialist. On March 19, 2013 Dr. Kingloff noted his review of a March 11, 2013 MRI scan study that showed the accessory navicular with bone marrow edema and movement, mild tibial tenosynovitis, plantar fasciitis, bipartite medial cuneiform with movement at the site of synchondosis and small effusions of the first, fourth and fifth tarsometatarsal joints. He advised that the increased activity shown on the MRI scan indicated that there was some abnormal activity, with a high likelihood that it could have come from an injury. Dr. Kingloff again recommended that appellant be seen by a foot and ankle specialist.

Appellant returned to work in March 2013 and reinjured his right ankle on April 9, 2013. He filed a separate claim for this injury, adjudicated by OWCP under file number xxxxxx308. At oral argument, appellant indicated that he had returned to work and had filed an Equal Employment Opportunity claim that was still pending. He also stated that the April 9, 2013 injury had been accepted and that he recently had reconstructive surgery on his right ankle.

In an April 30, 2013 report, Dr. Spiegl, a Board-certified orthopedic surgeon, reported that appellant had two employment-related right ankle injuries, on July 22, 2011 and April 9, 2013. He provided physical examination findings, noting that x-rays were unremarkable except for the accessory navicular. Dr. Spiegl diagnosed tibialis tendinitis, advised that appellant could only do sedentary work and recommended an MRI scan study. On July 8, 2013 he indicated that appellant could only be on his feet for 15 minutes each hour, was unable to climb and was unable to drive. On August 19, 2013 Dr. Kingloff noted an MRI scan study findings and described appellant's treatment. He indicated that appellant had synchondrosis of the accessory navicular and a posterior tibial tendon tear which were initiated by the July 22, 2011 employment injury.

[13] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[14] *Willie M. Miller*, 53 ECAB 697 (2002).

Dr. Dyer, Dr. Kingloff and Dr. Spiegl, however, did not address appellant's disability for work due to the July 2011 work injury between July 16, 2012, when his wage-loss compensation was terminated to when he returned to work in March 2013. Medical opinion regarding causal relationship must explain from a medical perspective how the current condition is related to the injury.[15] Dr. Spiegl did not see appellant until after his second work injury in April 2013. The Board finds that the reports from the physicians do not contain sound medical reasoning establishing that appellant was totally disabled after July 16, 2012 due to the accepted right ankle injury that occurred on July 22, 2011.[16] As such, their opinions are entitled to little probative value and are insufficient to meet appellant's burden of proof to establish that he had work-related disability due to the accepted July 22, 2011 ankle injury after July 16, 2012.[17]

As to appellant's assertions on appeal regarding whether Dr. Carlson was properly selected to render a second opinion evaluation. The Board notes that he is a Board-certified orthopedic surgeon, and had the appropriate specialty qualifications to render an opinion in this case. Regarding whether the physician was asked leading questions, the Board has reviewed the questions prepared for his review and finds that they were proper and not leading questions.[18]

The case will be remanded to OWCP because a conflict exists regarding whether appellant had residuals from the July 22, 2011 employment injury.

## ***CONCLUSION***

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation on July 16, 2012 but that a conflict in medical evidence exists regarding OWCP's termination of medical benefits. The Board further finds that appellant did not establish that he is entitled to wage-loss compensation for continuing disability from July 16, 2012 to March 2013, when he returned to work.

[15] *See Joan R. Donovan*, 54 ECAB 615 (2003).

[16] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[17] *S.S.*, 59 ECAB 315 (2008).

[18] *See J.T.*, Docket No. 13-452 (issued May 29, 2013).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 2 and July 24, 2013 decisions of the Office of Workers' Compensation Programs are affirmed in part and reversed in part, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 26, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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