United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	**Docket No. 14-341**
	)	**Issued: April 24, 2014**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Romulus, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 2, 2013 appellant, through her attorney, filed a timely appeal from a September 9, 2013 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 modify a June 14, 2007 wage-earning capacity decision on January 31, 2013 and terminate appellant's medical and wage-loss compensation benefits.

On appeal, appellant's attorney alleges that OWCP's decision was contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 10, 2003 appellant, then a 30-year-old transportation security screener, twisted her right ankle when she stepped out of a van in the performance of duty. She stopped work. The record reveals that appellant sustained previous nonwork-related right ankle injuries. In June 2001, she sustained a right bimalleolar fracture after a canoe trip, and in September 2001, she refractured her right ankle when she fell down some stairs.

In a January 16, 2003 x-ray report, Dr. Frank Ju Arevalo, a Board-certified radiologist, noted that appellant twisted her right ankle six days prior and had a previous history of right ankle fractures. He observed an old bimalleolar fracture and evidence of a break through the mid aspect of the metallic plate and one of the inferior screws. Dr. Arevalo also noted secondary degenerative changes of the tibiotalar joint with considerable reactive sclerosis. He stated that there was no evidence of an acute fracture or dislocation.

In a February 6, 2003 note, Dr. Eric Silberg, a Board-certified orthopedic surgeon, stated that appellant worked for the employing establishment. He diagnosed right ankle sprain with possible fracture.

OWCP accepted appellant's claim for a right ankle fracture and post-traumatic arthritis. On August 11, 2003 appellant returned to full-time limited duty based on the work restrictions of Dr. Silberg, who limited her to only sedentary work. She continued to receive medical treatment for her right ankle.

On April 12, 2005 appellant was referred for vocational rehabilitation.

Appellant stopped work and underwent surgery on her right ankle on August 24, 2005. OWCP paid wage-loss compensation and placed her on the periodic rolls. Appellant resumed vocational rehabilitation in September 2005.

On May 9, 2007 OWCP proposed to reduce appellant's wage-loss compensation based upon a determination that she had the capacity to earn wages as a receptionist at the rate of $462.80 per week. It noted that the position was in compliance with her work restrictions and that the rehabilitation counselor's reports determined that the position reasonably represented her wage-earning capacity.

By decision dated June 14, 2007, OWCP reduced appellant's wage-loss compensation based upon the constructed position of receptionist.

On November 2, 2012 OWCP referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion examination. In a November 16, 2012 report, Dr. Obianwu related that she sustained a right ankle fracture and subsequent post-traumatic arthritis as a result of a January 10, 2003 employment injury. He reviewed appellant's history, including the statement of accepted facts and medical records. Dr. Obianwu noted that she had sustained two previous right ankle fractures in June and September 2001. Upon examination, he observed tenderness elicited over the medial aspect of the right ankle. Dorsiflexion was present to neutral and plantar flexion was to 10 to 15 degrees. Anterior drawer test was negative. Dr. Obianwu reported that x-rays of the right ankle revealed extensive sclerosis of the tibiotalar

joint and flattening of the dome of the talus. He stated that the fracture of the distal fibula seemed to be healed and clinically stable. Dr. Obianwu diagnosed insulin-dependent diabetes mellitus, right ankle Charcot's joint, status post multiple surgical procedures for bimalleolar fracture and slow healing medial malleolus. He stated that appellant's diabetes and right ankle Charcot's joint were not related to the January 10, 2003 employment injury. Dr. Obianwu opined that there was no medical evidence to support that any conditions related to the January 10, 2003 employment injury were present and active. He reported that the January 10, 2003 injury did not cause appellant's current right ankle condition and that her employment-related conditions resolved after the August 2005 surgery. Dr. Obianwu stated that she was not capable of performing her date-of-injury job but noted that the January 10, 2003 employment injury was not a contributing factor to her disability. He explained that the January 10, 2003 injuries were temporary problems that had subsided.

On December 27, 2012 OWCP proposed to terminate appellant's medical and wage-loss compensation benefits based on Dr. Obianwu's November 16, 2012 report. It advised her that, if she disagreed with the proposed action, she had 30 days to submit additional evidence or argument. No additional evidence was received.

By decision dated January 31, 2013, OWCP terminated appellant's medical and wage-loss compensation benefits effective January 31, 2013. It found that the weight of medical evidence rested with the opinion of Dr. Obianwu.

By letter dated February 27, 2013, appellant, through her attorney, requested a telephone hearing, which was held on June 10, 2013. Appellant described the January 10, 2003 injury, her medical treatment and her efforts at vocational rehabilitation. She contended that her medical condition did not change during that period of time. Appellant stated that she was recently examined by a physician who determined that she did not have Charcot's joint of the right ankle. Counsel related that nothing had changed in appellant's medical condition. He contended that Dr. Obianwu's report should not represent the weight of medical evidence. Counsel also noted that if appellant had Charcot's joint then it should be considered a factor in her wage-earning capacity.

In an unsigned January 30, 2013 report, Dr. Channa B. Williams, a podiatrist, related appellant's complaints of pain and noted her long-standing history of a right ankle condition, including the January 10, 2003 injury. Upon examination, Dr. Williams observed limited passive range of motion in all directions and moderate edema of the right ankle, along the lateral aspect. Anterior drawer test and eversion were negative. Dr. Williams reported that a computerized tomography (CT) scan was unequivocal for Charcot's joint and explained that the typical pattern of bone resorption and osteopenia, along with bone consolidation, was not seen. She reviewed appellant's medical records and opined that appellant had an acute process along with an ongoing chronic process. Dr. Williams stated that the previous evidence of fixation of the ankle and current appearance of the ankle demonstrated that appellant did not have Charcot's joint. She noted that appellant could have injured her right ankle at work because the ankle was previously injured. The fact that appellant injured her ankle in 2003 and had increased incidences of issues was an indication of a worsening condition following the fall at work.

In a February 4, 2013 CT scan of the right ankle, Dr. Ashok Jain, a Board-certified diagnostic radiologist, observed a small, chronic avulsion fracture of the distal tibula with an interarticular fragment within the talofibular joint space. He also noted an old fracture of the lateral malleolus with interarticular extension and post-traumatic osteoarthritic changes of the ankle and generalized marked osteopenia. Dr. Jain diagnosed multiple fractures of a chronic nature with interarticular extension and post-traumatic arthritic changes.

In a decision dated September 10, 2013, an OWCP hearing representative affirmed the January 31, 2013 decision terminating appellant's compensation benefits. The hearing representative noted that the termination of appellant's benefits should be based upon modification of the loss of wage-earning capacity determination in 2007. He found that the weight of the medical evidence rested with the opinion of Dr. Obianwu.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.[2] OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[3]

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Section 8115(a) of FECA provides that wage-earning capacity is best measured by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.[4] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5]

It is well established that either a claimant or OWCP may seek to modify a formal loss of wage-earning capacity determination. Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[6]

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[2] *S.F.,* 59 ECAB 642 (2008); *Kelly Y. Simpson,* 57 ECAB 197 (2005); *Paul L. Stewart,* 54 ECAB 824 (2003).

[3] *Jason C. Armstrong,* 40 ECAB 907 (1989); *Charles E. Minnis,* 40 ECAB 708 (1989); *Vivien L. Minor,* 37 ECAB 541 (1986).

[4] 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox,* 39 ECAB 143 (1988).

[5] *Katherine T. Kreger,* 55 ECAB 633 (2004).

[6] *Sharon C. Clement,* 55 ECAB 552 (2004); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.11 (October 2009).

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the opinion.[8]

ANALYSIS

OWCP accepted that on January 10, 2003 appellant sustained a right ankle fracture and post-traumatic arthritis. She worked full time in a limited-duty capacity until she underwent right ankle surgery on August 24, 2005 and stopped work. OWCP paid wage-loss compensation and placed appellant on the periodic rolls. On June 14, 2007 it reduced her entitlement to wage-loss compensation based upon a determination that the position of receptionist fairly and reasonably represented her wage-earning capacity and adjusted her compensation accordingly. In a decision dated January 31, 2013, OWCP terminated appellant's entitlement to medical and wage-loss compensation benefits finding that the medical evidence failed to establish that she continued to suffer residuals of her January 10, 2003 employment injury. By decision dated September 10, 2013, an OWCP hearing representative affirmed the termination of appellant's medical and wage-loss benefits and modified the June 14, 2007 wage-earning capacity determination. Accordingly, OWCP has the burden of proof to establish that the wage-earning capacity determination should be modified.[9]

On November 2, 2012 OWCP referred appellant to Dr. Obianwu for a second opinion evaluation. In a November 16, 2012 report Dr. Obianwu provided an accurate history of the January 10, 2003 employment injury and noted that he reviewed the statement of accepts facts and the medical record. He related that appellant had two previous nonwork-related right ankle fractures in June and September 2001, which required multiple surgeries. Dr. Obianwu reported that x-rays of the right ankle revealed that the fracture of the distal fibula seemed to be healed and clinically stable. He conducted a physical examination and diagnosed insulin-dependent diabetes mellitus, right ankle Charcot's joint, status post multiple surgical procedures for bimalleolar fracture and slow healing medial malleolus. Dr. Obianwu determined that there was no medical evidence to support that appellant's employment-related conditions were still present and opined that her January 10, 2003 employment-related injury was a temporary problem that resolved after the August 2005 surgery. He stated that appellant was not capable of performing her date-of-injury job but explained that her current disability and problems were not related to the January 10, 2003 employment injury.

The Board finds that based on the opinion of Dr. Obianwu appellant's accepted conditions have resolved and she no longer suffers residuals of her January 10, 2003 employment-related injury. Dr. Obianwu provided a thorough factual and medical history and

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[7] *Tamra McCauley,* 51 ECAB 375, 377 (2000).

[8] *Jennifer Atkerson,* 55 ECAB 317, 319 (2004).

[9] *Supra* note 7.

accurately summarized the relevant medical evidence. He conducted an examination and provided medical rationale, based on his physical examination findings and diagnostic test results, explaining how appellant's January 10, 2003 employment injury had resolved. Dr. Obianwu also noted that her current problems resulted from her previous, nonwork-related conditions, including two previous right ankle injuries. Thus, OWCP met its burden of proof to modify the June 14, 2007 wage-earning capacity determination and terminate appellant's medical and wage-loss compensation benefits on January 31, 2013.[10]

The Board also finds that appellant has not established any continuing residuals or disability causally related to the January 10, 2003 employment injury. Following the January 31, 2013 termination decision, she submitted a January 30, 2013 report by Dr. Williams, who reviewed appellant's history and conducted an examination. Dr. Williams reported that a CT scan was unequivocal for Charcot's joint but also stated that the appearance of the ankle demonstrated that appellant did not have Charcot's joint. She stated that appellant could have injured her right ankle at work and that the fact that her right ankle had increased incidences of issue demonstrated an indication of a worsening condition following the fall at work. The Board notes, however, that Dr. Williams' opinion is vague and equivocal and failed to explain the causal relationship between appellant's current conditions and the January 10, 2003 employment incident.[11] Likewise, Dr. Jain's February 4, 2013 diagnostic report also fails to establish continuing disability and need for treatment as he does not provide any medical opinion on the cause of appellant's current right ankle condition.[12] For these reasons, the medical evidence is not sufficient to create a conflict in the medical opinion evidence with Dr. Obianwu's opinion or to establish that appellant continues to suffer residuals or disability causally related to the January 10, 2003 employment injury.

CONCLUSION

The Board finds that OWCP met its burden of proof to modify the June 14, 2007 wage-earning capacity decision and terminate appellant's medical and wage-loss compensation.

[10] *See B.P.,* Docket No. 13-1219 (issued December 12, 2013).

[11] *Roy L. Humphrey,* 57 ECAB 238, 242 (2005); *Michael E. Smith,* 50 ECAB 313 (1999).

[12] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *R.E.,* Docket No. 10-679 (issued November 16, 2010).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2014
Washington, DC

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

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

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