United States Department of Labor
Employees' Compensation Appeals Board

Y.D., Appellant	)	
and	)	**Docket No. 17-0461**
	)	**Issued: July 11, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 28, 2016 appellant, through counsel, filed a timely appeal from an October 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 13, 2014; and (2) whether appellant

[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.*

met her burden of proof to establish that she had continuing employment-related disability or residuals after May 13, 2014.

FACTUAL HISTORY

On April 4, 2008 appellant, then a 46-year-old part-time flexible carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she fractured her left leg in the performance of duty. OWCP accepted the claim for a closed left lateral malleolus fracture of the ankle, a closed nonunion fracture of the left ankle, arrest of bone development or growth of the left ankle, and post-traumatic left ankle arthritis. Appellant stopped work on April 5, 2008 and received compensation for total disability beginning May 20, 2008.[3] She returned to limited duty on August 8, 2009, but was placed back on FECA compensation on August 11, 2009 and later on the periodic rolls.

A computerized tomography (CT) scan obtained September 22, 2008 found incomplete healing of a fracture of a distal fibular "with a persistent fracture line and cortical break along the lateral margin." On March 10, 2009 appellant underwent an open reduction and internal fixation of the left ankle. She then underwent removal of left ankle hardware and a sinus tarsectomy on March 18, 2010.[4] A magnetic resonance imaging (MRI) scan of the left ankle dated December 10, 2010 revealed an old fracture union and degenerative bone cysts/geodes in the subarticular tibia and lateral malleolus.[5]

Dr. Armen Kelikian, a Board-certified orthopedic surgeon, performed an arthroscopic debridement of the left ankle on February 23, 2011. He diagnosed impingent syndrome of the ankle after a fracture and ankle arthrosis of the distal tibia.

An OWCP medical adviser, on December 12, 2011, recommended expansion of appellant's claim to include post-traumatic arthritis of the ankle, noting that it was a "well-recognized" result of an ankle fracture. OWCP, on January 5, 2012, expanded acceptance of the claim to include post-traumatic left ankle arthritis, a left nonunion fracture, and the left arrest of bone development or growth.

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[3] Appellant returned to modified work on August 8, 2009, but filed a claim for recurrence (Form CA-2a) beginning August 10, 2009. In a March 10, 2010 decision, OWCP denied a recurrence of disability beginning August 10, 2009. On April 1, 2010 it denied a claim for compensation from August 11, 2009 to March 1, 2010. On April 12, 2010 OWCP found that appellant had established a recurrence of total disability beginning March 18, 2010. In a May 27, 2010 decision, it denied her claim for compensation from March 3 to 17, 2010.

[4] In a report dated August 25, 2010, Dr. Paul Belich, a Board-certified orthopedic surgeon and an impartial medical examiner, diagnosed a healed left distal fibula fracture and a resolved mild lumbar strain. He opined that appellant had no residuals of her ankle fracture. Dr. Belich noted that she was receiving treatment from a back specialist due to a June 30, 2010 motor vehicle accident and further noted that on June 6, 2009 she fractured her left shoulder when she was mugged.

[5] OWCP referred appellant to Dr. Jaroslaw B. Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical examination. In a May 17, 2010 report, Dr. Dzwinyk diagnosed a resolved back strain/contusion, status post open reduction internal fixation of a left distal tibia fracture, and status post hardware removal. He found that appellant's back condition and closed ankle fracture had resolved, but that she had continued symptoms due to her hardware removal, which should resolve within a few months. Dr. Dzwinyk opined that appellant could perform limited-duty work until June 18, 2010, when she could resume her usual work.

A May 9, 2012 left ankle MRI scan showed irregularities in the posterior distal tibia possibly showing post-traumatic changes or early osteoarthritis and mild inflammatory changes.

On May 6, 2013 Dr. Ari J. Kaz, a Board-certified orthopedic surgeon, performed a debridement of extensive scar tissue of the left ankle, a curettage of an osteochondral lesion, and debridement of two microfractures. He diagnosed an "osteochondral lesion of the talar dome with abundant scar tissue."

In a disability certificate dated June 17, 2013, Dr. Anatoly Rozman, a Board-certified physiatrist, advised that appellant was unable to work as she was recovering from left ankle surgery. In a duty status report dated July 5, 2013, Dr. Rozman found that she could not work.

OWCP, on July 25, 2013, referred appellant to Dr. Allan M. Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation, to determine appellant's work capacity.

Dr. Kaz, in a report dated August 15, 2013, noted that it had been 10 weeks since appellant's "left ankle arthroscopy with debridement and osteochondral lesion of the talus microfracture."[6] He recommended a weight-bearing program and continued physical therapy. Dr. Kaz advised that appellant could perform "sit-down work only."

In a September 16, 2013 work capacity evaluation (OWCP-5c), Dr. Rozman diagnosed a left ankle fracture and found that appellant could work eight hours per day with restrictions, including no walking or driving and sitting and standing up to two hours per day.

In a report dated October 30, 2013, Dr. Brecher discussed the medical evidence of record and found swelling and tenderness of the medial malleoli of the ankle and "paresthesias on tapping the medial calcaneal region." He diagnosed residual arthritis after an ankle fracture. Dr. Brecher attributed the diagnosed condition to the work injury and related, "[Appellant] clearly had an ankle fracture related to her work-related injury in 2008 and is now going on to arthritic changes." He found that she could perform sedentary employment with walking and standing for one hour per day.

Dr. Kaz, in a report dated November 14, 2013, related that a left ankle MRI scan obtained November 4, 2013 showed four "low-grade osteochondral lesions in the talar dome, with mild surrounding marrow edema: and "an associated kissing lesion on the tibial plafond…." He diagnosed improving ankle pain after a debridement. Dr. Kaz reviewed the MRI scan with appellant and noted that she had "numerous osteochondral lesions which were visualized at the time of surgery."

On December 2, 2013 Dr. Rozman advised that her MRI scan "confirmed signs of severe arthritis in the left ankle." He opined that appellant could perform sedentary work, but was off work pending treatment by Dr. Kaz. On January 3, 2014 Dr. Rozman found that she was totally disabled until February 2, 2014 due to a left ankle fracture and lumbar stenosis.

[6] On October 17, 2013 Dr. Kaz noted that physical examination findings did not "correlate with her history or her areas of subjective complaints." He recommended additional physical therapy and opined that she was possibly in a cycle of pain preventing physical therapy.

OWCP found a conflict in the medical evidence between Dr. Rozman, for appellant, and Dr. Brecher, for OWCP. On January 28, 2014 it referred appellant to Dr. G. Klaud Miller, a Board-certified orthopedic surgeon, for an impartial medical examination. It provided Dr. Miller with a November 25, 2013 statement of accepted facts (SOAF) indicating that it had accepted the April 4, 2008 work injury for an unspecified closed fracture of the left ankle.

Dr. Rozman, in a report dated March 3, 2014, advised that appellant continued to have mobility issues due to her ankle and might require arthrodesis. He advised that she could not return to her usual employment due to her left ankle impairment. In a disability certificate, Dr. Rozman found appellant disabled from employment.

In a report dated March 6, 2014, Dr. Miller noted that appellant had a disability rating for her time in the service for "headaches from a residual traumatic brain injury, lumbar spine sprain, degenerative disc disease, a cervical spine strain, and postconcussion syndrome." He advised that he had reviewed the medical evidence provided, including the results of imaging studies. Dr. Miller noted that appellant was mugged on December 6, 2009 causing a left shoulder fracture and that she was in a motor vehicle accident on June 30, 2010. On examination of the right ankle, he found tenderness over the "osteromedial joint line, the proximal calf, the Achilles' tendon, the distal half of the fibula, the medial malleolus, the whole posterotibial tendon, the peroneal tendons just distal to the tip of the fibula, the sinus tarsi, the whole anterior joint line, and the first metatarsal. There was a palpable spur over the first metatarsal." Dr. Miller found no ligament instability and noted pain with dorsiflexion and plantar flexion. He related that after appellant left his office he observed her walking with "almost no limp." Dr. Miller found that appellant had a "nondisplaced lateral malleolus fracture" due to her work injury which he had only seen "gone on to a nonunion one time." He noted that, in his experience, he had "never seen arthritis as a result of this injury." Dr. Miller advised that appellant's fracture "healed uneventfully" and her continued complaints of pain "could have been nothing more than her residual back problems." He noted that a CT scan "did show some equivocal evidence for a nonunion," but surgery did not help her pain. Dr. Miller advised, "Giving [appellant] the benefit of the doubt, she had an ankle fracture" that "healed without any symptoms whatsoever by May 17, 2010." He found that treatment after that date resulted from preexisting back pain. Dr. Miller opined that appellant had no disability for work due to her employment injury as of August 21, 2008.

OWCP, on March 26, 2014, notified appellant of its proposed termination of her wage-loss compensation and medical benefits. It noted that it had determined that a conflict existed between Dr. Brecher and Dr. Rozman regarding work restrictions, necessitating an impartial medical examination. OWCP found that Dr. Miller's opinion represented the weight of the evidence and established that she had no further employment-related disability.

Dr. Kaz, in a report dated April 10, 2014, related that he had treated appellant since March 2013 for ankle pain. He advised that arthroscopic surgery performed May 2013 "showed numerous osteochondral lesions of her talar dome. Appellant's history, physical, and imaging studies including an MRI [study] from November 5, 2013 clearly demonstrates numerous osteochondral lesions in the talus as well as articular damage." Dr. Kaz opined that she "clearly has left ankle arthritis." He diagnosed post-traumatic left ankle arthritis and recommended further surgery. Dr. Kaz noted that appellant did not have problems before her injury on April 4, 2008, which was treated with casting and surgery.

By decision dated May 20, 2014, OWCP terminated appellant's wage-loss and medical benefits effective May 13, 2014. It found that the opinion of Dr. Miller as the impartial medical examiner constituted the weight of the evidence and supported that she had no further employment-related condition or disability.

In a June 9, 2014 report, Dr. Rozman questioned Dr. Miller's findings given the "multiple imaging studies, which are objective findings supporting [her] claim for nonunion fracture of the left ankle…."

Appellant, on June 16, 2014, requested a review of the written record. In a statement dated June 25, 2014, she advised that she had left ankle surgery on June 20, 2014. Appellant also asserted that her April 4, 2008 injury aggravated a preexisting back condition.

In a report dated June 26, 2014, Dr. Kaz related:

> "In brief, [appellant] injured her ankle in April 2008, while at work. This led to a chain of events that involved casting of her ankle, subsequent surgeries, and eventually post-traumatic ankle arthritis. [Appellant] has had numerous imaging studies including radiographs and MRI [studies] that support the diagnosis of ankle arthritis. She has also had two ankle arthroscopies by me, one in May 2013 and one in June 2014, both of which document ankle arthritis. It is clear based on her history, physical, imaging studies, and findings at the time of surgery, that [appellant] has ankle arthritis which is directly related to her injury from April 2008."

Dr. Kaz disagreed with the impartial medical examiner's finding that appellant did not have ankle arthritis, noting that it was "clear beyond a reasonable degree of doubt that her injury from April 2008 has led to the development of ankle arthritis."

On June 30, 2014 Dr. Rozman found that appellant was disabled as she was recovering from surgery on her left foot.

Dr. Kaz, on December 11, 2014, advised that appellant was permanently disabled from standing and walking at work.

By decision dated January 23, 2015, an OWCP hearing representative affirmed the May 20, 2014 decision, finding that the weight of medical evidence rested with Dr. Miller.

Dr. Rozman, in a report dated January 5, 2015, discussed appellant's history of arthroscopic surgeries and her continued difficulty walking due to her left ankle condition. He found that she was unable to perform her work duties. Dr. Rozman advised that appellant's lumbar radiculopathy and disc disease contributed to her condition.

On January 26, 2015 Dr. John E. Mayer, a psychologist, indicated that he was treating appellant for a physiological condition arising from her traumatic ankle injury. He diagnosed depression, anxiety, post-traumatic stress disorder, headaches, and a sleep disorder.

On May 26, 2015 appellant requested that OWCP accept her claim for a back injury. On June 5, 2015 she sought reconsideration of the termination of compensation.

Dr. Charles Slack, an orthopedic surgeon, on June 8, 2015, noted appellant's complaints of radiating left leg pain worsened by a changed gait due to a work-related ankle condition. He diagnosed lumbar spondylosis and degenerative disc disease and indicated that it appeared her 2008 work injury aggravated preexisting degenerative lumbar disc disease.

In a report dated June 10, 2015, Dr. Robert Fink, an orthopedic surgeon, obtained a history of appellant injuring her back in the military.[7] Appellant was asymptomatic until she experienced a work injury. Dr. Fink diagnosed a lumbar disc protrusion at L5-S1.

Dr. Estella Hernandez, Board-certified in family practice, in a September 17, 2015 report, evaluated appellant for left ankle and foot pain exacerbated with standing and walking for extensive periods. She diagnosed secondary osteoarthritis of the foot and ankle, an arrest of bone development, a nonunion left ankle fracture, a closed fracture of the lateral malleolus, and low back pain with sacroiliac joint dysfunction.

In a January 17, 2016 report, Dr. Fink discussed appellant's April 4, 2008 work injury and subsequent treatment. He recommended further surgery and found that the treatment was necessary due to her accepted employment injury.

By decision dated March 14, 2016, OWCP denied modification of its January 23, 2015 decision. It found that appellant had not submitted evidence showing disabling residuals of her April 4, 2008 work injury.

On May 4, 2016 Dr. Fink advised that appellant could not perform her usual work due to a back condition and traumatic ankle fracture.

In a report dated May 24, 2016, Dr. Roberto Ramirez, a Board-certified internist, noted that appellant sustained an ankle fracture and aggravation of lumbar disc disease and radiculopathy at L4-5 and L5-S1 due to an April 4, 2008 employment injury. He found that she was permanently disabled from working on her feet.

On June 9, 2016 appellant, through counsel, requested reconsideration. She submitted a November 23, 2015 MRI study of the left ankle, which showed "[p]rominent arthritic changes…."

In a decision dated October 19, 2016, OWCP denied modification of its March 14, 2016 decision. It found that the medical evidence of record was insufficient to overcome the weight afforded Dr. Miller as impartial medical examiner.

On appeal counsel argues that OWCP should have expanded acceptance of appellant's claim and that it ignored the evidence of record.

[7] By decision dated November 9, 2015, OWCP granted appellant a schedule award for five percent permanent impairment of her left lower extremity.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP 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.[8] OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[9]

Section 8123(a) of FECA 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.[10] Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

OWCP's procedures provide, "[w]hen the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[12]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a closed left lateral malleolus fracture of the ankle, a closed nonunion fracture of the left ankle, arrest of bone development or growth of the left ankle, and post-traumatic left ankle arthritis due to an April 4, 2008 work injury. It paid her compensation for total disability. Appellant underwent numerous left ankle surgeries.

OWCP determined that a conflict arose between Dr. Rozman, an attending physician who found that appellant could perform sedentary employment, and Dr. Brecher, an OWCP referral physician who found that she had no restrictions due to her accepted work injury. It referred her to Dr. Miller, a Board-certified orthopedic surgeon, for an impartial medical examination.

Where a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[13] The Board, however, finds that

[8] *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[9] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[10] 5 U.S.C. § 8123(a).

[11] *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600(3) (October 1990).

[13] *See Glen E. Shriner*, 53 ECAB 165 (2001).

Dr. Miller's opinion is of diminished probative value and thus does not represent the special weight of the medical evidence. OWCP provided the physician with a SOAF that did not include all of the accepted conditions. To assure that the report of a medical specialist is based upon a proper factual background, OWCP provides information to the physician through the preparation of a SOAF.[14] The SOAF indicated that it had accepted appellant's claim for an unspecified closed fracture of the left ankle. It did not include the accepted conditions of a closed nonunion fracture of the left ankle, arrest of bone development or growth of the left ankle, and post-traumatic left ankle arthritis.

In his March 6, 2014 report, Dr. Miller found that appellant sustained a nondisplaced ankle fracture due to her work injury, noting that he had only once seen nonunion after such an injury. He attributed her continued complaints to her back condition. Dr. Miller further advised that he had not seen arthritis due to such an ankle fracture. OWCP, however, accepted a left nonunion fracture and ankle arthritis due to the work injury. Dr. Miller did not find that appellant had no residuals from these conditions, but instead found that she had not experienced such conditions due to her work injury. As noted, when a physician renders a medical opinion based on an incomplete or inaccurate SOAF, the probative value of the opinion is seriously diminished or negated altogether.[15] Dr. Miller relied upon a SOAF that did not accurately reflect the conditions OWCP accepted as employment related. Consequently, his opinion is of diminished probative value and insufficient to resolve the conflict in medical opinion.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits, effective May 13, 2014.[16]

[14] *See supra* note 12.

[15] *See supra* note 12; *see also A.C.*, Docket No. 07-2423 (issued May 15, 2008).

[16] In view of the Board's determination that OWCP improperly terminated appellant's compensation benefits, the issue of whether appellant has established continuing disability or residuals after May 13, 2014 is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 19, 2016 is reversed.

Issued: July 11, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board