

FACTUAL HISTORY

OWCP accepted that on February 28, 2007 appellant, then a 50-year-old food service worker, sustained a right ankle fracture, right ankle synovitis, right wrist sprain and right shoulder contusion in a fall at work. She stopped work after her February 28, 2007 injury and returned to limited-duty work on a full-time basis on September 10, 2007. Appellant stopped work on November 2, 2007 and OWCP accepted that she sustained a recurrence of disability. From November 2, 2007 to November 4, 2008, she received compensation for total disability.

On May 22, 2008 Dr. Wen Shen, an attending Board-certified orthopedic surgeon, performed a right ankle arthroscopy with extensive debridement, medial malleolar tibial osteotomy, curettage of talus bone cyst and local autograft. The procedures were authorized by OWCP. On November 5, 2008 appellant returned to work at the employing establishment in a limited-duty job for four hours per day. In a December 10, 2008 report, Dr. Harvey L. Seigel, a Board-certified orthopedic surgeon, opined that appellant had recovered from the accepted conditions from the February 28, 2007 injury and that she was able to perform her date-of-injury job as a food service worker full time. In contrast, Dr. Shen stated in several reports dated between late 2008 and early 2009 that she continued to be partially disabled due to her February 28, 2007 work injury. On January 16, 2009 appellant returned to work performing limited-duty work on a full-time basis.

Due to the lack of current medical evidence regarding appellant's capacity to work, OWCP scheduled her for a second opinion examination with Dr. Seigel, a Board-certified orthopedic surgeon. In a December 10, 2008 report, Dr. Seigel provided a description of her factual and medical history. He opined that appellant had recovered from the accepted conditions resulted from the February 28, 2007 injury and that she was able to perform her date-of-injury job as a food service worker full time.

In reports dated between late 2008 and early 2009, Dr. Shen provided an opinion that appellant continued to be partially disabled due to her February 28, 2007 work injury and he recommended work restrictions such as no lifting more than 15 pounds and no standing more than four hours per day. He noted that she reported diffuse right ankle pain and that examination showed some right ankle swelling.

OWCP determined that a conflict in medical opinion arose between Dr. Seigel and Dr. Shen regarding whether appellant continued to have residuals of her February 28, 2007 work injury and her capacity for work. It referred her to Dr. Louis D. Nunez, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In a September 8, 2009 report, Dr. Nunez reviewed appellant's factual and medical history, including the findings upon physical examination and diagnostic testing since her February 28, 2007 work injury. Physical examination of her right ankle revealed dorsiflexion to 15 degrees, plantar flexion to 40 degrees, inversion to 30 degrees and eversion to 15 degrees. There was a well-healed eight-centimeter incision along the anteromedial aspect of the right ankle and there was no swelling or tenderness to palpation of the anterior middle or posterior calcaneofibular ligaments. Dr. Nunez found no draw sign in the right ankle and that there was no tenderness to palpation of the peroneal tendon sheath. There was no pain on percussion of the

posterior tibial nerve and there was no atrophy of the right calf musculature as compared to the left leg. Dr. Nunez stated that there were no complaints of pain in the right shoulder or right wrist.

Dr. Nunez stated that appellant was status post twisting injury of the right ankle with a posterior tibial malleolar fracture and proximal fibular and status post arthroscopy of the right ankle, malleolar osteotomy, curettage of talus bone cyst and packing with local bone graft.² He concluded that the conditions accepted in connection with the February 28, 2007 work injury were not active or causing objective symptoms. Dr. Nunez stated, "In my opinion, [appellant], based upon my examination and the objective findings found at this examination[,] is fully capable of returning to the full duties as a food service worker on a full-time basis." He completed a work restriction form, without any physical restrictions.

On September 21, 2009 Dr. Shen requested authorization for optional right ankle surgery with removal of hardware and intraoperative cultures; but on November 02, 2009 he advised that appellant wanted to hold off on any surgery.

Based upon Dr. Shen's recommendation for surgery, OWCP asked Dr. Nunez if the proposed surgery altered his medical opinion that appellant was fit for duty in her regular work on a full-time basis.

In a January 12, 2010 report, Dr. Nunez stated that the surgery for removal of the hardware was appropriate and causally related to the February 28, 2007 work injury. He stated, "In my opinion, [appellant] could still work full time, full duty even if she decides not to have the surgery to remove her hardware. Therefore, my opinion regarding her status remains unchanged."

In a January 22, 2010 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits on the grounds that she ceased to have residuals of her February 28, 2007 work injury. It found that the weight of the medical evidence regarding termination rested with the well-rationalized opinion of Dr. Nunez.

Appellant submitted a February 5, 2010 report, from Dr. Shen, who stated that on physical examination she had full right ankle and hindfoot range of motion. Swelling of her right ankle was minimal and she had tenderness on the proximal portion of the surgical incision, which was in the supramalleolar region of the ankle on the medial side. Dr. Shen noted that there was no clear tenderness at the tip of the medial malleolus, provided a diagnosis of right ankle pain and stated, "I explained to [appellant] that to medically remove hardware is optional but at this point she does not appear to be tender at the area of the hardware. There is no guarantee that ... removal of hardware will improve her pain level."

In a March 2, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective March 2, 2010 on the grounds that she had no residuals of her February 28, 2007 work injury after that date. It found that the weight of the medical evidence regarding termination continued to rest with the opinion of Dr. Nunez.

² Dr. Nunez stated that appellant aggravated a preexisting talar dome cyst and distal tibial bone cyst.

Appellant submitted several reports, dated from March to August 2010, in which Dr. John Uhorchak, an attending Board-certified orthopedic surgeon, recommended work restrictions due to her February 28, 2007 injury. She also submitted reports dated between late 2010 and early 2011, from a treating physician who indicated that she continued to have right ankle symptoms.

In a June 2, 2011 decision, OWCP affirmed its March 2, 2010 decision in part and modified it in part to reflect that, while OWCP had shown that appellant had no wage loss after March 2, 2010 due to her February 28, 2007 work injury, it had not established that she had no residuals or need for medical benefits due to her February 28, 2007 work injury.³ It also found that the medical evidence submitted by her after the termination of her compensation did not create a new conflict in the medical evidence.

LEGAL PRECEDENT

Once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁷

Section 8123(a) of FECA provides in pertinent part: "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."⁸ In situations 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.⁹

³ The Board notes that OWCP reinstated appellant's entitlement to medical benefits related to the February 28, 2007 work injury and this matter is not currently before the Board.

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Id.*

⁶ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁸ 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS

OWCP accepted that on February 28, 2007 appellant, then a 50-year-old food service worker, sustained a right ankle fracture, right ankle synovitis, right wrist sprain and right shoulder contusion due to a fall at work. It terminated her wage-loss compensation effective March 2, 2010 based on the opinion of Dr. Nunez, a Board-certified orthopedic surgeon serving as an impartial medical specialist.

OWCP properly determined that a conflict arose in the medical opinion between Dr. Shen, an attending Board-certified orthopedic surgeon, and Dr. Seigel, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have residuals and disability from her February 28, 2007 work injury. In order to resolve the conflict, it properly referred her, pursuant to section 8123(a) of FECA, to Dr. Nunez for an impartial medical examination and an opinion on the matter.¹⁰

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Nunez, the impartial medical specialist selected to resolve the conflict in the medical opinion.¹¹ The September 8, 2009 and January 12, 2010 reports of Dr. Nunez establish that appellant had no disability due to her February 28, 2007 work injury after March 2, 2010.

In his September 8, 2009 report, Dr. Nunez indicated that physical examination of appellant's right ankle revealed a well-healed eight-centimeter incision along the anteromedial aspect of the right ankle and that there was no swelling or tenderness to palpation of the anterior middle or posterior calcaneofibular ligaments. He indicated that there was no draw sign in the right ankle and that there was no tenderness to palpation of the peroneal tendon sheath. There was no pain on percussion of the posterior tibial nerve and there was no atrophy of the right calf musculature as compared to the left leg. Dr. Nunez stated that there were no complaints of pain in the right shoulder or right wrist. He concluded that appellant had no disability due to her February 28, 2007 work injury and did not recommend any work restrictions. Dr. Nunez stated, "In my opinion, [appellant], based upon my examination and the objective findings found at this examination[,] is fully capable of returning to the full duties as a food service worker on a full-time basis." After Dr. Shen indicated that appellant had the option of removing surgical hardware from her right ankle but declined such optional surgery, Dr. Nunez produced a January 12, 2010 report, in which he stated that this circumstance did not change his opinion that she ceased to have disability due to her February 28, 2007 work injury.

The Board has carefully reviewed the opinion of Dr. Nunez and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Nunez provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹² He provided medical rationale for

¹⁰ See *supra* note 8.

¹¹ See *supra* note 9.

¹² See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

his opinion by explaining that there were no medical findings that the conditions accepted in connection with the February 28, 2007 work injury were still active or causing objective symptoms.¹³

After OWCP's March 2, 2010 decision terminating appellant's wage-loss compensation, effective that date, she submitted additional medical evidence which she felt showed that she was entitled to wage-loss compensation after March 2, 2010 due to residuals of her February 28, 2007 work injury. Given that the Board has found that OWCP properly relied on the opinion of the impartial medical examiner, Dr. Nunez, in terminating her compensation, effective March 2, 2010, the burden shifts to appellant to establish that she is entitled to compensation, after that date.¹⁴ The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that she had residuals of her February 28, 2007 work injury after March 2, 2010. Several physicians indicated that she continued to have work-related work restrictions but they did not provide adequate medical rationale in support of their opinions.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation effective March 2, 2010 on the grounds that she had no wage loss due to her February 28, 2007 work injury after that date.

¹³ Appellant submitted a February 5, 2010 report in which Dr. Shen provided findings which were similar to those he provided in previous reports. However, as Dr. Shen was on one side of the conflict, his additional report is essentially duplicative of his stated opinion and is insufficient to give rise to a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001). On appeal, appellant asserted that Dr. Nunez' opinion was not thorough or well rationalized. However, Dr. Nunez carried out a comprehensive evaluation and provided reasons for his conclusions.

¹⁴ *See K.E.*, Docket No. 08-1461 (issued December 17, 2008) (where OWCP meets its burden of proof to justify the termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury).

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2012
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