

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

LARRISSA A. PARDE, Appellant

and

**U.S. POSTAL SERVICE, WOODS PARK POST
OFFICE, Lincoln, NE, Employer**

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**Docket No. 06-318
Issued: July 17, 2006**

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On November 21, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 23, 2005, denying her request for authorization for right ankle surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the September 23, 2005 decision.¹

ISSUE

The issue is whether the Office properly denied appellant's request for authorization for right ankle surgery.

¹ Appellant indicated in her application for review by the Board that she was also appealing a December 14, 2005 termination decision. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c); 501.3(d)(2). As appellant's appeal was filed on November 21, 2005, the Board has no jurisdiction to consider the December 14, 2005 termination decision. See *Algimantas Bumelis*, 48 ECAB 679 (1997); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

FACTUAL HISTORY

On May 25, 2004 appellant, then a 28-year-old part-time flexible letter carrier, filed a traumatic injury claim alleging that on May 24, 2004 she sprained her right ankle when it “rolled” off a step as she was delivering mail. The Office accepted her claim for a right ankle sprain. Appellant returned to work on May 25, 2004 using crutches.

An August 31, 2004 magnetic resonance imaging (MRI) scan reported a “normal right ankle.”

In reports dated September 7 and 21, 2004, Dr. James W. Gallentine, an attending orthopedic surgeon, indicated that appellant had a bilateral ankle instability with a history of an inversion injury. He indicated that only the right ankle was symptomatic and it was reasonable to proceed with ligamentous reconstructive surgery if conservative treatments failed. Dr. Gallentine noted that an MRI scan might show essentially normal findings in the case of ankle instability. He indicated that his finding of ankle instability was based on “an anatomic finding of increased translation on evaluation with clinical complaints of pain.”

The Office asked Dr. Daniel D. Zimmerman, an internist and an Office medical adviser, “Should [the Office] authorize the proposed bilateral ligamentous reconstruction surgery that is being requested by Dr. Gallentine.” The Office medical adviser stated that left ankle surgery was not appropriate as a left ankle condition had not been accepted by the Office. Regarding appellant’s right ankle, he noted that an x-ray and MRI scan were negative. Dr. Zimmerman stated, “I would think, if there was significant translation, it would be demonstrable with inversion-eversion ankle x-rays.” He advised the Office to obtain medical records from Dr. Michael Martin and then refer appellant for a second opinion as to whether right ankle surgery was appropriate.

In an October 15, 2004 preoperative evaluation, Dr. Gallentine indicated that appellant’s right ankle instability was work related and she would consider surgery pending authorization by the Office.

On December 8, 2004 the Office referred appellant, together with copies of medical records, a statement of accepted facts and a list of questions, to Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation of the need for right ankle surgery. Among the questions asked was, “Is reconstructive surgery appropriate given a negative x-ray report of the right ankle on [May 24, 2005] and a normal MRI [scan] on [August 31, 2004]?”

In a report dated December 28, 2004, Dr. Agarwal provided a history of appellant’s condition and findings on examination. He diagnosed a healed right ankle sprain and indicated that reconstructive surgery was not appropriate.

By decision dated January 7, 2005, the Office denied authorization for appellant’s right ankle surgery on the grounds that the weight of the medical opinion evidence, represented by the opinion of Dr. Agarwal, did not establish that reconstructive right ankle surgery was medically necessary.

By decision dated May 25, 2005, an Office hearing representative set aside the January 7, 2005 decision and remanded the case for further development.

On June 13, 2005 the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. Lonnie R. Mercier, a Board-certified orthopedic surgeon, in order to resolve the conflict in the medical opinion evidence between Dr. Gallentine and Dr. Agarwal as to whether reconstructive surgery for appellant's right ankle should be authorized. Among the questions asked was, "Is reconstructive surgery appropriate given a negative x-ray report of the right ankle on May 24, 2004 and a normal MRI [scan] on August 31, 2004?"

In reports dated June 30 and August 15, 2005, Dr. Mercier provided a history of appellant's condition and findings on physical examination. He diagnosed a lateral sprain of the right ankle, possible chronic tendinitis of the right ankle and possible lateral instability. Dr. Mercier stated that he was concerned that right ankle reconstructive surgery would be successful, given the mild amount of instability, the lack of evidence of any intra-articular problem on MRI scan and the fact that appellant's symptoms were primarily pain, not instability.

By decision dated September 23, 2005, the Office denied authorization for appellant's right ankle surgery based on the opinion of Dr. Mercier.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees' Compensation Act provides for furnishing an injured employee "the services, appliances and supplies prescribed by a qualified physician," which the Office, under authority delegated by the Secretary of labor, "considers likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation." The Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.²

The Office's obligation to pay for medical treatment extends only to treatment of employment-related conditions and appellant has the burden of establishing that the requested treatment is for the effects of an employment-related condition. Proof of causal relationship must include rationalized medical evidence.³

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."⁴ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

² *Stella M. Bohlig*, 53 ECAB 341 (2002).

³ *Id.*

⁴ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁵

ANALYSIS

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is required.

A physician selected by the Office to serve as an impartial medical specialist should be one who is wholly free to make a completely independent evaluation and judgment.⁶ The Office should carefully observe the distinction between adjudicatory questions which are not appropriate and medical questions which are appropriate.⁷ The Board will carefully examine the facts of the case to see if the Office sought a particular medical opinion through inquiries which may be characterized as leading questions.⁸ The Board has defined a leading question as one which suggests or implies an answer to the question posed.⁹ It is generally a question which suggests the answer desired.

The Board finds that the Office improperly asked a leading question in its list of questions presented to both Dr. Agarwal and Dr. Mercier. The Office asked, “Is reconstructive surgery appropriate given a negative x-ray report of the right ankle on May 24, 2004 and a normal MRI [scan] on August 31, 2004?” By mentioning in the question only medical evidence which is not supportive of a need for surgery, the Office may have influenced the opinion of Dr. Agarwal and Dr. Mercier. The wording and substance of the question make it a leading question, clearly suggesting an answer of “no” to the question of whether right ankle surgery is appropriate. Therefore, the reports of Dr. Agarwal and Dr. Mercier must be excluded.

CONCLUSION

The Board finds that this case is not in posture for a decision. It is remanded for further development of the medical evidence on the issue of whether the Office should grant authorization for appellant’s reconstructive right ankle surgery. Upon return of the case record, the Office should prepare a new list of questions for examining physicians, being careful to avoid any leading questions. The Office should then refer appellant to a new referral physician for an examination and evaluation of his accepted condition and whether right ankle surgery is appropriate.¹⁰

⁵ See *Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

⁶ *Raymond J. Brown*, 52 ECAB 192 (2001).

⁷ *Carlton L. Owens*, 36 ECAB 608 (1985).

⁸ *Brenda C. McQuiston*, 54 ECAB 816 (2003).

⁹ *Carl D. Johnson*, 46 ECAB 804 (1995).

¹⁰ If the opinion of the new referral physician creates a conflict with the opinion of appellant’s attending physician, on the issue of whether right ankle surgery is appropriate, the Office should refer appellant to a new impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 23 and January 7, 2005 are set side and the case is remanded for further development consistent with this decision of the Board.

Issued: July 17, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board