



## **FACTUAL HISTORY**

On December 1, 2008 appellant, then a 56-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 2008 he sustained a right ankle injury when he tripped on raised plastic flooring. By decision dated January 16, 2009, OWCP accepted the claim for right ankle sprain. Appellant worked light duty until May 22, 2010 when the employing establishment could no longer accommodate him. He received compensation benefits for total disability until August 3, 2010, when he began receiving partial disability as a result of part-time work.

In a June 3, 2009 medical report, Dr. John R. Sellman, appellant's treating physician and Board-certified orthopedic surgeon, reported that he began treating appellant on January 9, 2009 for a right ankle injury he sustained on November 26, 2008 when he tripped and fell at work. He reported severe injury to both ankles from a plane crash in 1980 resulting in 12 left ankle surgeries and 4 right ankle surgeries. Dr. Sellman noted pseudarthrosis and severe arthritis involving the right ankle, talus and subtalar joint. He provided findings and treatment notes pertaining to all prior visits for which he evaluated appellant. Review of a January 9, 2009 right ankle x-ray revealed severe arthritis and degeneration of the ankle. A March 5, 2009 computerized tomography (CT) scan revealed no acute fracture.

Dr. Sellman diagnosed right ankle sprain, arthritis of the right ankle and history of severe ankle and talar calcaneal fracture of the right foot with reinjury on November 26, 2008. He noted that appellant worked as an air traffic controller for many years without issues to the ankle or need for narcotic function. Dr. Sellman noted that appellant was able to get around without special shoes, support or medication prior to the November 26, 2008 injury. Appellant reinjured his right ankle in a trip-and-fall episode on November 26, 2008 which resulted in immobilization, continued pain and required narcotic function.

OWCP referred appellant, a statement of accepted facts and the case file to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for a second opinion examination to address the nature and extent of disability. It noted that the claim was accepted for right ankle sprain but appellant had a preexisting condition from a 1980 airplane accident. OWCP requested Dr. Bleecker to provide an opinion regarding whether any residuals of the injury continued and whether appellant required work limitations.

In a June 24, 2010 report, Dr. Bleecker stated that he examined appellant on June 23, 2010. On November 26, 2008 appellant tripped on raised plastic flooring causing a right ankle injury which was accepted for a strain. Dr. Bleecker noted appellant's medical history pertaining to injuries sustained from the 1980 plane crash. He provided findings on physical examination and noted review of prior medical reports and diagnostic testing. Dr. Bleecker stated that, following the November 26, 2008 injury, appellant developed pain anteriorly in the right ankle. The pain only occurred when he placed weight on the forefoot and did not occur when he placed weight on the heel. Dr. Bleecker noted that appellant's pain only occurred when a dorsiflexion force was applied to the ankle. He reviewed prior x-rays showing a pseudarthrosis at the ankle joint with collapse of the talus and joint body in the anterior aspect of the ankle. Dr. Bleecker stated that the diagnosis should be changed to possible partial fracture of fragment of the right os calcis versus loose body along with arthritis of the right ankle joint.

He opined that the November 26, 2008 injury caused a small fracture with the development of a loose body and precipitated the motion at the pseudarthrosis causing him to be symptomatic. Dr. Bleecker stated that appellant was disabled and unable to work, requiring use of a cane for partial weight bearing.

By letter dated September 27, 2012, OWCP requested appellant's attending physician to provide an opinion regarding whether he had residuals of his injury. It noted that a second opinion medical report supported a small fracture with the development of a loose body or precipitated the motion at the pseudarthrosis causing appellant to be symptomatic.

In an October 9, 2012 medical report, Dr. Sellman responded that his diagnosis remained arthritis of the right ankle status post injury, multiple operations and a sprain in 2008. Based on appellant's history, findings on physical examination and review of diagnostic studies, he opined that appellant's condition was as bad or worse as it was when he initially examined him in 2009. Dr. Sellman stated that appellant remained partially disabled and required permanent work restrictions.

OWCP referred appellant, a statement of accepted facts and the case file to Dr. Richard P. Pollis, a Board-certified orthopedic surgeon, for a second opinion medical examination to establish the nature and extent of disability, appropriate treatment for any residuals of the work injury and appropriate work restrictions. The statement of accepted facts noted that Dr. Bleecker's June 24, 2010 second opinion report diagnosed a small fracture with a loose body causing the underlying pseudarthrosis to be symptomatic, supporting total disability from work.

In a December 5, 2012 report, Dr. Pollis reported that radiographs of the right ankle performed on December 15, 2008 revealed severe degenerative arthritis, as did x-rays on January 9, 2009. A March 5, 2009 CT scan revealed no acute fractures and advanced degenerative arthritis. Dr. Pollis provided findings on physical examination and noted that appellant ambulated with a right-sided limp requiring use of a cane. He diagnosed right ankle pain due to sprain injury with preexisting severe and advanced degenerative arthritis. Dr. Pollis opined that appellant's November 26, 2008 work injury caused his right ankle sprain but did not cause or affect the preexisting degenerative arthritis. He stated that appellant had severe advanced degenerative arthritis of the ankle prior to his November 26, 2008 injury. Dr. Pollis opined that appellant developed severe right ankle degenerative arthritis as a result of the plane crash injury in 1980 for which he underwent four right ankle surgeries. He concluded that appellant required permanent work restrictions.

By letter dated December 27, 2012, OWCP requested Dr. Pollis to advise whether the accepted November 26, 2008 work-related right ankle sprain had resolved. It further requested that he explain why appellant's current right ankle condition and disability were not due to his preexisting right ankle degenerative arthritis with medical reasoning for the opinions offered.

In a December 27, 2012 addendum report, Dr. Pollis stated that appellant's November 26, 2008 work-related right ankle sprain had fully resolved. He opined that his current right ankle condition was exclusively due to his preexisting advanced severe right ankle degenerative arthritis which was present for many years prior to his November 26, 2008 injury.

On March 21, 2013 OWCP notified appellant of its proposal to terminate his compensation benefits based on Dr. Pollis' opinion that his right ankle sprain had ceased and he was not experiencing any residuals or disability connected to his November 26, 2008 employment injury. Appellant was provided 30 days to submit additional information.

By letter dated March 26, 2013, appellant argued that he remained disabled as a result of the November 26, 2008 work injury. He contended that Dr. Pollis did not thoroughly evaluate him. Appellant further stated that his preexisting arthritis was manageable for the last 28 years until the November 26, 2008 employment incident. He had an upcoming medical appointment and would submit additional medical evidence in support of his claim.

In an April 3, 2013 medical report, Dr. Sellman reported that appellant complained of continued right ankle pain and required use of a cane, rocker bottom shoes and narcotics. He stated that he reviewed Dr. Pollis' second opinion report and disagreed with his opinion that the November 26, 2008 right ankle sprain injury did not affect the preexisting degenerative arthritis. Dr. Sellman argued that his prior reports attributed appellant's disability to the November 26, 2008 work injury. He referenced his June 3, 2009 report which stated that appellant did remarkably well following his severe ankle injury in 1980 until he reinjured himself on November 26, 2008, which took him from a condition that did not require narcotic functions to one that did.

Dr. Sellman agreed with Dr. Pollis regarding appellant's severe bilateral ankle fractures from the 1980 injury. He noted that the left ankle was fused and healed and the right ankle underwent four surgeries which left him with a severe nonunion and arthritis of both the ankle and subtalar joint on the right. In spite of this, appellant was able to work full time as an air traffic controller. He used no supports, canes, braces or analgesics. On November 26, 2008 appellant sprained his ankle at work and had pain and limited function ever since. Dr. Sellman also agreed with Dr. Pollis that diagnostic testing showed very severe ankle arthritis but no evidence of an acute fracture, that appellant required limited duty, had increasing pain and required cane support and an analgesic to function in his capacity. However, he disagreed with Dr. Pollis' opinion on causation. Dr. Sellman opined that appellant's ankle sprain permanently affected his preexisting arthritic conditions. He concluded that appellant was telling the truth, this was the worst ankle x-ray and CT scan he had seen and his own left ankle arthritis was affected by even small injuries which could have long lasting effects on the arthritic joint.

By decision dated April 29, 2013, OWCP terminated appellant's compensation benefits. It found that the weight of the medical evidence rested with Dr. Pollis who determined that his current right ankle condition was due to his preexisting advanced severe degenerative arthritis and he did not have any residuals of his work-related injury.

On May 12, 2013 appellant requested an oral hearing before the Branch of Hearings and Review. He argued that Dr. Bleecker's second opinion report, as well as Dr. Sellman's reports, supported that his current disability was caused by the November 26, 2008 work injury. Appellant argued that the opinion of the two physicians should outweigh that of Dr. Pollis. A hearing was held on September 30, 2013.

By decision dated December 12, 2013, a hearing representative affirmed the April 29, 2013 decision terminating compensation benefits. He found that no physician opined that the November 26, 2008 sprain continued and Dr. Pollis opined that the ankle sprain resolved. Regarding whether the work injury impacted the underlying arthritic condition of the ankle, the hearing representative found that the weight of the medical evidence rested with Dr. Pollis who established that the accepted injury resolved with no residuals.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>2</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>4</sup> 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.<sup>5</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

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.<sup>7</sup> The implementing regulations 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.<sup>8</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained a right ankle sprain in the performance of duty on November 26, 2008. The issue is whether it properly terminated his medical and wage-loss benefits effective April 29, 2013. The Board finds that the evidence of record establishes that the

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<sup>2</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>5</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

<sup>6</sup> *T.P.*, 58 ECAB 524 (2007); *Furman G. Peake*, 41 ECAB 351 (1975).

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> 20 C.F.R. § 10.321.

accepted condition of right ankle sprain has resolved, but a conflict in medical opinion exists as to whether the accepted ankle sprain permanently aggravated appellant's preexisting right ankle arthritis.

The Board notes that no examining physician found that appellant continues to suffer from the accepted right ankle sprain. OWCP terminated appellant's compensation benefits finding that the weight of the medical evidence rests with the reports of Dr. Pollis serving as the second opinion physician. In a December 5, 2012 report, Dr. Pollis opined that appellant's November 26, 2008 work injury caused his right ankle sprain but did not cause or affect his preexisting degenerative arthritis. He stated that appellant developed severe right ankle degenerative arthritis as a result of a plane crash in 1980 for which he underwent four right ankle surgeries. In a December 27, 2012 addendum, Dr. Pollis reported that appellant's November 26, 2008 work-related right ankle sprain had fully resolved. He opined that his current right ankle condition was exclusively due to his preexisting advanced severe right ankle degenerative arthritis which was present for many years prior to his November 26, 2008 injury.

The opinion of Dr. Pollis is in conflict with the opinion of Dr. Sellman, appellant's treating physician, who stated that appellant's right ankle degenerative arthritis was aggravated by the November 26, 2008 injury. Contrary to the opinion of Dr. Pollis, Dr. Sellman found that the November 26, 2008 right ankle sprain permanently aggravated appellant's preexisting right ankle arthritic condition. He noted that, despite the preexisting arthritis and ankle injuries sustained from the 1980 accident, appellant was able to work full time as an air traffic controller with no support, canes, braces, or analgesics. Following the November 26, 2008 right ankle sprain, appellant had limited function and required the use of narcotics and support because the injury aggravated his preexisting arthritis.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>9</sup> The Board notes that OWCP developed the evidence with respect to whether appellant's arthritis condition was aggravated by the November 26, 2008 injury. By letter dated December 27, 2012, OWCP asked Dr. Pollis to explain whether appellant's right ankle condition was due to his preexisting arthritis. The Board finds a conflict between Dr. Pollis and Dr. Sellman as to whether appellant's preexisting right ankle arthritis was aggravated by the November 26, 2008 injury.

At the time OWCP terminated appellant's compensation on April 29, 2013 it met its burden of proof to establish that the accepted condition had resolved. The record reveals an unresolved conflict in the medical opinion evidence as to whether appellant's right ankle arthritis was aggravated by the accepted employment injury. It is well established that where there exists opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.<sup>10</sup>

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<sup>9</sup> *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>10</sup> When there is a conflict of opinion between the claimants attending physician and the physician performing an examination for the government, OWCP shall appoint a third physician to resolve the disagreement. 5 U.S.C. § 8123(a). *See also Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

On remand OWCP shall refer appellant to an impartial medical specialist to determine whether appellant's preexisting arthritis of the right ankle was aggravated by the accepted employment injury. After such further development as necessary, OWCP shall issue an appropriate decision.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective April 29, 2013 based on the accepted right ankle sprain. A conflict remains as to whether appellant's preexisting arthritis of the right ankle was aggravated by the accepted injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 12, 2013 decision of Office of Workers' Compensation Programs is affirmed in part, and set aside and remanded in part.

Issued: September 29, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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