

**United States Department of Labor
Employees' Compensation Appeals Board**

A.F., Appellant

and

**DEPARTMENT OF COMMERCE, 2010
DECENNIAL CENSUS, Dallas, TX, Employer**

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**Docket No. 13-937
Issued: August 26, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 11, 2013 appellant, through counsel, filed a timely appeal from an October 23, 2012 merit decision of the Office of Workers' Compensation Programs terminating her compensation effective June 20, 2011. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly terminated appellant's compensation for wage loss effective June 20, 2011.

On appeal appellant, through counsel, contends that medical documentation verifies full-time permanent disability status based on her hip fracture.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 2, 2009 appellant, then a 47-year-old enumerator, sustained injury to her spine, back and neck. While map spotting and driving, she slid down a hill on gravel into an embankment. On January 11, 2010 OWCP accepted appellant's claim for closed dislocation of the fifth, sixth and seventh cervical vertebrae, a closed dislocation of the thoracic vertebra at T1 and closed dislocations of the third and fifth lumbar vertebrae. It subsequently accepted her claim for subluxations of the spine and right sacral fracture.

In a July 6, 2010 report, Dr. Margaret O. Burke, a treating Board-certified physiatrist with a subspecialty in spinal cord injury medicine, diagnosed a sacral alar insufficiency fracture that appeared to be well healed. She recommended physical therapy for appellant's bursitis. Dr. Burke opined that appellant remained able to work a light-duty job under restrictions as an enumerator. She did not believe that appellant was at maximum medical improvement. In an October 1, 2010 progress report, Dr. Burke noted that appellant had residual pain after sacral fracture, but a magnetic resonance imaging (MRI) scan showed that it had healed. She found that appellant was at maximum medical improvement.

By decision dated December 1, 2010, OWCP terminated appellant's wage-loss compensation effective that date. In a decision dated March 15, 2011, an OWCP hearing representative reversed the termination decision. The hearing representative noted that no development was taken by OWCP to determine how long appellant's commute would be and or to establish that the physical requirements of the position were within her medical restrictions.

On March 31, 2011 OWCP referred appellant to Dr. Glenn L. Scott, a Board-certified orthopedic surgeon, for a second opinion. It noted that appellant's work as an enumerator involved lifting and carrying a maximum weight of 5 pounds up to 3 hours a day; sitting (including driving) up to 3.5 hours a day; standing and walking up to 2 hours a day; climbing up to .50 hours per day; bending/stooping/twisting/pulling/pushing up to .25 hours per day; simple grasping up to 3 hours a day, fine manipulation (including keyboarding) up to 2 hours a day and driving a vehicle up to 3 hours a day.

In a May 11, 2011 report, Dr. Scott listed his impressions as multilevel degenerative cervical spine disease, multilevel lumbar spondylosis and healed sacral insufficiency fracture. He opined that appellant had mild residuals of her accepted cervical, thoracic and lumbar subluxation, probably representing aggravation of preexisting conditions. Dr. Scott agreed with Dr. Burke that appellant's fracture was, within reasonable medical certainty, healed. He found it difficult to explain her complaints of pain on a residual basis from the fracture, noting that her complaints were primarily subjective. The objective findings were difficult to evaluate due to appellant's clinical presentation. Dr. Scott found that she could return to the full duties of her date-of-injury position as a census enumerator as far as her cervical, thoracic, and lumbar subluxation or sacral fracture were concerned. He also opined that appellant had reached maximum medical improvement from her accepted injuries of May 2, 2009. In an accompanying work capacity evaluation, Dr. Scott listed her limitations as four hours of sitting, three hours each of walking and standing, one hour of bending/stooping, three hours of operating a motor vehicle at work, pushing/pulling/lifting limited to 10 pounds for three hours a day, and squatting, kneeling and climbing limited to one hour a day.

On May 13, 2011 OWCP proposed terminating appellant's wage-loss compensation benefits based on the opinion of Dr. Scott. It noted that her medical benefits would remain open for treatment of her accepted conditions. By decision dated June 20, 2011, OWCP terminated appellant's wage-loss compensation benefits effective that date.

On June 30, 2011 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative that was held on October 6, 2011.²

Following the telephonic hearing, appellant submitted an October 31, 2011 report from Dr. Sarah J. Danninger, a Board-certified family practitioner, who diagnosed chronic pain syndrome. Dr. Danninger also noted chronic problems with anxiety, chronic fatigue and fibromyalgia. She noted that appellant's conditions impaired her functioning significantly, but was unprepared to gauge how much. Dr. Danninger noted that, without supporting documentation, she was only able to report what appellant told her and conduct a single limited examination. She noted that another physician mentioned that appellant had right-sided hip pain/strain after a motor vehicle accident and mentioned the diagnoses of restless leg syndrome, tremor, fibrocystic breast disease, abdominal adhesions and status post right lower abdomen hernia repair, premenstrual syndrome and hot flashes.

In a decision dated December 14, 2011, the hearing representative affirmed the December 14, 2011 termination decision.

On December 22 2011 appellant, through counsel, requested reconsideration. As OWCP did not respond to this reconsideration request on May 7, 2012 appellant filed another request for reconsideration.

In an October 23, 2012 decision, OWCP denied modification of the prior decisions.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ It may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

² Appellant's attorney asked for 30 more days to submit additional medical evidence, which the hearing representative granted. On November 4, 2011 her attorney asked for another 30-day extension to submit further medical evidence.

³ See *Kathryn E. Demarsh*, 56 ECAB 677 (2005); see also *Beverly Grimes*, 54 ECAB 543 (2003).

⁴ *Id.*

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

ANALYSIS

OWCP accepted appellant's claim for subluxations of the cervical, thoracic and lumbar spine as well as right sacral fracture. It paid wage-loss compensation and paid for medical treatment. OWCP terminated appellant's wage-loss compensation effective June 20, 2011 as the medical evidence established that her disability had ceased.

The Board finds that the medical evidence supports OWCP's termination of appellant's compensation. Dr. Scott, the second opinion physician, found that appellant could return to her full duties of her date-of-injury position as a census enumerator as far as residuals from the accepted conditions of cervical, thoracic and lumbar subluxation or sacral fracture were concerned. He noted that there was no objective evidence to explain her subjective complaints. Dr. Scott added that her sacral fracture was well healed as noted by appellant's treating physician, Dr. Burke, and that she was at maximum medical improvement.

Appellant's treating physician, Dr. Burke, in a July 6, 2010 report, opined that appellant's fracture appeared to be well healed and that appellant remained able to work her light-duty position as an enumerator.

Appellant submitted an October 31, 2011 medical report by Dr. Danninger but Dr. Danninger did not provide a rationalized medical opinion giving an opinion as to appellant's ability to perform her duties as a census enumerator. In fact, Dr. Danninger specifically indicated that she was not prepared to gauge how much appellant's conditions affected her functioning. She noted that another doctor had diagnosed numerous conditions, but her first hand observations with regard to appellant's medical condition were limited.

OWCP terminated appellant's wage-loss compensation after determining that her disability for work had ceased. As used in FECA, the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁶

The weight of medical evidence of record establishes that appellant is capable of performing the duties of her date-of-injury position as an enumerator with restrictions. Therefore, she is no longer disabled and OWCP properly terminated her wage-loss compensation as of June 20, 2011.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation for wage loss effective June 20, 2011.

⁶ 5 U.S.C. § 8102.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 23, 2012 is affirmed.

Issued: August 26, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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