

pushing an all-purpose container. On March 2, 2010 OWCP accepted the claim for closed fractures of the medial and lateral malleolus of the right ankle. Appellant had stopped working as of December 8, 2009 and began receiving compensation for wage loss. On April 8, 2010 OWCP accepted a fracture of the lateral tibial plateau of the right knee.

OWCP referred appellant for a second opinion examination by Dr. Robert Smith, a Board-certified orthopedic surgeon. In a report dated July 22, 2010, Dr. Smith provided a history and results on examination. He stated that the clinical examination was relatively benign, with “not a great deal” of objective findings that would explain appellant’s complaints of pain. Dr. Smith opined that it appeared the fractures had healed, noting that it had been seven months since the injury and such fractures would be expected to heal with two or three months. He indicated that the results of a bone scan were unavailable and pending review of the scan appellant could return to light-duty work.

Appellant was referred for an additional examination by Dr. Smith. In a report dated October 14, 2010, Dr. Smith provided a history and results on examination. He reported that it appeared the knee fracture had resolved based on the bone scan, although appellant continued to have some inflammation in the ankle and had yet to reach her preinjury level. Dr. Smith recommended that she complete physical therapy. OWCP again referred appellant for an additional examination by Dr. Smith, and in a report dated January 14, 2011, he provided a history and results on examination. Dr. Smith opined that it appeared that appellant’s fractures had resolved with no residuals. He stated that appellant could return to her date-of-injury position.

By letter dated January 19, 2011, OWCP advised appellant that it proposed to terminate her compensation for wage-loss and medical benefits based on the medical evidence. Appellant was advised to submit additional evidence or argument within 30 days if he disagreed with the proposal. On January 24, 2011 she submitted a December 16, 2010 report from attending physician, Dr. Fotios Tjounakaris, a Board-certified orthopedic surgeon, indicating that she had sustained a left ankle sprain recently when she fell down some steps.

In a decision dated February 22, 2011, OWCP terminated compensation for wage-loss and medical benefits.

Appellant, through her representative, requested reconsideration by letter dated January 16, 2012. She submitted a report dated January 4, 2012 from Dr. Gabriela Mendez, a podiatrist, who provided a history and indicated that she had initially examined appellant on April 22, 2011. Appellant indicated that right ankle surgery was performed on September 21, 2011, described as a Brostrum-Gould reconstruction repairing both the anterior talofibular (ATFL) and calcaneofibular (CFL) ligaments. Dr. Mendez opined that the reconstruction surgery was precipitated by the fall at work on December 8, 2009. She stated that appellant had suffered instability and pain as a result of her injury and the repetitive ankle instability lead to increased injury to the ATFL and CFL ligaments, as well as Achilles tendinitis and plantar fasciitis.

In a decision dated April 17, 2012, OWCP denied modification of the February 22, 2011 decision. It also found that the report from Dr. Mendez was sufficient to create a conflict in the

medical evidence with Dr. Smith and indicated that appellant would be referred for a referee examination.

OWCP selected Dr. Menachem Meller, a Board-certified orthopedic surgeon, as a referee physician.² In a letter dated April 25, 2012, counsel stated that he objected to the selection of Dr. Meller “as OWCP is aware that he has been found to give partial testimony. The assignment of such a physician is inconsistent with the nonadversarial process that this purports to be.” In a letter dated May 9, 2012, counsel renewed his objection and requested a pool of three physicians to select an appropriate physician.

By letter dated May 23, 2012, OWCP noted the concern of counsel, but stated that there was no evidence received by OWCP that Dr. Meller had ever given “partial testimony” as a referee physician. It requested that probative evidence supporting the objection be submitted within 14 days in order to participate in the referee selection process.

In a report dated May 16, 2012, Dr. Meller provided a history and results on examination. He opined that appellant’s work-related nondisplaced distal fibular fracture and the chip avulsion on the medial malleolus had fully healed with no residuals and the accepted right knee tibial plateau fracture was currently without complaints or objective clinical findings and had healed without residuals. Dr. Meller further stated, “In my opinion, her current complaints, findings and physical limitations would be related to the right lateral ankle reconstruction. In either case, they are perceptions of injury and illness which are far greater than one would reasonably expect for a successful reconstruction without any untoward surgical events.... In my opinion, [appellant] is capable of returning to her preinjury occupation without any restrictions related to her injury. As far as ankle reconstruction, it is objectively functional. I see no additional reason to limit [appellant] with this aspect as well from the type of work activities that she had been performing.”

By decision dated August 23, 2012, OWCP found that appellant’s claim for compensation remained terminated as of February 22, 2011. It found that the weight of the evidence rested with Dr. Meller.

On September 14, 2012 appellant requested a hearing before an OWCP hearing representative, which was held on December 13, 2012. At the hearing, counsel argued that Dr. Meller’s report was inadequate and biased. In a letter dated December 13, 2012, he cited the case of *J.S.*³ as evidence of bias by Dr. Meller.

By decision dated February 26, 2013, OWCP’s hearing representative affirmed the prior decision. The hearing representative found that Dr. Meller represented the weight of the medical evidence with respect to an ongoing employment-related condition or disability on or after February 22, 2011.

² The record contains and April 19, 2012 ME023 appointment schedule notification, with a screen shot indicating that a physician had been bypassed as he was a hand specialist only.

³ Docket No. 10-2198 (issued July 26, 2011).

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.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵ After termination or modification of 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 she had an employment-related disability which continued after termination of compensation benefits.⁶

FECA provides that, if there is a 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 the examination.⁷ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

A claimant who asks to participate in the selection of a referee physician based on an objection to the physician selected, must provide reasons for the request to participate.⁹ Examples of circumstances under which a claimant may participate in the selection of a referee are document bias or unprofessional conduct by the selected physician.¹⁰

ANALYSIS

In the present case, as OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits on February 22, 2011, the burden of proof shifted to appellant to establish continuing residuals.

⁴ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

⁵ *Furman G. Peake*, 41 ECAB 361 (1990).

⁶ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

⁷ 5 U.S.C. § 8123.

⁸ 20 C.F.R. § 10.321 (1999).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(f) (March 2013).

¹⁰ *Id.*

On reconsideration, appellant submitted a January 4, 2012 report from Dr. Mendez regarding appellant's right ankle condition. Dr. Mendez did not begin treating appellant until April 22, 2011, and she indicated that ankle surgery was performed on September 21, 2011 and she believed the surgery and continuing symptoms were employment related. OWCP found that a conflict in the medical evidence was created under 5 U.S.C. § 8123(a) with respect to a continuing employment-related condition and disability.

To select a referee physician, OWCP used a medical management application with a strict rotational scheduling feature.¹¹ It documented the selection of Dr. Meller with an ME023 form and screen shots with respect to bypassed physicians.¹² Appellant raised an objection prior to the examination based on an allegation that Dr. Meller was biased. As noted above, a claimant may participate in the selection if a valid reason is established. However, a general allegation that a physician is biased, without supporting documentation, is not sufficient.¹³ Appellant did not provide any supporting documentation as to bias. After the referee examination and pursuant to a request for a hearing, she referred to the *J.S.* decision,¹⁴ where the claimant did submit specific and supporting documentation as to bias. The Board has held that the reference to the *J.S.* decision after the referee examination does not establish a right to participate in the selection of the referee physician.¹⁵ The Board finds that appellant did not submit any documentation of bias and did not establish the right to participate in the selection of Dr. Meller. On appeal, counsel again argues that OWCP improperly proceeded with the referee examination despite objections. For the reasons noted above, the Board finds appellant had not established a right to participate in the selection of the referee physician.

The above legal precedent indicates that once compensation is properly terminated based on the evidence, the burden to establish continuing wage-loss compensation or medical benefits shifts to the claimant. However, regardless of the burden of proof, when the case is referred to a referee physician, the referee must resolve the issue presented.¹⁶ In this case the issue presented to Dr. Meller was whether appellant had an employment-related condition or disability on or after February 22, 2011. The report from Dr. Meller requires clarification with respect to the issue presented. Dr. Meller does not specifically address the issue of an employment-related disability or condition on or after February 22, 2011. He opines that at that time of his examination on May 16, 2012 the accepted conditions had resolved, without discussing the period commencing February 22, 2011. OWCP cannot base a determination that appellant had

¹¹ *J.G.*, Docket No. 13-965 (issued December 11, 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (March 2013).

¹² *Id.*

¹³ *S.C.*, Docket No. 12-801 (issued January 4, 2013).

¹⁴ Docket No. 10-2198 (issued July 26, 2011).

¹⁵ *See A.H.*, Docket No. 11-2080 (issued July 26, 2012); *see also A.V.*, Docket No. 12-1377 (issued August 16, 2013).

¹⁶ *S.W.*, Docket No. 13-502 (issued June 6, 2013); *Thomas J. Fragale*, 55 ECAB 619 (2004); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(d)(2) (September 2010) (the referee physician's report must actually fulfill the purpose for which it was intended).

no employment-related disability or medical condition on or after February 22, 2011 on the report of Dr. Meller, as he did not address the issue. Moreover, Dr. Meller noted that appellant had symptoms related to the September 21, 2011 ankle surgery, without discussing whether he believed the surgery was employment related. Dr. Mendez had opined that the surgery was employment related. To properly resolve the issue presented, Dr. Meller failed to address the issue of causal relationship between the surgery and the employment injuries.

The case will be remanded to OWCP to properly resolve the issue presented. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that a conflict exists in the medical opinion evidence as to whether appellant had residuals of the accepted condition after February 22, 2011. The case will be remanded to OWCP to resolve the conflict as to whether she established an employment-related disability or condition after February 22, 2011.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 26, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 18, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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