

September 28, 2011 while in the performance of duty, as a result of shooting firearms on that date. The Board notes that appellant had prior claims involving the left arm that have been consolidated with the present claim. Appellant filed an occupational claim (Form CA-2) dated September 1, 2010, alleging that continuous use of the left arm for lifting items such as files and mail buckets had resulted in a left elbow injury. On January 20, 2011 OWCP accepted the claim for a left shoulder bursae and tendon disorder, and left elbow enthesopathy. Appellant also filed a claim for a recurrence of disability (Form CA-2a) on September 8, 2010 from lifting files and mail bins for five years. OWCP developed this incident as a separate occupational claim, and on February 22, 2011 stated that the accepted conditions were: left shoulder impingement syndrome, left lateral epicondylitis, left lateral extensor tendon tear and left elbow tendinitis. The September 8, 2010 claim was designated the master file with respect to the consolidated claims, and appellant began receiving compensation as of November 5, 2010.

In a prior appeal, the Board noted that OWCP had terminated compensation for wage loss effective July 19, 2011. The Board affirmed a June 13, 2012 OWCP decision, finding the medical evidence did not establish continuing disability after July 19, 2011.

By decision dated December 1, 2011, OWCP denied the claim for compensation on the grounds that the medical evidence was insufficient to establish a traumatic injury claim. Appellant requested a hearing before an OWCP hearing representative, which was held on March 13, 2012. The hearing representative stated that an emergency room report established a left elbow strain as causally related to the September 28, 2011 employment incident. In a May 10, 2012 decision, she stated that the December 1, 2011 OWCP decision was reversed. Appellant began receiving wage-loss compensation as of November 14, 2011.

The record indicates that effective April 8, 2012 appellant began working at the employing establishment as a legal assistant. She continued to receive compensation for wage loss, adjusted to reflect her earnings.²

In a report dated July 6, 2012, the attending osteopath, Dr. Laura Ross, provided results on examination and diagnosed status post left elbow sprain with ulnar neuritis. In a form report dated July 19, 2012, she diagnosed left lateral epicondylitis/ulnar neuritis and checked a box “yes” the condition was causally related to using firearms.

In a report dated September 10, 2012, Dr. Ross discussed her treatment of appellant’s condition. She opined: “The trauma and force of the use of her firearm, while qualifying for a firearms test at work on September 28, 2011 directly caused the exacerbation of her underlying lateral epicondylitis of her left elbow, as well as left elbow ulnar neuropathy.” Dr. Ross stated that her findings were based on multiple physical examinations and diagnostic testing.

OWCP prepared a statement of accepted facts with respect to the left arm claims and referred appellant for a second opinion examination by Dr. Stanley Askin, a Board-certified orthopedic surgeon. It requested that Dr. Askin provide an opinion as to whether appellant continued to have a left elbow sprain, whether a left lateral epicondylitis was related to the

² OWCP did not issue a formal wage-earning capacity determination.

September 28, 2011 employment injury, and whether she could perform the corrections officer position.

In a report dated December 21, 2012, Dr. Askin provided a history and results on examination. With respect to the accepted left elbow condition, he stated that a sprain was a partial tear of the ligament. Dr. Askin opined, "There is no description of any condition by record or clinical presentation that suggests that she continues to have a partial tear of a ligament at the left elbow and consequentially that condition is not still present." As to a left lateral epicondylitis, he stated "I do not find any anatomic condition consequential to her work activities." Dr. Askin indicated that appellant had an "intolerance for the nature of her employment" that "is not anatomic, and it is nothing that would respond to interaction by any healthcare provider as her past history has already amply documented." He concluded, "There is no work-related reason to prevent her from performing her regular duties as a correction officer."

By letter dated February 1, 2013, OWCP advised appellant that it proposed to terminate compensation for wage-loss and medical benefits based on the weight of the medical evidence of record. In a letter dated February 11, 2013, appellant's counsel argued that Dr. Ross had maintained that appellant suffered residual disability and should create a conflict with Dr. Askin.

By decision dated March 4, 2013, OWCP terminated compensation for wage-loss and medical benefits effective that date. It found the weight of the medical evidence was represented by Dr. Askin.

Appellant requested a hearing before an OWCP hearing representative, which was held on July 15, 2013. In a report dated May 24, 2013, Dr. Ross stated that she disagreed with the findings of Dr. Askin. She opined that the injury on September 28, 2011 had exacerbated underlying left lateral epicondylitis, and caused left ulnar neuropathy. Dr. Ross stated that appellant continued to have residuals of these work-related conditions.

By decision dated September 18, 2013, the hearing representative affirmed the March 4, 2013 decision. She found that Dr. Askin represented the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

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 or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³

ANALYSIS -- ISSUE 1

In the present case, the only accepted condition with respect to the September 28, 2011 employment incident was a left elbow strain. In this regard, the Board notes that Dr. Ross had diagnosed status post left elbow "sprain" in her July 6, 2012 report, and the question posed to Dr. Askin referred to the accepted condition as a left elbow sprain. The diagnoses are similar but

³ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

not identical, as a “strain” refers to a muscle or tendon, while a “sprain” refers to a ligament, as noted by Dr. Askin.⁴ In this case the evidence indicates that, whether identified as a strain or sprain, the accepted condition had resolved as of March 4, 2013. As noted, Dr. Ross refers to a left elbow sprain as “status post” in her July 6, 2012 report, and her September 10, 2012 report provides other diagnoses that will be discussed below. Dr. Askin clearly found no continuing left elbow strain or sprain, and his report indicated that he found no physical condition related to the September 28, 2011 employment injury.

Based on the probative evidence of record, the Board finds that OWCP met its burden of proof to terminate compensation based on the accepted left elbow strain/sprain. On appeal, appellant argues that Dr. Askin was not provided a proper background. However, the statement of accepted facts was detailed in discussing all of the left elbow injury claims and states that the September 28, 2011 injury was due to firing firearms. There is no evidence that Dr. Askin lacks a proper background to render a decision on the issue presented.

LEGAL PRECEDENT -- ISSUE 2

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 he had an employment-related disability which continued after termination of compensation benefits.⁵

ANALYSIS -- ISSUE 2

The attending physician, Dr. Ross, has opined in her reports of November 10, 2011 and May 15, 2013 that the September 28, 2011 employment injury caused aggravation of left lateral epicondylitis and ulnar neuritis. Her opinion was based on examination and electromyography and other test results. The second opinion physician, Dr. Askin, opined in his report dated December 21, 2012 that appellant did not have any continuing employment-related physical conditions. He indicated that his opinion was based on the examination results and review of the medical evidence.

The Board finds that a conflict in the medical evidence exists with respect to whether appellant has established a left lateral epicondylitis or ulnar neuritis as causally related to the September 28, 2011 employment injury.⁶ If there are additional employment-related conditions, this raises the issues of whether there continued to be an employment-related condition or

⁴ See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (1988).

⁵ *Talmadge Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

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. 5 U.S.C. § 8123(a). 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321(b).

disability after March 4, 2013. Appellant had returned to a light-duty job, but until March 4, 2013 was still receiving wage-loss compensation adjusted for her actual earnings. The case will be remanded to OWCP to resolve the conflict in accord with established procedures for resolving conflicts under 5 U.S.C. § 8123(a). After such further development as OWCP deems necessary, it should issue an appropriate decision with findings as to whether there are additional employment-related conditions and whether there was an employment-related disability after March 4, 2013.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate compensation on March 4, 2013 based on the accepted condition. The case is remanded to OWCP to resolve a conflict with respect to whether appellant had a continuing employment-related condition or disability after March 4, 2013.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 18, 2013 is affirmed with respect to termination of compensation for the accepted condition, and is set aside and remanded with respect to a continuing employment-related condition or disability after March 4, 2013.

Issued: August 17, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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