

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

L.M., Appellant

and

**DEPARTMENT OF THE ARMY, TOBYHANNA
ARMY DEPOT, Tobyhanna, PA, Employer**

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**Docket No. 13-960
Issued: August 5, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2013 appellant filed a timely appeal from a January 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met its burden of proof to terminate compensation for wage loss effective May 6, 2012.

FACTUAL HISTORY

On March 26, 2008 appellant, then a 46-year-old education technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries in the performance of duty on March 19, 2008. She stated that she was walking across a parking lot and something caused her

¹ 5 U.S.C. § 8101 *et seq.*

right ankle and hip to twist and cause pain. On April 23, 2008 OWCP accepted the claim for a right ankle sprain/strain. In a report dated December 5, 2008, Dr. Joseph Chun, an attending osteopath, indicated that appellant had fallen on November 15, 2008. OWCP accepted a consequential right wrist sprain/strain and right knee contusion. Appellant stopped working as of March 19, 2008 and began receiving compensation for total disability.

By report dated April 29, 2009, Dr. Guido LaPorta, a podiatrist, requested authorization for decompression of the peroneal nerve of the right foot. Surgery was performed on May 7, 2009. In a report dated June 28, 2010, Dr. Robert Draper, a Board-certified orthopedic surgeon selected as a second opinion examiner, opined that the May 7, 2009 surgery was not causally related to the employment injury. He also opined that appellant could work with a 10-pound lifting restriction.

In a decision dated August 18, 2010, OWCP denied reimbursement for the right foot surgery. In a decision dated November 17, 2010, an OWCP hearing representative set aside the August 18, 2010 OWCP decision. The hearing representative remanded the case for further development of the medical evidence.²

In a report dated October 22, 2010, Dr. Chun indicated that appellant had a recent fall. He diagnosed cervical myofascial pain syndrome, new onset upper extremity weakness and left rib fracture. In a report dated December 19, 2010, an OWCP medical adviser opined that the May 7, 2009 surgery should not be authorized.

By report dated December 30, 2010, Dr. LaPorta indicated that appellant was interested in receiving an injection in her common peroneal nerve and anterior talofibular (ATF) ligament. On January 13, 2011 he performed a common peroneal nerve decompression and scar removal, right ankle arthroscopy and lateral ankle ligament repair/Brostrom modified procedure.

OWCP referred appellant to Dr. Charles Levine, a Board-certified orthopedic surgeon, for an opinion as to whether the accepted injuries warranted the May 7, 2009 and January 13, 2011 surgeries. In a report dated March 29, 2011, Dr. Levine provided a history and results on examination of March 28, 2011 and reviewed medical records. He noted that appellant had a fracture of the right ankle in 1982 and ankle surgery in 1989. Dr. Levine opined that the January 13, 2011 surgical procedure was related to the employment injuries. He also opined that he could not relate “the complaints of continued falling with a history that goes back to at least 1982 to her current medical condition or as it relates to her fall at work on March 19, 2011. I specifically cannot relate the diagnoses of S1 radiculopathy, a right peroneal neuropathy at the fibula, or a right tibial neuropathy at the popliteal fossa to the March 19, 2008 work-related incident.” Dr. Levine further opined that he could not relate the surgical decompression of the peroneal nerve as a result of the employment injury. He concluded, “In my opinion based upon the diagnosis of ankle sprain on [March 19, 2008] and given the job description of educational technician, which involved mostly sitting with some filing and walking, I feel that there was no

² The hearing representative noted that the existing statement of accepted facts (SOAF) did not include all of the accepted conditions. The record indicates that OWCP subsequently prepared an April 29, 2009 SOAF that did discuss all accepted conditions.

period of complete disability. I do feel that [appellant] was able to perform her job with no period of disability.”

In a report dated April 8, 2011, Dr. Chun indicated that appellant was treated for right leg, foot and neck pain. He noted that appellant had a “work-related injury” on March 18, 2008, causing persistent right leg pain and secondary diffuse neck pain and headaches. Dr. Chun stated that appellant had worsening cervical pain since the January 13, 2011 surgery.

OWCP requested a supplemental report from Dr. Levine. In a report dated April 11, 2011, Dr. Levine stated that, with regard to the right ankle surgery, “as I did not have a history or physical exam[ination] prior to the surgery one must trust the medical records that the ligament was injured on [March 19, 2008] and the repair was necessary.” He noted appellant’s previous ankle injury and stated that, if there was no history of instability prior to the employment injury, then it was reasonable the January 13, 2011 surgery was causally related to the employment injury. As to disability, Dr. Levine stated, “As I saw [appellant] status post ankle fracture as well as status post ligament surgery and peroneal surgery, I cannot state what her condition is independently of the medical records. Based upon my history taking, review of medical records and physical exam[ination] on [March 28, 2011], it is my opinion that there is no disability at this point in time as a result of the [March 19, 2008] work injury and I feel that there is no residual from the [March 19, 2008] injury based on my objective findings on [March 28, 2011].”

OWCP again requested clarification as to a period of disability from the January 13, 2011 surgery. In a report dated May 24, 2011, Dr. Levine stated that the recovery period for the ankle surgery was three months. He indicated that appellant would have recovered as of April 13, 2011.

In a report dated July 22, 2011, Dr. Chun provided results on examination and stated that appellant continued to have neck and shoulder pain. He diagnosed cervical myofascial pain, bilateral shoulder pain due to rotator cuff syndrome/impingement and chronic right leg pain.

By letter dated March 22, 2012, OWCP advised appellant that it proposed to terminate her compensation for wage loss. It stated that the weight of the evidence was represented by Dr. Levine, and if appellant disagreed with the proposed action, she should submit evidence or argument within 30 days. On April 17, 2012 appellant submitted a hospital report that indicated that she was seen in the emergency room on August 5, 2011.

In a decision dated May 3, 2012, OWCP terminated compensation for wage loss effective May 6, 2012. It found the weight of the evidence as to disability was represented by Dr. Levine.

Appellant requested a hearing before an OWCP hearing representative, which was held on August 6, 2012. In a report dated June 5, 2012, Dr. John Lease, an employing establishment orthopedic surgeon, diagnosed right leg radiculopathy, right leg ligamentous injury to ankle and right leg peroneal nerve irritation. He stated that appellant was unable to work or driving a car because of pain medications. In a report dated July 20, 2012, Dr. Chun stated that appellant was treated for right leg and neck pain. He stated that appellant had a work-related injury on March 18, 2008 resulting in persistent right leg pain.

By decision dated October 15, 2012, the hearing representative affirmed the May 3, 2012 OWCP decision. The hearing representative found the weight of the evidence established that the employment-related disability had ceased.

In a letter dated January 16, 2013, appellant, through counsel, requested reconsideration. Appellant submitted an October 2, 2012 surgery report from Dr. Melissa Obmann, an osteopath, who indicated that appellant had a left brachial artery occlusion.

By decision dated January 18, 2013, OWCP reviewed the merits of the claim and denied modification. It found the weight of the evidence rested with Dr. Levine.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³

The Board has noted that in assessing medical evidence the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁴

ANALYSIS

In the present case, OWCP accepted that appellant sustained a right ankle sprain/strain on March 19, 2008, and a right wrist sprain/strain, and right knee contusion, as consequential injuries in a November 15, 2008 fall. As appellant was receiving compensation for wage loss it is OWCP's burden to terminate compensation for wage loss.⁵

The record contains three reports from Dr. Levine, the second opinion examiner, who was provided a detailed SOAF and medical records, and his March 29, 2011 report provided a history, results on examination and review of the factual and medical evidence. Dr. Levine had opined that the January 13, 2011 ankle surgery was employment related. As to disability for the date-of-injury position, he had indicated in both his March 29 and April 11, 2011 reports that he did not find any continuing employment-related disability. In the May 24, 2011 report, Dr. Levine indicated that appellant would have recovered from surgery as of April 13, 2011, three months after the January 13, 2011 right ankle surgery.

³ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁴ *Gary R. Sieber*, 46 ECAB 215 (1994).

⁵ The Board notes that the May 3, 2012 OWCP decision specifically stated that medical benefits were not terminated. The decision stated that compensation for wage loss was terminated as of May 6, 2012.

The Board finds that Dr. Levine provided a probative medical opinion, based on a complete background, indicating that an employment-related disability had ceased prior to May 6, 2012. On the other hand, appellant did not submit a probative medical opinion with respect to a continuing employment-related disability. Dr. Chun submitted reports indicating that appellant was treated for right leg, neck and shoulder pain. He did not provide a complete background, referring only briefly to a “work-related injury” on March 18, 2008. Dr. Chun did not discuss causal relationship with any current diagnosis and the employment injury. Moreover, he did not discuss disability for the education technician position. As noted above, a probative medical opinion is an opinion based on a complete background and supported by medical rationale. Dr. Chun did not provide a rationalized opinion that appellant continued to be disabled as a result of an employment-related medical condition.

Similarly, the remainder of the medical evidence lacks a rationalized medical opinion on the issue presented. Dr. Lease, for example, did not discuss causal relationship between appellant’s condition on June 5, 2012 and the employment injury. He referred to appellant being unable to drive because of pain medications, without providing a rationalized medical opinion relating the need for pain medications to an employment injury from 2008. Dr. Obmann did not discuss the relevant medical issues presented.

In reviewing the medical evidence of record, the Board finds that the weight of the medical evidence rested with Dr. Levine who provided a rationalized medical opinion based on a complete background, whereas the attending physicians did not provide a rationalized medical opinion. The Board accordingly finds that OWCP met its burden of proof to terminate compensation for wage loss effective May 6, 2012.

On appeal, appellant states that the decision to terminate compensation has caused financial and emotional hardship. She stated that Dr. Levine could not examine her right leg because she was wearing a compression cast. The March 29, 2011 report, however, indicated that appellant took off a leg brace and Dr. Levine provided results on examination of the right leg. Appellant also stated that Dr. Obmann was not her primary care physician and does not treat her compensation injury. The termination of compensation was based, as noted above, on Dr. Levine’s reports. Appellant argued that she still has physical problems and submitted additional medical evidence. The Board cannot review evidence on appeal that was not before OWCP at the time of the final decision on appeal.⁶ Based on the evidence of record, the Board finds that OWCP met its burden of proof to terminate compensation for wage loss.

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 compensation for wage loss effective May 6, 2012.

⁶ 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 18, 2013 and October 15, 2012 are affirmed.

Issued: August 5, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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