

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

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S.D., Appellant)	
)	
and)	Docket No. 17-1271
)	Issued: November 7, 2017
)	
U.S. POSTAL SERVICE, MAIN POST OFFICE,)	
Vallejo, CA, Employer)	
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Appearances:
Jeffery S. Fultz, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2017 appellant, through his representative, filed a timely appeal from a December 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 May 4, 2015 as he no longer had any

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

residuals or disability causally related to the accepted employment injuries; and (2) whether appellant met his burden of proof to establish continuing residuals or disability of his employment injuries after May 4, 2015.

On appeal appellant's representative contends that the report of Dr. Fulton S. Chen, a Board-certified physiatrist, should be accorded the weight of the medical evidence as he provided a well-rationalized opinion on causal relationship between appellant's condition and employment. He asserts that Dr. J. Hearst Welborn, Jr., a Board-certified orthopedic surgeon and an OWCP referral physician, did not provide a well-rationalized opinion and ignored the statement of accepted facts (SOAF).

FACTUAL HISTORY

On January 10, 2012 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day while delivering mail he injured his left foot and ankle when, after feeling pressure while walking on an uneven concrete slab, he almost slipped and fell down. He stopped work on January 11, 2012 and returned to modified duty on January 12, 2012. Appellant stopped worked again on June 1, 2013 because no work was available. He has not returned to work.

OWCP accepted the claim for contusion of the left foot and left plantar fibromatosis. It paid wage-loss compensation benefits.

OWCP received an April 9, 2014 progress report from Dr. David Guzman, an attending podiatrist, in which he noted appellant's complaint of pain in the left heel. On physical examination, Dr. Guzman diagnosed left plantar fasciitis and calcaneal spur. He requested authorization to perform surgery, noting that conservative treatment had failed.

On May 20, 2014 OWCP referred appellant, together with a SOAF, the medical record, and a list of questions, to Dr. Welborn for a second opinion to determine whether the proposed surgery should be authorized and whether appellant's accepted conditions had resolved. The SOAF listed the accepted conditions as contusion of the left foot and left plantar fibromatosis (fasciitis).

In a June 18, 2014 medical report, Dr. Welborn reviewed the SOAF and medical record. He noted a history of appellant's accepted employment injuries and work history. Dr. Welborn also noted his complaint of moderate off and on left plantar calcaneal pain. He reported essentially normal findings on physical examination of the left foot. Dr. Welborn assessed left plantar fasciitis, but noted that there were no objective findings of this condition, including no significant heel tenderness on examination. He advised that appellant's subjective complaints were moderate intermittent foot pain with standing more than one hour. Dr. Welborn related that he could not explain how appellant's work-related contusion led to plantar fasciitis. He indicated that it would be unusual for plantar fasciitis to be caused by trauma. Dr. Welborn further indicated that appellant may have made good improvement from his last visit to his provider. He opined that the left foot contusion had resolved as of his examination on that day. Dr. Welborn maintained that appellant had no nonindustrial or preexisting disability. He did not recommend surgery because no further treatment was necessary. Dr. Welborn related that appellant's long-

term prognosis was poor. He concluded that appellant could return to his regular work with no restrictions.

OWCP, on September 18, 2014, requested that Dr. Guzman review Dr. Welborn's report and provide a well-rationalized opinion on whether appellant had any continuing employment-related residuals and whether he had any disagreement with Dr. Welborn's opinion regarding the requested surgery and appellant's work capacity.

On January 26, 2015 Dr. Guzman responded to OWCP's September 18, 2014 letter. He disagreed with Dr. Welborn's opinion that the accepted left foot contusion had resolved. Dr. Guzman advised that appellant's plantar fasciitis was still symptomatic based on an objective finding of pain. He further advised that this condition was caused by the January 10, 2012 employment injury. Dr. Guzman again recommended surgery to treat the diagnosed condition because conservative treatment had failed. In a January 23, 2015 progress report, he again noted an objective finding of pain in the left medial tubercle calcaneus and restated his diagnosis of plantar fasciitis. On that same day Dr. Guzman completed a work capacity evaluation in which he advised that appellant was unable to perform his usual job or work eight hours a day. He indicated that appellant required sedentary work and that his restrictions were permanent unless he underwent surgery. OWCP received additional progress reports dated June 13, 2014 to March 5, 2015 from Dr. Guzman which reiterated his diagnosis of left plantar fasciitis.

On March 17, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Welborn's opinion. Appellant was afforded 30 days to submit additional evidence or argument.

In an April 6, 2015 letter, appellant disagreed with the proposed action. He contended that he was unfairly treated by Dr. Welborn based on his race. Appellant also contended that the physician was not a podiatrist and did not conduct a thorough medical examination. He requested authorization to undergo surgery performed by a podiatrist.

On April 13, 2015 OWCP received an April 2, 2015 primary treating physician's permanent and stationary report from Dr. Guzman. He reported findings on physical and x-ray examination and restated his diagnosis of left plantar fasciitis. Dr. Guzman determined that appellant had eight percent permanent impairment of the left foot. He placed a checkmark in a box marked "yes" indicating that appellant was permanently disabled due to an employment injury. Dr. Guzman continued to recommend surgery as appellant had not responded to conservative care. He concluded that appellant could return to modified work with restrictions.

By decision dated May 4, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day. It found that the weight of the medical evidence rested with Dr. Welborn's June 18, 2014 opinion.

OWCP received an April 16, 2015 report from Dr. John A. Ambrosino, a podiatric surgeon, in which he examined appellant and opined that appellant had work-related left lower extremity tarsal tunnel syndrome. Dr. Ambrosino recommended that appellant's claim should be expanded to include this condition.

On May 26, 2015 appellant requested reconsideration of the May 4, 2015 decision. He submitted an April 30, 2015 report from Dr. Guzman. Dr. Guzman reiterated his diagnosis of left foot plantar fasciitis, opined that appellant had residuals of his accepted conditions which were permanent, and recommended surgery. He advised that appellant could perform semi-sedentary work with restrictions.

OWCP, in an August 21, 2015 decision, denied modification of the May 4, 2015 decision. It found that the medical evidence submitted was insufficient to outweigh Dr. Welborn's opinion.

OWCP received a January 29, 2016 report from Dr. Fulton S. Chen, Board-certified in physical and rehabilitative medicine, in which he provided results on examination and opined that appellant continued to have residuals of his work-related left plantar fasciitis. He advised that appellant could continue his usual and customary duties, albeit with some difficulty, but that he might require occasional modified work.

By letter dated June 13, 2016, appellant requested reconsideration of the August 21, 2015 decision. He contended that Dr. Welborn's opinion was not entitled to the weight of the medical evidence as it was not supported by medical evidence or rationale. Appellant further contended that he disregarded the SOAF which listed plantar fasciitis as an accepted condition in his claim. He asserted that OWCP, in the questions it presented to Dr. Welborn, did not include the diagnosis of tarsal tunnel syndrome, to which it referred in affirming its prior decision. Lastly, appellant asserted that Dr. Chen's opinion outweighed the nonspecific and unscientific opinion of Dr. Welborn as it provided medical rationale to establish the causal relationship between the plantar fasciitis and appellant's employment.

In a December 19, 2016 decision, OWCP denied modification of the August 21, 2015 decision. It found that Dr. Chen's report was insufficient to outweigh Dr. Welborn's opinion.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of proof to justify termination or modification of compensation benefits.³ OWCP may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits as of May 4, 2015. OWCP accepted that he sustained left foot contusion and left plantar fibromatosis (fasciitis) while in the performance of

³ *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

duty. OWCP terminated appellant's wage-loss compensation and medical benefits based on the medical opinion of Dr. Welborn, a second opinion physician.

The Board finds, however, that Dr. Welborn's report is insufficiently well reasoned to establish that appellant no longer had any residuals or disability of his accepted employment injuries. Regarding appellant's accepted left plantar fasciitis, Dr. Welborn diagnosed left plantar fasciitis, noting a lack of objective findings of this condition. He related that he could not explain how appellant's condition was caused by the work-related left foot contusion. However, appellant's condition was accepted by OWCP for left plantar fasciitis and this was reflected on the SOAF provided to Dr. Welborn. The Board finds that Dr. Welborn's report is of diminished probative value, as his opinion disregarded a critical element of the SOAF. The Board notes that it is the function of the medical expert to give an opinion only on medical questions, not to find facts.⁶ In addition, the Board has held that medical conclusions based on inaccurate or incomplete histories are of diminished probative value.⁷ As Dr. Welborn did not give due regard to the SOAF, his opinion was not based on a proper factual background. His report is insufficient to constitute the weight of the medical opinion evidence to establish that appellant no longer had any employment-related residuals or disability. OWCP, therefore, did not meet its burden of proof to terminate appellant's benefits.⁸

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 4, 2015.⁹

⁶ *S.J.*, Docket No. 09-1355 (issued May 20, 2010); *Paul King*, 54 ECAB 356 (2003).

⁷ *John W. Montoya*, 54 ECAB 306 (2003).

⁸ *Sarah A. Lawson*, Docket No. 04-825 (issued July 13, 2004).

⁹ In light of the above findings and conclusion, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 7, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board