

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

K.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 14-285
Issued: May 8, 2014**

Appearances:
C.B. Weiser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2013 appellant, through his attorney, filed a timely appeal from a September 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 appellant had employment-related disability after March 11, 2012.

FACTUAL HISTORY

On March 13, 2008 appellant, then a 38-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained injuries to his feet as a result of walking and standing in federal employment. OWCP accepted the claim on February 24, 2009 for bilateral plantar fibromatosis and bilateral calcaneal spurs. In a report

¹ 5 U.S.C. § 8101 *et seq.*

dated February 12, 2010, Dr. Robert Moore, a podiatrist, advised that appellant underwent left foot surgery.² He received compensation for wage-loss on the periodic rolls as of February 12, 2010.

OWCP referred appellant for a second opinion examination by Dr. Robert Fulford, a Board-certified orthopedic surgeon. In a report dated July 1, 2010, Dr. Fulford opined that appellant was capable of returning to his date-of-injury position. On August 9, 2010 Dr. Moore disagreed with Dr. Fulford and stated that appellant could only work sedentary duty.

To resolve the conflict in medical opinion as to appellant's employment-related disability, OWCP selected Dr. Grant McKeever, a Board-certified orthopedic surgeon, as the referee physician. In a report dated September 23, 2010, Dr. McKeever reviewed a history of injury provided and results on examination. He diagnosed status post left foot plantar fasciotomy release and calcaneal exostectomy. Dr. McKeever found that the left foot condition did not prevent appellant from returning to his date-of-injury position.

On October 4, 2010 appellant submitted a September 30, 2010 functional capacity evaluation (FCE). In a letter dated October 12, 2010, OWCP advised him that it proposed to terminate compensation for wage loss based on the weight of the medical evidence. By decision dated November 15, 2010, it terminated wage-loss compensation effective November 21, 2010.

Appellant requested a hearing before an OWCP hearing representative. By decision dated February 7, 2011, the hearing representative reversed the November 15, 2010 termination decision. The hearing representative found that Dr. McKeever did not specifically address the right foot condition or the FCE findings.

On March 17, 2011 Dr. McKeever submitted an addendum report. He noted that, although appellant originally claimed bilateral foot pain, all of the injections and surgeries were performed on the left foot. Dr. McKeever stated that there were no objective findings on examination and his opinion was unchanged.

By letter dated March 25, 2011, OWCP advised appellant that it proposed to terminate his compensation for wage loss. In a decision dated April 27, 2011, it terminated wage-loss compensation effective May 8, 2011.

Appellant again requested a hearing before an OWCP hearing representative. By decision dated July 27, 2011, the hearing representative set aside the April 27, 2011 decision. The hearing representative found Dr. McKeever did not address the FCE findings as requested in the February 7, 2011 decision.

On August 25, 2011 Dr. McKeever submitted an additional report. He did not agree with the FCE findings that showed appellant was capable of only sedentary duty. Dr. McKeever stated that there were no significant physical findings on the physical examination, only slight

² Dr. Moore described the surgery as a resection of plantar fascial band, left midfoot neuroplasty with release of the adhesions, left midfoot and rearfoot/inferior release of the flexor digitorum brevis muscle belly origin, left foot/resection of scar tissue, left foot.

tenderness over the sole with no calluses, bunions or hammer toe. He reported that appellant walked with a normal heel to toe gait. Dr. McKeever concluded that his opinion remained unchanged.

By letter dated August 29, 2011, OWCP again advised appellant that it proposed to terminate wage-loss compensation based on the medical evidence. In a report dated September 8, 2011, Dr. Moore indicated that left foot surgery was recommended. He stated that the proposed surgery was a neuroplasty with release of adhesions, plantar fasciectomy with excision of plantar fibroma.

OWCP referred the case to its medical adviser for an opinion as to the necessity for surgery. In a report dated September 15, 2011, Dr. Ronald H. Blum, a Board-certified otolaryngologist and OWCP medical adviser, opined that the proposed surgery was not within accepted medical practice. He noted that appellant had two prior left foot surgeries that provided no lasting improvement and the proposed surgery was essentially the same procedure. The medical adviser recommended a second opinion evaluation on the issue.

Appellant was referred to Dr. Donald Mauldin, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 27, 2011, Dr. Mauldin provided a history and results on examination. He opined that there was no evidence that surgery was necessary. Dr. Mauldin noted that the prior foot surgeries had failed to provide relief and there was no indication that a third surgery would have any benefit.

OWCP found a conflict in medical opinion on the need for surgery and selected Dr. Frank Barnes, a Board-certified orthopedic surgeon, as the referee physician. In a report dated January 3, 2012, Dr. Barnes provided a history and results on examination, diagnosing plantar fasciitis. He opined that a neuroplasty surgery was not indicated as there was no demonstrable nerve problem. Dr. Barnes stated that an extensive fasciectomy would probably not help, noting the lack of improvement with prior surgeries and would increase the risk of the foot collapsing into a flatfoot deformity.

By letter dated January 20, 2012, OWCP advised appellant that it proposed to terminate wage-loss compensation. Appellant was advised to submit evidence or argument within 30 days. By decision dated February 22, 2012, OWCP terminated compensation for wage loss effective March 11, 2012. It also denied authorization for the proposed surgery. On February 24, 2012 OWCP received additional evidence, including a September 26, 2011 report from Dr. Moore. In the September 26, 2011 report, Dr. Moore stated that appellant had developed a plantar fibromatosis and the accepted standard of surgical treatment was a complete plantar fasciectomy.

Appellant requested a hearing before an OWCP hearing representative, which was held on June 11, 2012. Counsel argued that he had timely mailed evidence on February 19, 2012 that OWCP did not consider in the February 22, 2012 decision.

By decision dated September 6, 2012, OWCP's hearing representative affirmed the termination of wage-loss compensation, finding that Dr. McKeever represented the weight of the medical evidence. She reviewed all of the evidence of record, including evidence received after

February 22, 2012. The hearing representative also affirmed the denial of authorization for surgery.

By letter dated December 7, 2012, appellant requested reconsideration of his claim. He argued that OWCP had erred as the district office did not consider evidence mailed on February 19, 2012. Appellant also argued that Dr. McKeever should not represent the weight of the medical evidence as his findings were inconsistent with the FCE.

Appellant resubmitted a November 3, 2010 report from Dr. Jason Armstrong, a podiatrist, who listed results on examination. In a report dated November 1, 2012, Dr. Jerry Miles, a podiatrist, reported that appellant had symptoms consistent with scarred adhesion of the plantar fascial band in the left foot. He stated that appellant was unable to return to work due to difficulty wearing shoes and he stated that appellant needed the surgery proposed by Dr. Moore. Appellant also submitted continuing reports from Dr. Moore regarding treatment for left foot pain.

By decision dated March 11, 2013, OWCP reviewed the case on its merits and denied modification. It found that the medical evidence did not establish a continuing employment-related disability.

In a letter dated June 17, 2013, appellant again requested reconsideration. He reiterated that OWCP failed to consider evidence mailed on February 19, 2012 and that Dr. McKeever did not represent the weight of the evidence. Appellant submitted reports from Dr. Moore dated February 7, April 8 and 26 and June 6, 2013. Dr. Moore advised that appellant was limited to light duty, with 2 hours of alternate sitting and 20 minutes standing/walking.

By decision dated September 5, 2013, OWCP reviewed the case on its merits. It found that the evidence was not sufficient to modify the March 11, 2013 decision.

LEGAL PRECEDENT

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.³

The Board has noted that in assessing medical evidence the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁴

³ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

⁴ *Gary R. Sieber*, 46 ECAB 215 (1994).

ANALYSIS

OWCP terminated wage-loss compensation, effective March 11, 2012 in a decision dated February 22, 2012. This determination was reviewed by a hearing representative in a decision dated September 6, 2012. The Board notes that appellant argued that OWCP erred because evidence was mailed on February 19, 2012, which was within 30 days of a January 19, 2012 notice of proposed termination. The Board notes that OWCP regulations provide that a claimant must be given notice that he or she has 30 days to submit relevant evidence or argument regarding a proposed termination, and if he or she does not respond within 30 days of the written notice, OWCP will issue an appropriate decision.⁵ Appellant did not respond within 30 days of the January 20, 2012 notice, as the evidence was not received until February 24, 2012. Even so, OWCP's hearing representative reviewed all evidence of record prior to the September 6, 2012 decision. Therefore, OWCP took the evidence into consideration in a subsequent merit decision.

With regard to the September 6, 2012 hearing representative decision, appellant had an opportunity to request a timely appeal of this decision. He did not request an appeal, but requested reconsideration and submitted evidence relative to his continuing treatment. As noted above, when compensation has been properly terminated, the burden shifts to appellant to establish continuing employment-related disability after the date of termination. In this case it is his burden of proof to establish that he had an employment-related disability after March 11, 2012.

Appellant did not meet his burden of proof. The November 1, 2012 report from Dr. Miles did not provide a complete history or an adequate factual and medical background. Dr. Miles noted only that appellant had sustained a left foot injury and was treated by Dr. Moore. The brief statement that appellant was unable to work due to difficulty with wearing shoes is not sufficient to establish an employment-related disability after March 11, 2012.

Dr. Moore reiterated his opinion that appellant was capable of light duty with limitations on sitting, standing and walking. These reports are not sufficient to establish a period of employment-related disability after March 11, 2012. Dr. Moore had opined that appellant could work only light duty since 2010, and had been on one side of the conflict under 5 U.S.C. § 8123(a).⁶ As noted by the hearing representative, the conflict was resolved by the reports from Dr. McKeever, who found that appellant could return to his date-of-injury position. The additional notes of Dr. Moore that appellant can only work with restrictions are not sufficiently rationalized to establish employment-related disability after March 11, 2012.

On appeal, appellant argues that Dr. McKeever's report was not sufficient to terminate compensation as it was not a rationalized opinion and conflicted with the FCE. As noted above, OWCP's hearing representative reviewed the evidence of record on this issue and found that Dr. McKeever represented the weight of the medical evidence. Appellant did not timely request

⁵ 20 C.F.R. § 540, 541.

⁶ Additional reports from a physician on one side of the conflict that is properly resolved by a referee specialist are generally insufficient overcome the weight accorded the referee's report or create a new conflict. *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

an appeal of the September 6, 2012 decision. For the reasons noted above, the Board finds that he has not established an employment-related disability after March 11, 2012. 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 established an employment-related disability after March 11, 2012.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 5, 2013 is affirmed.

Issued: May 8, 2014
Washington, DC

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

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

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