



On appeal appellant asserts that the information provided by OWCP to the referee physician was incomplete because the statement of accepted facts did not include all accepted conditions and did not describe his proper job title. He further alleges that the opinion of the referee physician was not medically rationalized, and the weight of the medical opinion should rest with the attending orthopedic surgeon.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> In an August 26, 2014 decision, the Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation on July 16, 2012. The Board found that the weight of the medical evidence rested with the second opinion evaluation of Dr. Carl S. Carlson, Jr., an orthopedic surgeon. In reports dated March 29 and May 10, 2012, Dr. Carlson noted that appellant demonstrated pain and histrionic behaviors. He advised that appellant had an accessory navicular but did not think it was problematic, explaining that it was a separate bone, usually present from birth. Dr. Carlson indicated that the July 22, 2011 ankle sprain should have resolved in 8 to 12 weeks and, based on his review of the diagnostic studies, appellant never had a right calcaneous fracture. He concluded that appellant's subjective complaints outweighed the objective findings and indicated that appellant had no restrictions and that any current symptoms were related to recent activity, not the July 22, 2011 employment injury.<sup>4</sup> The Board further found a conflict in medical evidence had been created regarding OWCP's termination of medical benefits.<sup>5</sup> The law and facts of the previous Board decision are incorporated herein by reference.

Shortly, after appellant returned to work in March 2013, he reinjured his right ankle on April 9, 2013 when he stepped from a postal vehicle. The claim, adjudicated by OWCP under file number xxxxxx308, was accepted for right ankle sprain, right tibialis tendinitis, right exostosis, right bunion, resolving right idiopathic scoliosis, and acquired right equinovarus deformity. Under that file number appellant received wage-loss compensation and was placed on the periodic compensation rolls, where he remains.<sup>6</sup>

In response to the Board's August 26, 2014 decision, in which it found a conflict in medical evidence as to termination of medical benefits, in October 2014 OWCP referred

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<sup>3</sup> In the instant case, adjudicated by OWCP under file number xxxxxx460, 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 and received continuation of pay and wage-loss compensation. The employing establishment dismissed appellant for cause, effective March 17, 2012. By decision dated July 16, 2012, OWCP terminated his wage-loss compensation and medical benefits. On March 4, 2013 an OWCP hearing representative affirmed the July 16, 2012 OWCP decision. Appellant returned to work in March 2013. In a merit decision dated July 24, 2013, OWCP denied modification of the prior decisions.

<sup>4</sup> Appellant's attending physician, Dr. W. Carl Dyer, a Board-certified orthopedic surgeon, was consistent in his opinion that appellant's continued right ankle problems were related to the July 22, 2011 employment injury.

<sup>5</sup> Docket No. 14-30 (issued August 26, 2014).

<sup>6</sup> File numbers xxxxxx308 and xxxxxx460 were doubled, with file number xxxxxx460 as the master file. Under file number xxxxxx308, in a July 20, 2015 decision, the Board found that OWCP did not abuse its discretion in denying appellant's request for travel reimbursement. Docket No. 14-1841 (issued July 20, 2015).

appellant to Dr. Neil Spitalny, a Board-certified orthopedic surgeon, to determine whether appellant had any residuals from his accepted conditions. The appointment was scheduled for December 4, 2014 and rescheduled for December 11, 2014. Dr. Spitalny was provided the case record, including a statement of accepted facts, a set of questions, and a statement of accepted facts regarding the July 22, 2011 employment injury.

In correspondence dated October 9, 2014, Dr. Daniel L. Kingloff, an attending Board-certified orthopedic surgeon, described findings in his previous reports dated March 13 and December 28, 2012 and March 19, 2013 regarding the July 22, 2011 right ankle injury. He then described appellant's condition following the April 9, 2013 injury described above. Dr. Kingloff opined that appellant had never recovered from the July 22, 2011 injury and that the April 9, 2013 injury was just an aggravation of his initial injury. He opined that, because appellant's benefits were terminated in June 2012, treatment for the July 22, 2011 injury was delayed. Dr. Kingloff further opined that appellant could be suffering from a regional pain syndrome as a result of the July 22, 2011 employment injury. He advised that appellant needed to be seen by a pain specialist, noting that he initially made this recommendation in March 2012, and that appellant's impairment began on July 22, 2011. On November 11, 2014 Dr. Kingloff diagnosed ankle pain, accessory navicular of bone of foot, injury and disorder of left knee, and injury of left hip region. He advised that the problems appellant was having with his knee and hip were due to overstress during his period of injury and recuperation regarding the right foot and ankle and opined that he could not work.

On November 11, 2014 Dr. Paul V. Spiegl, an attending Board-certified orthopedic surgeon, noted seeing appellant in follow-up for the April 9, 2013 injury. On December 4, 2014 he advised that appellant was recovering from March 11, 2014 right foot surgery.<sup>7</sup> Dr. Spiegl discussed appellant's back, hip, and knee complaints, noting that he did not assess those areas. He advised that appellant had not reached maximum medical improvement, could not return to work as a city carrier, but could perform sedentary duties, and was a candidate for vocational rehabilitation.

Dr. Spitalny, who was selected to resolve the conflict in medical evidence regarding whether appellant had residuals of the July 22, 2011 right ankle injury necessitating further medical treatment, submitted a report dated December 11, 2014. He noted his review of extensive medical records and appellant's current complaints that he had to use a cane, was unable to climb stairs, had decreased sensitivity over the toes, and that his right foot was swollen. Right lower extremity examination demonstrated mild edema, calf atrophy, diffuse tenderness, and diminished ankle range of motion. Examination of the left foot demonstrated pes planus (flat foot) with mild edema. Dr. Spitalny disagreed with the decision to perform surgery on appellant's right ankle. He noted that appellant had an ankle sprain on July 22, 2011 and advised that his tendon dysfunction and accessory navicular were congenital abnormalities, and that posterior tibial tendinitis was a normal progression and caused his flat foot. Dr. Spitalny advised that appellant's knee, lower back, and hip problems were not attributable to either the 2011 or 2013 injuries. In a supplemental report dated March 2, 2015, he opined that appellant never had

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<sup>7</sup> Under the April 2013 injury, file number xxxxxx308, on March 11, 2014 Dr. Spiegl performed right capsulotomy and calcaneal osteotomy. The surgery was approved by an OWCP medical adviser, and authorized by OWCP.

a calcaneal fracture and had no residuals due to the July 22, 2011 ankle sprain, noting that he sustained a subsequent ankle injury.

By decision dated April 7, 2015, OWCP found that the weight of the medical evidence rested with Dr. Spitalny's opinion that appellant had no residuals of the July 22, 2011 employment injury and terminated his entitlement to medical benefits on July 16, 2012 due to the July 22, 2011 employment injury.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. Furthermore, 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 appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>8</sup>

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.<sup>9</sup> The implementing regulations state 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>10</sup> When 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.<sup>11</sup>

### **ANALYSIS**

The Board finds that OWCP met its burden of proof to terminate appellant's medical benefits on March 12, 2015, the date Dr. Spitalny, the impartial examiner, advised that appellant has no residuals of the July 22, 2011 right ankle injury.

In an August 26, 2014 decision, the Board determined that a conflict in medical evidence had been created between Dr. Dyer, an attending orthopedic surgeon, and Dr. Carlson, an OWCP referral orthopedic surgeon, regarding whether appellant had continuing residuals of the July 22,

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<sup>8</sup> *Fred Simpson*, 53 ECAB 768 (2002).

<sup>9</sup> 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

<sup>10</sup> 20 C.F.R. § 10.321.

<sup>11</sup> *V.G.*, 59 ECAB 635 (2008).

2011 right ankle injury.<sup>12</sup> OWCP properly referred him to Dr. Spitalny for an impartial evaluation.

In a comprehensive report dated December 11, 2014, Dr. Spitalny noted his review of extensive medical records and appellant's current complaints. He provided lower extremity examination findings and opined that appellant had an ankle sprain on July 22, 2011. Dr. Spitalny advised that appellant's tendon dysfunction and accessory navicular were congenital abnormalities, and that posterior tibial tendinitis was a normal progression and the cause of appellant's flat feet. On March 2, 2015 he opined that appellant had no residuals of the July 22, 2011 right ankle injury and noted that he had sustained a subsequent ankle injury that occurred on April 9, 2013, for which he had surgery on March 11, 2014.<sup>13</sup>

As Dr. Spitalny provided a well-reasoned opinion that appellant had no continuing residuals of the July 22, 2011 injury, his opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence regarding whether appellant had a continuing need for medical treatment due to the July 22, 2011 right ankle injury, as of the date of his report on July 2, 2015.<sup>14</sup> The Board, however, finds that OWCP did not meet its burden of proof to terminate appellant's medical benefits on July 16, 2012 because there is no medical evidence that specifically addresses whether his residuals had ceased prior to Dr. Spitalny's March 2, 2015 report. Appellant, therefore, would be entitled to medical benefits for the July 22, 2011 injury up to April 9, 2013, the date OWCP accepted that he reinjured his right ankle and resumed payment of FECA compensation and medical benefits under file number xxxxxx308.

The medical evidence submitted by appellant is insufficient to outweigh Dr. Spitalny's opinion. Dr. Kingloff discussed his medical reports dated March 13 and December 28, 2012 and March 19, 2013, which were previously reviewed by both OWCP and the Board in its August 26, 2014 decision.<sup>15</sup> While he also advised that the April 9, 2013 injury was an aggravation of the July 22, 2011 injury, the evidence supports that the 2013 injury was a new injury that occurred when appellant stepped from his postal vehicle. Dr. Spiegl merely commented regarding his care and treatment of appellant following the April 9, 2013 employment injury.

As to appellant's assertion on appeal regarding the statement of accepted facts, this claim is in regard to the July 22, 2011 employment injury only, adjudicated by OWCP under file number xxxxxx460. OWCP provided Dr. Spitalny the complete record including a correct statement of accepted facts regarding this claim. Dr. Spitalny thoroughly reviewed the entire record. There is no evidence of OWCP error.

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<sup>12</sup> *Supra* note 5.

<sup>13</sup> *Supra* notes 6 and 7.

<sup>14</sup> *V.G.*, *supra* note 11.

<sup>15</sup> *Supra* note 5.

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 OWCP met its burden of proof to terminate appellant's medical benefits based on Dr. Spitalny's opinion on March 12, 2015 that appellant had no residuals due to the July 22, 2011 right ankle injury. Appellant, however, would be entitled to medical benefits from July 16, 2012, the date his medical benefits were previously terminated, to April 9, 2013, the date his wage-loss compensation and medical benefits resumed, based on a second right ankle injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed as modified.<sup>16</sup>

Issued: January 12, 2016  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.