United States Department of Labor
Employees' Compensation Appeals Board

C.D., Appellant	)	
and	)	**Docket No. 10-918**
	)	**Issued: October 26, 2010**
DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Vicksburg, MS, 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, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2010 appellant, through his attorney, filed a timely appeal from a January 4, 2010 merit decision of the Office of Workers' Compensation Programs terminating his compensation. 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 effective July 16, 2009 on the grounds that he had no further disability causally related to his October 4, 2008 employment injury.

FACTUAL HISTORY

On October 10, 2008 appellant, then a 48-year-old deckhand, filed a claim alleging that on October 4, 2008 he sustained an injury to his left ankle in the performance of duty. The Office accepted the claim for a closed fracture of the left calcaneus and paid him compensation for disability beginning November 19, 2008.

Following his work injury, appellant received treatment from Dr. John J. Lochemes, a Board-certified orthopedic surgeon.[1] On March 3, 2009 Dr. Lochemes diagnosed a closed fracture of the calcaneus and noted that appellant had pain in the lateral peroneal tendon region. He found that appellant could return to work in two to three weeks. Dr. Lochemes referred him for daily work conditioning. On April 28, 2009 Dr. Lochemes released appellant to return to his regular employment. He stated:

> "At this point in time, I [have] recommended that we consider observation and return to work full duty and see how [appellant] does. Risks, benefits and alternatives discussed, he voiced understanding. If [appellant] has interval concerns he should call. We went ahead and filled out his questionnaire. [Appellant's] pain never goes below level IV. He has had most aspects of his life affected. [Appellant] will wear the braces indefinitely. I would certainly think medicals would be kept open for an extended period of time. If [appellant] has interval concerns he is to call. He is entitled to a rating based on the fracture and the dysfunction."

In a work restriction evaluation dated May 8, 2009, Dr. Lochemes found that appellant could work at his usual employment without limitations beginning April 28, 2009.[2]

On June 4, 2009 the Office notified appellant that it proposed to terminate his compensation benefits as the weight of the medical evidence established that he had no further employment-related disability.

By decision dated July 16, 2009, the Office terminated appellant's compensation effective that date.

On July 24, 2009 his attorney requested a telephone hearing. At the hearing, appellant noted that he might require surgery in the future. He did not return to work with the employing establishment because his job was seasonal and there was no work currently available.[3] Appellant related that he could not perform his work duties. The hearing representative advised him to have his physician provide a report addressing whether he could work in his usual employment.

By decision dated January 4, 2010, the hearing representative affirmed the July 16, 2009 decision.

[1] Dr. Lochemes referred appellant for a functional capacity evaluation in February 2009. The functional capacity evaluation revealed that he had the basic ability to perform his usual work but recommended additional physical therapy.

[2] Dr. Lochemes noted that appellant could have to continue to wear a brace.

[3] By letter dated June 17, 2009, the employing establishment noted that appellant was a temporary employee who worked August to November each year.

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. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] 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.[5]

ANALYSIS

The Office accepted that appellant sustained a closed fracture of the left calcaneus due to an October 4, 2008 employment injury. It paid him compensation for total disability beginning November 19, 2009.

Appellant received treatment following his work injury from Dr. Lochemes. On March 3, 2009 Dr. Lochemes noted that appellant had continued pain in the area of his lateral peroneal tendon. He advised that appellant could return to work in two or three weeks and referred him for work conditioning. Therefore, Dr. Lochemes released him to return to his usual employment. In a work restriction evaluation dated May 8, 2009, he found that appellant could perform his usual employment with no listed limitations effective April 28, 2009. As the attending physician, Dr. Lochemes had a thorough knowledge of appellant's condition. His opinion constitutes the weight of the medical evidence. The Office, consequently, properly relied upon the opinion of the attending physician in terminating appellant's compensation effective July 16, 2009.[6]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective July 16, 2009 on the grounds that he had no further disability causally related to his October 4, 2008 employment injury.

[4] *K.H.*, 58 ECAB 211 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[5] *J.M.*, 58 ECAB 478 (2007); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[6] Appellant submitted new medical evidence subsequent to the hearing representative's decision. The Board has no jurisdiction to review evidence that was not before the Office at the time of its last decision. *See* 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and requested reconsideration under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2010
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board