United States Department of Labor
Employees' Compensation Appeals Board

P.G., Appellant	)	
and	)	**Docket No. 10-1327**
	)	**Issued: April 8, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Jefferson, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 14, 2010 appellant, through counsel, filed a timely appeal from a March 19, 2010 decision of the Office of Workers' Compensation Programs affirming a November 3, 2009 decision terminating her compensation benefits. Pursuant to 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 the Office properly terminated appellant's compensation for wage loss and medical benefits effective November 3, 2009 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

FACTUAL HISTORY

On May 6, 2008 appellant, then a 55-year-old rural carrier, filed an occupational disease claim alleging that on May 4, 2008 she first realized that her right knee and swollen feet were employment related. The Office accepted the claim for right ankle and knee tendinitis and placed her on the periodic rolls for temporary total disability.

On October 14, 2008 Dr. Michael J. Jurenovich, a second opinion Board-certified osteopathic orthopedic surgeon, concluded that appellant no longer had any residuals or disability due to her accepted work conditions. A physical examination revealed full right knee range of motion, no muscle atrophy, no effusion and negative Lachman and drawer maneuvers. A review of x-ray interpretations showed some ankle arthritis. Dr. Jurenovich opined that appellant was capable of returning to her date-of-injury job as a rural mail carrier. In an attached work capacity evaluation form, he limited walking and twisting to six hours per day and pulling four to six hours with a limitation of 20 pounds. Further, Dr. Jurenovich indicated that the restrictions would apply for two months that appellant could not resume her date-of-injury position and that she could work six to eight hours per day.

On October 28, 2008 the Office received an October 6, 2008 work capacity evaluation form from Dr. John B. Lubahn, a treating Board-certified orthopedic surgeon, indicating that appellant was totally disabled from working for at least one year.

In a November 11, 2008 addendum, Dr. Jurenovich stated that he had reviewed his findings and work restrictions and reiterated his conclusion that appellant's work-related condition had resolved. He stated that it was his practice to limit activities for individuals with tendinitis returning to work "to avoid reoccurrence of the tendinitis problem."

In December 24, 2008 and March 23, 2009 progress notes, Dr. William A. Seeds, appellant's treating Board-certified orthopedic surgeon, stated that appellant was awaiting approval for right ankle fusion. Diagnoses included ankle and foot tenosynovitis. Dr. Seeds related that appellant was seen for complaints of constant right ankle pain and dysfunction. In the March 23, 2009 progress notes, he related that an x-ray interpretation showed continued advanced tibiotalar joint degenerative changes.

On April 3, 2009 the Office forwarded a copy of Dr. Jurenovich's reports for review by Dr. Seeds. No response was received.

On October 1, 2009 the Office issued a notice proposing to terminate appellant's compensation based on Dr. Jurenovich's October 14, 2008 opinion. It found the December 24, 2008 and March 23, 2009 progress notes from Dr. Seeds unrationalized and insufficient to create a conflict with Dr. Jurenovich's opinion that her residuals and disability from the accepted employment injury had ceased.

Following the Office's proposal to terminate appellant's compensation benefits, it received progress notes dated October 13, 2009 and an October 8, 2009 x-ray interpretation from Dr. Seeds, who diagnosed ankle and foot tenosynovitis and recommended that a magnetic resonance imaging scan be performed to evaluate the osseous changes seen on an x-ray interpretation. A physical examination revealed tenderness over the anterior talus and tibiotalar joint areas and decreased range of motion due to pain.

By decision dated November 3, 2009, the Office finalized the termination of appellant's compensation benefits effective that day. It found the weight of the evidence establishing that her condition had resolved rested with Dr. Jurenovich's opinion.

In a letter dated November 6, 2009, appellant's counsel requested a telephonic hearing before an Office hearing representative, which was held on February 1, 2010.

In February 12, 2010 report, Dr. Seeds opined that appellant's accepted March 4, 2008 employment injury "directly affected her ankle and progressing a continued articular breakdown of the joint" such that she currently is a candidate for ankle fusion. In concluding, he stated that she was unable to perform any ambulatory activity as a direct result of the pain caused by the joint injury.

By decision dated March 19, 2010, the Office hearing representative affirmed the November 3, 2009 decision terminating appellant's compensation benefits.[1]

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[2] After it has determined that, an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[5] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[6]

Section 8123(a) 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.[7] The implementing regulations state that, if a

[1] The Board notes that, following the March 19, 2009 hearing representative's decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003); *M.B.*, Docket No. 09-176 (issued September 23, 2009).

[2] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[3] *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[4] *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988); *see I.R.*, Docket No. 09-1229 (issued February 24, 2010).

[5] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[6] *Kathryn E. Demarsh*, *supra* note 5; *James F. Weikel*, 54 ECAB 660 (2003); *B.K.*, Docket No. 08-2002 (issued June 16, 2009).

[7] 5 U.S.C. § 8123(a). *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *see S.R.*, Docket No. 09-2332 (issued August 16, 2010).

conflict exists between the medical opinion of the employee's physician and the second opinion physician, the Office shall appoint a third physician to make an examination.[8] This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

ANALYSIS

The Office accepted appellant's claim for right ankle and knee tendinitis and paid appropriate compensation and medical benefits. Appellant was placed on the periodic rolls for temporary total disability. By decision dated November 3, 2009, the Office terminated her compensation benefits effective that day on the basis that the weight of the medical opinion evidence rested with Dr. Jurenovich, an Office referral physician. This decision was affirmed by an Office hearing representative in a March 19, 2010 decision.

The Board finds that there is a disagreement between Dr. Seeds, appellant's treating physician, and the second opinion physician, Dr. Jurenovich, with regard to whether appellant has any disability continuing residuals of her accepted right ankle and knee tendinitis, thereby constituting a conflict in medical opinion evidence.

In his various reports, Dr. Seeds relayed that appellant continued to experience right ankle pain and dysfunction. A physical examination revealed tenderness over the anterior talus and tibiotalar joint areas and decreased range of motion due to pain. The second opinion physician, Dr. Jurenovich, opined in his October 14 and November 11, 2008 reports that appellant no longer had any residuals or disability from her employment injury. Accordingly, there was an unresolved conflict between appellant's treating physician and the second opinion physician with regard to whether she had any continuing disability associated with her accepted work conditions and as to whether she still needed medical treatment. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a referee physician, also known as an impartial medical examiner, to resolve the conflict.[10] The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits due to an unresolved conflict in medical opinion.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective November 3, 2009.

[8] 20 C.F.R. § 10.321.

[9] *Barry Neutuch* 54 ECAB 313 (2003) *David W. Pickett*, 54 ECAB 272 (2002); *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

[10] 5 U.S.C. § 8123(a). *Elaine Sneed*, 56 ECAB 373 (2005); *see D.L.*, Docket No. 09-1549 (issued February 23, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 19, 2010 and November 3, 2009 are reversed.

Issued: April 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board