

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

_____)	
R.B., Appellant)	
)	
and)	Docket No. 19-1032
)	Issued: October 25, 2019
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 10, 2019 appellant, through counsel, filed a timely appeal from a March 18, 2019 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish continuing employment-related disability or residuals after March 5, 2015 causally related to her accepted June 18, 1990 employment injury.

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.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 21, 1990 appellant, then a 24-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 18, 1990 she sprained her left ankle as she descended stairs while delivering mail in the performance of duty. OWCP accepted the claim for right posterior tibial tendinitis.

In 1995 Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, began treating appellant. He submitted progress notes through July 12, 2012 describing appellant's condition and treatment.

Appellant stopped work on July 26, 2012 and filed claims for compensation (Form CA-7). On July 26, 2012 Dr. Chmell opined that aggravation of venous varicosities in appellant's right leg were secondary to her previous diagnoses. He concluded that appellant's condition had deteriorated considerably and she was "fully incapacitated for duty."

In an August 11, 2012 report, Dr. Christopher Gross, a Board-certified psychiatrist serving as a district medical adviser (DMA), recommended that OWCP not accept right venous varicosities as employment related.

OWCP found that a conflict in medical evidence had been created between Dr. Chmell and the DMA regarding whether the conditions of left tibialis tendinitis and right venous varicosities were employment related, and referred appellant to Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, for an impartial medical examination. In a November 26, 2012 report, Dr. Komanduri related that the diagnosis of left posterior tibial tendinitis was barely supported on the most recent magnetic resonance imaging (MRI) scan and was not clinically supported, and that appellant's right venous varicosities were not employment related. He concluded that appellant had no residuals or physical limitations resulting from the 1990 employment injury.

Appellant retired from the employing establishment on disability, effective September 6, 2013.

By decision dated December 4, 2013, OWCP terminated appellant's wage-loss and medical benefits, effective November 25, 2013, finding that the special weight of the medical evidence rested with the opinion of Dr. Komanduri, the impartial medical examiner (IME).

Appellant subsequently requested a hearing. By decision dated June 6, 2014, an OWCP hearing representative found that no conflict had existed between the opinions of Dr. Chmell and the DMA because the opinion of the DMA was not of equal weight to that of Dr. Chmell. She instead found that a conflict existed between the opinions of Dr. Chmell and Dr. Komanduri. The

³ Docket No. 16-0010 (issued April 1, 2016); *Order Dismissing Appeal*, Docket No. 18-0955 (issued October 19, 2018).

hearing representative therefore vacated the December 4, 2013 decision and ordered OWCP to arrange an appropriate referee examination.

In November 2014, OWCP referred appellant to Dr. Ira B. Kornblatt, a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 3, 2014 report, Dr. Kornblatt reviewed the medical record, the statement of accepted facts (SOAF), noted appellant's history of injury, and described physical examination findings. He advised that she had *pes planovalgus* bilaterally and well-maintained ankle, hindfoot, midfoot, and forefoot range of motion. Dr. Kornblatt opined that appellant's right venous varicosity was a presumed diagnosis, based on localized swelling and palpation of an area in the right lower extremity, but he found no evidence that the 1990 employment injury caused this condition or ongoing posterior tibial tendinitis. He indicated that she had no work-related disability as a result of the 1990 left ankle sprain, and her disability at that time was caused by the degenerative process due to the anatomy of her foot and ankle as well as her obesity. Dr. Kornblatt concluded that there were no objective findings to substantiate ongoing subjective complaints and, as such, there was no evidence of residuals of the 1990 employment injury. He therefore concluded that further treatment for the employment injury was not needed.

By decision dated March 5, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, finding that the weight of the medical evidence rested with the opinion of Dr. Kornblatt, the IME.

Appellant subsequently requested reconsideration. By decision dated June 16, 2015, OWCP denied modification of the March 5, 2015 decision.

Appellant continued to request reconsideration. By decisions dated June 16 and August 20, 2015, OWCP denied merit review.

Appellant thereafter appealed to the Board. By decision dated April 1, 2016, the Board affirmed the August 20 and June 16, 2015 decisions, finding that the special weight of the medical evidence rested with the opinion of Dr. Kornblatt and that OWCP had therefore met its burden of proof to terminate appellant's compensation benefits on March 5, 2015. The Board further found that appellant had not met her burden of proof to establish that she had continuing employment-related disability or conditions after that date causally related to the June 18, 1990 employment injury. Finally, the Board found that OWCP had properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).⁴

On October 21, 2016 appellant, through counsel, requested reconsideration and submitted a May 9, 2016 report in which Dr. Chmell indicated that appellant continued to require monthly medical treatment for the residuals of her accepted work-related conditions.

By decision dated February 24, 2017, OWCP denied modification of its March 5, 2015 decision. It noted that Dr. Chmell had been on one side of the conflict which was resolved by Dr. Kornblatt, the IME, and found that the evidence submitted on reconsideration was of little probative value and was therefore insufficient to meet appellant's burden of proof to establish continued work-related disability.

⁴ *Id.*

On April 12, 2017 appellant, through counsel, requested reconsideration and submitted a March 23, 2017 report in which Dr. Chmell again disagreed with the findings and conclusions of Dr. Kornblatt, the IME. Dr. Chmell referenced a medical article which he maintained supported that Dr. Kornblatt's diagnosis of flat foot developed with chronic permanent posterior tibial tendinitis/dysfunction.

By decision dated June 26, 2017, OWCP denied modification of its prior decisions. It noted that, although Dr. Chmell referenced a medical publication, it was not found in the record. OWCP again found that the evidence submitted was of insufficient probative value to establish continuing employment-related disability.

On August 30, 2017 appellant, through counsel, requested reconsideration and submitted an August 3, 2017 report in which Dr. Chmell opined that appellant's initial left ankle injury, accepted for a sprain, should be expanded to include the additional condition of left posterior tibial tendinitis. In a September 1, 2017 report, Dr. Chmell opined that medical records contemporaneous with the employment injury clearly indicated that appellant's left posterior tibial tendinitis was a direct result of the June 18, 1990 employment injury when she fell on porch steps while delivering mail. These included a July 29, 1991 report from Dr. Michele Carlon, a Board-certified internist, and a February 21, 1991 report from Dr. J. Galante, a Board-certified orthopedic surgeon. Dr. Chmell indicated that he had forwarded the aforementioned medical publication. On October 26, 2017 and February 1, 2018 Dr. Chmell noted that he had examined appellant on those dates and advised that she continued to have complaints and objective abnormalities due to work-related conditions affecting her ankles and feet that required ongoing treatment.

By decision dated March 16, 2018, OWCP denied modification of its prior decisions. It found that Dr. Chmell had been on one side of the conflict in medical evidence and concluded that he neither provided new evidence or discussed other causes of appellant's condition, nor did he explain why her condition had remained active after she left employment. OWCP therefore concluded that the special weight of the medical evidence remained with the opinion of Dr. Kornblatt, the IME.

Appellant, through counsel, filed an appeal with the Board. By order dated October 19, 2018, the Board dismissed the appeal at counsel's request.⁵

On October 22, 2018 appellant, through counsel, requested reconsideration and in support resubmitted evidence already of record. In a July 29, 1991 report, Dr. Carlon indicated that appellant could have a posterior tibial injury. On August 22, 1991 Dr. Carlon had noted that a left ankle MRI scan of the left ankle revealed a small amount of fluid within the ankle and that appellant had developed left leg pain and numbness which was shown to be bilateral L5-S1 radiculopathy on electrodiagnostic studies, probably brought on by her poor posture from limping. In a November 15, 1990 report, Dr. Prieto advised that appellant appeared to have some mild residual posterior tibial tendinitis.

In a July 16, 2018 report, Dr. Chmell advised that the medical records from the time appellant was injured indicated that she had an injury to her posterior tibial tendon of her left ankle. He noted that since that time, despite continuous complaints, objective findings, and treatment, the

⁵ *Id.*

condition had not resolved. Dr. Chmell concluded that it was a permanent injury which caused incapacity and disability.

By decision dated March 18, 2019, OWCP again denied modification of its prior decisions. It noted that the reports of Dr. Prieto, Dr. Galante, and Dr. Carlon, referenced by Dr. Chmell had been reviewed by Dr. Kornblatt, who resolved the conflict between Dr. Chmell and Dr. Komanduri. OWCP concluded that appellant had not submitted medical evidence of sufficient probative value to refute Dr. Kornblatt's opinion.

LEGAL PRECEDENT

Once OWCP meets its burden of proof to terminate a claimant's compensation benefits, the burden shifts to the claimant to establish that he or she has continuing residuals or disability causally related to the accepted employment injury.⁶ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.⁷ A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁸

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish continuing employment-related residuals or disability after March 5, 2015 causally related to her accepted June 18, 1990 employment injury.

As the Board previously affirmed the termination of appellant's wage-loss compensation and medical benefits on March 5, 2015, absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.⁹ Therefore the only issue for consideration on appeal is continuing disability following the termination.

Following the Board's April 1, 2016 decision, appellant requested reconsideration. On reconsideration appellant submitted reports from Dr. Chmell who continued to note his disagreement with Dr. Kornblatt's IME opinion. The Board, however, notes that Dr. Chmell had been on one side of the conflict in medical evidence which Dr. Kornblatt resolved. Reports from a physician who was on one side of a medical conflict are insufficient to overcome the special weight accorded the IME, or to create a new conflict.¹⁰ Therefore this report is insufficient to establish appellant's claim for continuing disability.

⁶ *T.W.*, Docket No. 18-1573 (issued July 19, 2019).

⁷ *Id.*

⁸ *O.W.*, Docket No. 19-0316 (issued June 25, 2019).

⁹ *O.W.*, *id.*

¹⁰ *L.C.*, Docket No. 18-1759 (issued June 26, 2019); *I.J.*, 59 ECAB 408 (2008).

Appellant also submitted evidence previously of record, including reports from Drs. Carlon, Galante, and Prieto, all of which predated the termination of her compensation benefits and are therefore irrelevant to the issue of continuing disability.¹¹ As such, the Board finds that appellant has not met her burden of proof to establish her claim.

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 met her burden of proof to establish that she had continuing employment-related disability or residuals after March 5, 2015 due to a June 18, 1990 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2019 decision of the Office of Workers' Compensation Program is affirmed.

Issued: October 25, 2019
Washington, DC

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

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

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

¹¹ *Supra* note 8.