

File Number: 062351289
HR13-D-H

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury:
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review was completed on the case. Based upon that review, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER, ATTORNEY AT LAW
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, October 07, 2019

U. S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U. S. Code 8101 et. seq. of
claimant, employed by the*

*Merit consideration of the claim was completed in Washington D.C. Based on this review, the
decision of the district office dated is reversed for the reasons set forth below.*

The issue is whether or not the Office met its burden of proof to terminate medical benefits and wage loss compensation causally related to the accepted occupational disease claim.

The claimant was employed as a custodian with the when she filed a CA2 Notice of Occupational Disease form on claiming a right foot condition, which she attributed to repetitive work duties, walking, standing, pushing, sweeping, and mopping floors. The Office initially accepted the claim for right foot sprain and right ankle sprain. The claimant stopped work and the Office began paying compensation for temporary total disability as of placing the claimant on the periodic roll. She was evaluated by several physicians, including orthopedic surgeon, M.D., and physiatrist, M.D. The claimant was maintained off work. Based on a Office-directed second opinion examination performed by DPM, the Office expanded the claim for right tarsal tunnel syndrome and right plantar fasciitis. Dr. also opined the claimant was unable to work.

The Office referred the claimant for another second opinion examination on with Board-certified orthopedist, M.D., who was provided with a Statement of Accepted Facts (SOAF) and the pertinent medical records for reference. Dr. described the claimant's history and outlined the physical examination findings and summary of the medical records. Dr. indicated the objective findings were bilateral foot and ankle grade 2 swelling with antalgic gait using quad cane alternating with right and left hands, and tenderness over the retrocalcaneal area right side. He indicated there was no scar noted over the ankle or foot, no swelling or tenderness over the medial aspect of the right ankle or over the tarsal tunnel, and no abnormal mobility in the foot and ankle. Dr. noted the x-ray of the right foot was normal, with mild Achilles tendinosis noted on MRI, but normal posterior tibial tendon.

Dr. indicated the conditions accepted were sprain of the right foot and right ankle, which he opined was a temporary aggravation of a prior condition of injury of and the aggravation was temporary and resolved as there were no objective findings at the time of his examination. He indicated that while the diagnoses of posterior tibial tendon, tarsal tunnel syndrome, right plantar fasciitis, and Achilles tendinosis were listed in the medical records, they were not present at the time of his examination as there were no objective findings to document the presence of these conditions. Dr. Vanapalli advised the work-related conditions had

Washington DC, October 07, 2019

resolved as there were no objective findings except subjective complaints of pain. He indicated examination findings showed there was full range of movements of the ankle without pain and the MRI showed only the possibility of tendinosis but was subsequently reported as a normal MRI. Dr. [redacted] opined the claimant was capable of returning to her date of injury job based on the fact that there were no objective findings in support of her complaints. Dr. [redacted] concluded no further medical treatment was required as there were no objective findings on his examination.

Following Dr. [redacted] second opinion exam, Dr. [redacted] continued to report right foot and ankle residuals and the claimant's need for ongoing medical treatment and inability to work. The claimant sought further evaluation and treatment from pain management physician, M.D., as of [redacted] who provided his medical rationale as to why the claimant's right foot/ankle conditions were causally related to her employment exposure and that she was still incapacitated and required medical treatment. A [redacted] M.D., was also submitted indicating the claimant was still having work-related issues with her right foot/ankle and was temporarily incapacitated from work.

The Office determined there was a conflict in medical opinions between the current treating physician, Dr. [redacted], and the second opinion physician, Dr. [redacted] concerning whether there were still residuals and disability of the accepted work-related right foot/ankle conditions. The claimant was referred to selected Board-certified orthopedic surgeon, M.D., on [redacted] Dr. [redacted] was provided with the case record for full reference. Dr. [redacted] described the claimant's reported history, the physical examination findings, and his review of the medical records. Dr. [redacted] diagnosed chronic right foot pain subjective greater than objective; chronic lower extremity edema; resolved approved work related condition of right foot sprain; resolved approved work related condition of right ankle sprain; resolved approved work related condition of symptomatic tarsal tunnel syndrome; and resolved approved work related condition of plantar fasciitis caused by injury.

Dr. [redacted] noted the statement of accepted medical facts stated that there was a work injury on [redacted] that caused a right foot sprain, a right ankle sprain, which either directly or indirectly caused tarsal tunnel syndrome and right plantar fasciitis. Dr. [redacted] indicated the claimant had persistent foot pain and problems for many years prior to the claimed injury at work, noting she was treated in [redacted] for chronic foot swelling and chronic plantar foot pain and a bone spur. He indicated that she was at home on [redacted] when she felt a pop in her foot, and a subsequent [redacted] MRI showed no foot or ankle abnormalities other than dorsal foot edema which was a chronic problem, with no acute findings. Dr. [redacted] advised the claimant then began treatments with multiple physicians and was diagnosed with many different conditions that were never proven, and never improved with any treatment. Dr. [redacted] opined the claimant's right foot problem at this time was no different than the problems that she had treatment for in [redacted] and the actual so called injury never occurred at work but outside of her work. Dr. [redacted] opined the diagnoses that were used for the accepted medical facts had never been proven, contending there was never proven to be a foot or ankle sprain, and the tarsal tunnel syndrome was never proven to be anything other than nerve test findings and not clinical symptoms or physical findings. Dr. [redacted] further opined plantar fasciitis was not a diagnosis of an injury but rather a diagnosis of symptoms and her medical records preexisted the [redacted] injury which occurred outside of work. Dr. [redacted] discussed the diagnostic testing and how it ruled out the diagnoses, and again contended that all of the claimant's present complaints and physical findings were all present prior to her claimed [redacted] injury when she was not at work.

Dr. _____ again indicated there was no evidence in the records to support the presence of the foot or ankle sprains, and the tarsal tunnel and plantar fasciitis was preexisting and not related to the claimed injury. Dr. _____ opined he did not believe that her work aggravated, caused, accelerated, or precipitated any of these problems and they were all due to normal everyday wear and tear that occurred on a daily basis regardless of job. Dr. _____ concluded that since the claimant did not have a work related injury as stated in the accepted medical facts and even if these were injuries, they had completely resolved and were not the cause of her present pain or right foot problems. He advised that since either none of the problems noted in the SOAF ever existed as a work injury and/or they had completely resolved, the claimant would be able to return to her regular duty job as a custodian. Dr. Donati further opined the claimant required no further medical treatment for the claimed work injuries.

On _____ the Office sent the referee report to Dr. _____ for review. A report from _____ DPM, was received in which he gave his medical explanation that the claimant had a fracture fragment around the navicular with chronic tibialis posterior tendinitis that required surgery, and she could not return to work. Progress reports from Dr. _____ noted the claimant still had edema in the right foot and was still incapacitated.

On _____ the Office issued a Notice of Proposed Termination of medical benefits and wage loss compensation based on the weight of medical evidence of referee specialist, Dr. _____, finding he established the residuals and disability related to the work-related right foot and ankle conditions had resolved/ceased. The Office received correspondence from the claimant's attorney outlining their disagreements with the second opinion and referee examinations. _____ and _____ reports from Dr. _____ and _____ and _____ progress reports from Dr. _____ were received, along with physical therapy records.

By decision dated _____, the Office made its proposal final and terminated medical benefits and wage loss compensation effective _____ based on the special weight accorded to an independent medical evaluation. The claimant disagreed with this decision and by letter postmarked _____ through her attorney, requested an oral hearing.

Based on my preliminary review of the evidence of record, the _____ decision must be reversed as the Office did not meet its burden of proof to terminate benefits in relation to the occupational disease claim for the reasons set forth below.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.² The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.³

¹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

² *Id.*

³ *T.P.*, 58 ECAB _____ (Docket No. 07-60, issued May 10, 2007).

To discharge its burden of proof, it is not sufficient for the Office to simply produce a physician's opinion negating causal relationship. As with the case where the burden of proof is upon a claimant, the Office must support its position on causal relationship with a physician's opinion which is based upon a proper factual and medical background and which is supported by medical rationale explaining why there no longer is, or never was, a causal relationship.⁴

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁵

Section 8123(a) of the Act provides that when there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist to resolve the conflict of medical opinion.⁶ When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well-rationalized and based on a proper medical background, must be given special weight.⁷

In the instant case, the Office accepted the _____ occupational disease claim for right foot sprain, right ankle sprain, right tarsal tunnel syndrome, and right plantar fasciitis. The claimant has remained off all work since _____. Her treating physicians have continued to report the need for ongoing medical treatment for her right foot and ankle conditions, and that she has been totally incapacitated from work. The Office referred the claimant for the most recent second opinion examination on _____ with Board-certified orthopedist, Dr. _____

_____ who advised there were no objective physical findings on examination to support ongoing residuals of the specific work-related conditions.⁸ Dr. _____ opined the claimant could return to her date of injury job and did not require further medical treatment. The Office declared a conflict in medical opinions between the claimant's current treating physician, Dr. _____, and the second opinion physician, and referred the claimant for an independent medical evaluation with selected Board-certified orthopedic specialist, Dr. _____ on _____

The Office terminated the claimant's medical benefits and wage loss compensation based on the special weight accorded to a referee evaluation, advising Dr. _____ had established the work-related residuals and disability had resolved.

However, based on my preliminary review of referee report, this was not the conclusion reached by Dr. _____. He clearly opined several different times that he did not believe the accepted conditions ever existed or that they were ever related to the claimant's work injury. As Dr. _____ did not accept the findings made in the Statement of Accepted Facts, his opinions would not be based on a proper framework and would have diminished probative value.

⁴ *Frank J. Mala*, 41 ECAB 115, 125 (1989).

⁵ *Cornie Johns*, 44 ECAB 560, 570 (1993).

⁶ *William C. Bush*, 40 ECAB _____ (Docket No. 89-0449, issued July 10, 1989)

⁷ *Annabelle Shank*, 39 ECAB _____ (1987)

⁸ Although the claimant's attorney also argued that Dr. _____ had seen the claimant on consultation in the past, as he was previously in practice with her treating physician for another claim, there was no evidence that she contested his selection before his _____ Office-directed second opinion examination, and no evidence was presented to show any bias on the part of Dr. _____

Further, based on his language, it appeared that Dr. [redacted] was under the belief the claim was for a traumatic injury. His opinions were based on the claimant's conditions before and after this date and what specifically occurred on [redacted]. However, this would be inaccurate and improper as the claim was accepted for an occupational disease related to regular employment exposure over a period of time. When the DMA, second opinion specialist or referee physician renders a medical opinion based on a Statement of Accepted Facts which is incomplete or inaccurate or does not use the SOAF as a framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.⁹

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.¹⁰

Procedurally, the Office cannot ignore Dr. [redacted] language regarding there never being a work injury and instead interpret his opinions to mean that the work-related residuals had resolved. The Board has held that it is a denial of administrative due process for the Office to terminate compensation benefits on the grounds that a claimant no longer has residuals of an accepted condition, where the record supports that the reason for the Office's action was that the condition was not causally related to the claimant's employment and should not have been accepted as such. The Office must inform claimants correctly and accurately of the grounds on which a decision rests, so as to afford them an opportunity to meet, if they can, any defect appearing therein.¹¹ For these reasons, the special weight cannot be assigned to Dr. [redacted].

Accordingly, the [redacted] decision is hereby reversed as the Office did not meet its burden to terminate benefits based on the weight of medical evidence of the referee evaluation. The case is returned to the district office for reinstatement of benefits retroactive to the date of termination.

ISSUED:

WASHINGTON, D.C.

Hearing Representative
Branch of Hearings and Review
For
Director, Office of Workers'
Compensation Programs

⁹ FECA Procedure Manual, 3-0600-3.

¹⁰ *Annabelle Shank*, 39 ECAB (1988)

¹¹ *Sylena Wilkes*, Docket No. 05-1402 (issued June 2, 2006).