

On appeal, counsel contends that OWCP erred in developing the claim as one for a recurrence of disability when it should have been handled as a termination claim. He argues that appellant was on the periodic rolls and had never successfully returned to full duty, therefore, when OWCP denied the claim as a recurrence it erroneously shifted the burden of proof to appellant to establish continuing disability.

FACTUAL HISTORY

On October 5, 2007 appellant, then a 59-year-old postmaster relief, filed a traumatic injury claim (Form CA-1) alleging that she broke her left ankle as a result of falling down the steps of a loading dock in the performance of duty that same day. OWCP accepted the claim for closed fracture of left tibia and fibula and closed bimalleolar fracture of left ankle. It placed appellant on the periodic rolls and received appropriate compensation. Appellant underwent left ankle surgery on October 5, 2007.

OWCP referred appellant to Dr. Williams Somers, a Board-certified orthopedic surgeon, for a second opinion evaluation. On March 17, 2010 Dr. Somers reviewed appellant's medical history and a statement of accepted facts and conducted a physical examination. He found that her fracture had healed and her symptoms related to the fracture had mostly resolved. Appellant still had some aching, some tenderness over the screws and residual swelling related to the fracture and injury. Dr. Somers opined that she was capable of performing her duties as postmaster relief with some mild restrictions: sitting and walking for 4 hours, 30 minutes at a time; standing for 30 minutes at a time; pushing and pulling no more than 15 pounds; and lifting no more than 10 pounds.

Appellant returned to limited-duty work on May 14, 2010. The offer of employment as a modified postmaster relief indicated that the physical requirements included: intermittent letter sorting, sitting, walking and pushing/pulling for zero to one hour; and standing/intermittent bending and walking for zero to two hours.

OWCP terminated appellant's compensation on May 14, 2010.

On June 15, 2010 appellant, through counsel, filed a recurrence claim (Form CA-2a) alleging that she sustained a recurrence of total disability on May 14, 2010.

In a June 15, 2010 report, Dr. Heidi Grandis, a Board-certified family medicine physician, indicated that appellant fractured her left ankle on October 5, 2007 and that the injury was still present and would likely always be. She opined that appellant was disabled and unable to stand or walk for more than two hours, lift more than 10 pounds, or push, pull, lift, squat, kneel or climb for more than one to two percent per day. Dr. Grandis advised that appellant was able to sit and recline for eight hours. On June 21, 2010 she reiterated her medical restrictions and opined that appellant would never be able to resume her job as postmaster relief and part-time clerk.

On June 22, 2010 appellant, through counsel, filed a claim for disability compensation (Form CA-7) for the period May 17 to June 18, 2010. She submitted a time analysis form indicating that she worked for 7 hours on May 14, 2010 and 3.5 hours on May 15, 2010.

Appellant also submitted an offer of limited duty dated May 18, 2010 with the following requirements: zero to four hours of sitting, standing, walking, pushing and pulling; and zero to one hour of lifting up to 10 pounds.

On June 22, 2010 appellant, through her attorney, filed a second notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of total disability on May 14, 2010. Appellant indicated that she only worked to see if she could do the job and on May 14, 2010 she experienced swelling due to standing and sitting for long periods and back pain due to the way she stood to relieve her ankle pain.

In a July 6, 2010 letter, OWCP requested additional evidence to establish a recurrence of disability and afforded 30 days for submission.

In a July 26, 2010 report, Dr. Grandis reviewed appellant's limited-duty job description and the March 17, 2010 second opinion report from Dr. Somers. She indicated that appellant told her that she was left alone for six of the eight hours of her day. During these 6 hours appellant was constantly on her feet and did not get sufficient rest every 30 minutes as Dr. Somers advised. If she was on her feet for 30 minutes, she needed to sit and prop her foot for 2 to 3 hours for the swelling and pain to decrease. Dr. Grandis stated that appellant would not have time for this as shown in her offer of modified assignment. Although appellant's supervisor, Blanche Butcher, indicated that appellant would only be lifting up to 10 pounds for zero to one hour, Dr. Grandis explained that she did not see how this was possible for appellant if she was the only one at the employing establishment for six hours.

By decision dated December 6, 2010, OWCP denied appellant's claim for disability compensation for the period May 17 to June 18, 2010 on the grounds that the medical evidence submitted failed to establish disability due to the employment injury for the period claimed.

OWCP referred appellant to Dr. Edward Mulcahy, a Board-certified orthopedic surgeon, for a second opinion evaluation. On May 5, 2011 Dr. Mulcahy reviewed a statement of accepted facts, appellant's medical record and conducted a physical examination. He found that the fractures had healed completely but some residuals of the fracture and its effect on the ankle joint persisted. Dr. Mulcahy indicated that objective findings of the edema and joint swelling indicated a permanent synovitis. He concluded that the functional capacity of appellant was a sedentary light duty and opined that appellant was capable of performing the duties of postmaster relief full time with the following restrictions: 8 hours of sitting; no more than 2 hours of walking; and no more than 4 hours of standing with a 10-minute break for every hour of standing.

On September 8, 2011 appellant, through counsel, requested reconsideration of the December 6, 2010 decision.

By decision dated September 8, 2011, OWCP denied appellant's claim for compensation on or after May 14, 2010. It found that she had not met her burden of proof to establish that she sustained a recurrence of total disability due to her employment injury when she stopped working in her light-duty position on May 14, 2010. OWCP indicated that Dr. Mulcahy's May 5, 2011 report showed that appellant could perform light-duty work.

On September 9, 2011 appellant, through her attorney, requested an oral hearing on the September 8, 2011 recurrence decision before an OWCP hearing representative.

By decision dated December 7, 2011, OWCP denied modification of its December 6, 2010 decision, which had denied appellant's claim for compensation for the period May 17 to June 18, 2010.

On February 15, 2012 a hearing was held *via* telephone before an OWCP hearing representative. Appellant testified that the limited-duty position did not comply with her medical restrictions.

In a March 7, 2012 narrative statement, appellant's supervisor, Ms. Butcher, indicated that appellant observed a two-hour lunch period in an eight-hour workday and was able to take a break in between her customers. Appellant was instructed that she would not have to distribute mail and was without assistance for about 30 minutes at most, during which she was to do office work only within her restrictions. She was instructed to observe her restrictions and refrain from any pushing and/or pulling and to leave a hamper by the side door, so customers would be able to assist her by placing their parcel in the hamper. Appellant was instructed to sit as much as possible to alleviate stress on her ankle. Ms. Butcher stated that appellant did not adhere to her limited-duty offer.

By decision dated May 8, 2012, an OWCP hearing representative affirmed the September 8, 2011 recurrence decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.³ Generally, OWCP can meet this burden by showing that the employee returned to work, even if that work is light duty rather than the date-of-injury position, if thereafter the employee earns no less than he or she had before the employment injury.⁴ A short-lived and unsuccessful attempt to return to duty, however, does not automatically discharge OWCP's burden to justify termination of compensation.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained left tibia, fibula and ankle fractures on October 5, 2007 and paid disability compensation by periodic rolls. Appellant returned to work

³ See *Fred Reese*, 56 ECAB 568 (2005). See also *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

⁴ *Id.* See also *Billy Sinor*, 35 ECAB 419 (1983).

⁵ See *Janice F. Migut*, 50 ECAB 166 (1998) (the Board found that, although appellant returned to work for two days, the burden remained on OWCP to justify termination of benefits).

for only two days on May 14, 2010.⁶ In its September 8, 2011 decision, OWCP characterized her claim for compensation on or after May 14, 2010 as a claim for recurrence of total disability due to her employment injury. The Board finds, however, that OWCP inappropriately placed the burden of proof for continuing compensation on appellant, indicating that she had the burden of proof to show that she was totally disabled from light-duty work. OWCP found that appellant did not meet this burden of proof and did not pay compensation after May 14, 2010. As noted, however, a short-lived return to work does not shift the burden of proof regarding employment-related disability. The Board has held that such a shift in burden of proof is not appropriate when there is a brief return to work and the medical evidence does not establish that the claimant could continue to perform the light-duty job.⁷

The Board finds no probative medical evidence establishing that appellant's employment-related condition had ceased on or after May 14, 2010 or that her inability to perform the light-duty job was not related to her October 5, 2007 employment injury. On June 15, 2010 Dr. Grandis noted that appellant fractured her left ankle on October 5, 2007 and that the injury was still present. She opined that appellant was disabled and unable to stand or walk for more than two hours, lift more than 10 pounds, or push, pull, lift, squat, kneel or climb for more than one to two percent per day. On June 21, 2010 Dr. Grandis opined that appellant would never be able to resume her job as postmaster relief and part-time clerk. On July 26, 2010 she reviewed appellant's limited-duty job description and opined that it was not suitable to her work restrictions. Although Dr. Mulcahy concluded that appellant's employment-related fractures had healed and that appellant was capable of performing the duties of postmaster relief full time with restrictions, he also found some residuals of the fracture and that its effect on the ankle joint persisted. He indicated that objective findings of the edema and joint swelling indicated a permanent synovitis.

It remains OWCP's burden of proof to terminate compensation and the Board finds that it essentially terminated compensation benefits without meeting its burden in this case.⁸

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective May 14, 2010 and thus she is entitled to continuing compensation.⁹

⁶ The modified postmaster relief position contained various work restrictions.

⁷ See *Janice F. Migut*, *supra* note 5 (claimant returned to work for two days). See also *Cheryl A. Weaver*, 51 ECAB 308 (2000) (claimant returned to work for one day); *Carl C. Graci*, 50 ECAB 557 (1999) (claimant returned to work for one day).

⁸ See *V.B.*, Docket No. 08-463 (issued August 19, 2008).

⁹ In light of the Board's disposition of the termination issue, the second issue of whether appellant has met her burden of proof to establish that she was disabled for the period May 17 through June 18, 2010 is rendered moot. See *Sharon Edwards*, 56 ECAB 749 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 18, 2013
Washington, DC

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

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

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