

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

_____)	
O.S., Appellant)	
)	
and)	Docket No. 18-1549
)	Issued: February 7, 2019
U.S. POSTAL SERVICE, BULK MAIL CENTER, Greensboro, NC, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 6, 2018 appellant filed a timely appeal from a July 23, 2018 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.²

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective July 23, 2018; and (2) whether she has met her burden of proof to

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 23, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

establish that the acceptance of her claim should be expanded to include right compression neuropathy of the posterior tibial nerve.

FACTUAL HISTORY

On August 12, 2008 appellant, then a 48-year-old laborer custodian, filed an occupational disease claim (Form CA-2) alleging that she sustained right heel pain causally related to factors of her federal employment. OWCP accepted the claim for aggravation of bilateral hallux valgus bunion/hammertoes and aggravation of right foot plantar heel pain/plantar fasciitis. Appellant performed modified employment beginning July 28, 2008.³ She stopped work and OWCP paid her wage-loss compensation for total disability on the periodic rolls beginning November 21, 2010.

On June 29, 2010 Dr. William A. Somers, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed appellant's history of bilateral foot pain greater on the right side. He diagnosed likely right tarsal tunnel syndrome and mild asymptomatic hallux valgus and hammertoes bilaterally. Dr. Somers opined that he could not eliminate plantar fasciitis as a diagnosed condition, but found that her symptoms were more consistent with tarsal tunnel syndrome. He attributed the tarsal tunnel syndrome to appellant "walking and working on concrete floors." Dr. Somers provided work restrictions.

In order to obtain an assessment of appellant's employment-related conditions and to determine the extent and degree of any employment-related disability and the necessity for treatment OWCP, on February 3, 2016, again referred appellant to Dr. Somers for a second opinion examination.

On February 25, 2016 Dr. Somers diagnosed right compression neuropathy of the posterior tibial nerve on the right, plantar fasciitis, or a combination of the two conditions. He advised that all diagnoses were possible and that he was unable to distinguish between the conditions based on the information available. Dr. Somers indicated that "one or all" of the conditions were aggravated by appellant standing on concrete floors working for the employing establishment. He questioned why OWCP had not included the diagnoses he provided in his prior report in the statement of accepted facts. Dr. Somers opined that appellant could perform sedentary or light-duty employment with restrictions on standing no more than 10 to 15 minutes each hour.

OWCP, on October 31, 2017, requested that appellant submit updated medical information regarding her current condition and disability. Appellant subsequently submitted an October 6, 2017 report from Dr. Carl Carter, a psychologist. Dr. Carter advised that appellant's condition had not changed and that the Office of Personnel Management (OPM) had "found her to be permanently disabled for the position of [I]aborer [c]ustodian at the [employing establishment]."

On January 9, 2018 OWCP referred appellant to Dr. Chason S. Hayes, a Board-certified orthopedic surgeon, for a second opinion examination.

³ By decision dated July 8, 2009, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity. By decision dated August 31, 2009, it denied her request for bathroom modification as the evidence did not establish that it was necessary as a result of her accepted employment injury.

In a report dated January 26, 2018, Dr. Hayes reviewed appellant's history of experiencing bilateral foot pain performing her work duties. He noted that she had stopped work on November 21, 2010 as there was no limited-duty employment available within her restrictions. On examination, Dr. Hayes found bilateral hallux valgus passively correctable to neutral and clawing of the lesser toes. He diagnosed bilateral hallux valgus, clawing of the toes, and plantar fasciitis by history. Dr. Hayes attributed the diagnosed conditions to appellant's work duties "by aggravation of preexisting and naturally occurring conditions," noting that claw toes and bunions were common disorders. He opined that appellant had no physical limitations and could manage her symptoms by modifying her shoes or with supports. In a January 26, 2018 work capacity evaluation (OWCP-5c), Dr. Hayes found that she could perform her usual employment without restrictions.

On June 4, 2018 OWCP notified appellant of its proposed termination of her wage-loss compensation as the evidence of record established that she no longer had any employment-related disability due to her June 3, 2008 employment injury.

In a July 9, 2018 report, Dr. Kinjal Patel, a podiatrist, advised that appellant required toe spacers to keep the bunions on her toes separated.

Appellant, on July 12, 2018, challenged the proposed termination of her wage-loss compensation. She requested that OWCP expand acceptance of her claim to include compression neuropathy of the right posterior tibia as found by Dr. Somers. Appellant asserted that her physicians concurred that she required additional medical treatment.

By decision dated July 23, 2018, OWCP terminated appellant's wage-loss compensation, effective that date. It found that Dr. Hayes' opinion constituted the weight of the evidence and established that she had no further employment-related disability. OWCP advised appellant that her claim remained open for medical treatment. It noted that while Dr. Somers diagnosed "compression neuropathy posterior tibial nerve versus plantar fasciitis versus combination of the two he [did] not provide rationalized medical evidence to support that this office should change [appellant's] accepted condition."

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof in justifying modification or termination of an employee's benefits.⁴ 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.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

⁴ *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁵ *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁶ *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective July 23, 2018 as she had no further disability causally related to her employment injury.

On January 26, 2018 Dr. Hayes, an OWCP referral physician, reviewed the history of injury and provided detailed findings on physician examination. He determined that appellant had bilateral hallux valgus passively correctable to neutral and clawing of the lesser toes. Dr. Hayes diagnosed bilateral hallux valgus, clawing of the toes, and a history of plantar fasciitis. He opined that appellant's work duties had aggravated the diagnosed conditions, which he found had preexisted the employment injury. Dr. Hayes noted that bunions and claw toes occurred commonly in the general population. He found that appellant had no work restrictions and could manage her symptoms by modifications to her footwear. Additionally, in completing the work restriction evaluation form (OWCP-5c), Dr. Hayes concluded that appellant could perform her usual employment without restrictions. He provided a thorough review of the factual and medical background and accurately summarized the relevant medical evidence. Moreover, Dr. Hayes provided detailed findings on examination and reached conclusions regarding appellant's condition which comported with his findings.⁷ Consequently, his opinion is entitled to the weight of the evidence and establishes that she had no further disability due to her employment injury.⁸

The remaining evidence of record submitted prior to OWCP's termination of compensation is insufficient to show that appellant had continuing disability due to her employment injury. In a report dated July 9, 2018, Dr. Patel opined that appellant required toe spacers to keep her bunions separated. He did not, however, address whether she was disabled from employment, and thus his opinion is of no probative value.⁹ Appellant also submitted an October 6, 2017 report from a psychologist. However, a psychologist is not a specialist in the appropriate field of medicine.¹⁰

The Board finds that Dr. Hayes' opinion represents the weight of the evidence regarding appellant's accepted conditions and establishes that she has no further employment-related disability.¹¹ OWCP thus properly terminated her entitlement to wage-loss compensation, effective July 23, 2018.¹²

LEGAL PRECEDENT -- ISSUE 2

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is

⁷ *S.P.*, Docket No. 16-0341 (issued November 7, 2016).

⁸ *See S.W.*, Docket No. 17-0215 (issued September 19, 2017).

⁹ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁰ *See generally T.F.*, Docket No. 16-0851 (issued June 19, 2017); *S.P.*, Docket No. 16-1349 (issued May 10, 2017).

¹¹ *O.W.*, Docket No. 17-1881 (issued May 1, 2018).

¹² *See D.J.*, Docket No. 17-0327 (issued July 11, 2018).

causally related to the employment injury.¹³ To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such causal relationship.¹⁴ 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁵ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁶

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁷ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁸ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that this issue is not in posture for decision.

In a report dated June 29, 2010, Dr. Somers diagnosed likely right tarsal tunnel syndrome. He noted that, while he could not eliminate plantar fasciitis as a diagnosis, her symptoms were consistent with tarsal tunnel syndrome. Dr. Somers attributed the tarsal tunnel syndrome to appellant's employment.

Dr. Somers evaluated appellant again for OWCP on February 25, 2016. He questioned why OWCP had not expanded acceptance of her claim to include the conditions that he diagnosed in his June 29, 2010 report. Dr. Somers opined that appellant had either right compression neuropathy, right plantar fasciitis, or a combination of both conditions, each of which was aggravated by her employment.

Once OWCP undertakes development of the medical evidence, however, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.²⁰ Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP should request an

¹³ See *T.F.*, Docket No. 17-0645 (issued August 15, 2018).

¹⁴ *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

¹⁵ *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

¹⁶ *L.G.*, Docket No. 18-0321 (issued October 25, 2018).

¹⁷ *K.S.*, Docket No. 18-0845 (issued October 26, 2018).

¹⁸ 20 C.F.R. § 10.121.

¹⁹ *L.B.*, Docket No. 17-1020 (issued July 10, 2018).

²⁰ *Id.*

opinion from Dr. Hayes regarding whether the acceptance of appellant's claim should be expanded to include the condition of right compression neuropathy as initially diagnosed by Dr. Somers in his report of February 25, 2016. Following any necessary further development, OWCP shall issue a *de novo* decision on this issue.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective July 23, 2018. The Board further finds that the case is not in posture for decision regarding whether she has met her burden of proof to establish that the acceptance of her claim should be expanded to include right compression neuropathy of the posterior tibial nerve.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this opinion.

Issued: February 7, 2019
Washington, DC

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

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

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