



has met her burden of proof to establish any continuing disability or medical residuals on or after July 15, 2014.

On appeal counsel argues that OWCP failed to meet its burden of proof to terminate appellant's benefits as there was an unresolved conflict of medical opinion evidence.

### **FACTUAL HISTORY**

This case has previously been before the Board<sup>3</sup> the facts and circumstances set forth the Board's prior decisions are incorporated herein by reference, the facts relevant to the present appeal are set forth below. On March 7, 1993 appellant, then a 26-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she jumped from the back of a trailer, missed the loading dock, and landed on the concrete floor fracturing both ankles. OWCP accepted her claim for bilateral ankle fractures on April 30, 1993 and authorized her surgeries.

On March 7, 1993 appellant underwent left ankle open reduction with internal fixation. She returned to modified work on June 1, 1993. Appellant claimed a recurrence of disability (Form CA-2) on November 17, 1993. On November 23, 1993 she underwent additional surgery due to delayed union of the left ankle fibula with shift of mortis and failure of implant. Dr. Mark Reiger, a Board-certified orthopedic surgeon, performed surgical removal of her implant, iliac bone graft, open reduction, and internal fixation with reconstruction of the deltoid ligament. Appellant returned to part-time light-duty work on June 6, 1994 and full duty on March 28, 1996.

Appellant filed a claim for a schedule award (Form CA-7). OWCP granted her a schedule award for nine percent permanent impairment of her left leg on May 8, 1998. On April 20, 1999 it granted a schedule award for an additional one percent impairment of appellant's left lower extremity. By decision dated April 4, 2000, OWCP granted her a schedule award for an additional 30 percent impairment of her left lower extremity. Through a decision dated April 2, 2004, it determined that appellant had no more than 40 percent permanent impairment of her left lower extremity for which she had received schedule awards.<sup>4</sup> Appellant appealed this decision to the Board and, by decision dated January 7, 2005,<sup>5</sup> the Board affirmed OWCP's finding that she had no more than 40 percent permanent impairment of her left lower extremity. The facts and circumstances as set forth in that case are adopted herein by reference.

On March 13, 2002 appellant sought treatment from Dr. David S. Levine, a Board-certified orthopedic surgeon. He noted her history of injury and surgical treatment. Dr. Levine reviewed appellant's left ankle x-rays and found evidence of broken hardware consistent with her surgeries. He found that her ankle joint itself clearly demonstrated some subtle effects of trauma including subtle irregularities along the medial dome, the lateral dome, and the plafond. Dr. Levine found that appellant's subtalar joint also appeared to be narrowed. He suggested a

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<sup>3</sup> Docket No. 04-1877 (issued January 7, 2005).

<sup>4</sup> On June 13, 2001 OWCP noted that it was attempting to reconstruct appellant's file and requested all correspondence and medical records from the employing establishment.

<sup>5</sup> *Supra* note 3.

diagnosis of possible ankle joint arthritis and subtalar arthritis. Appellant underwent a left ankle arthrogram on August 21, 2002. This test demonstrated mild degenerative changes in the tibiotalar joint space.

Dr. Levine examined appellant on September 25, 2002 and reviewed x-rays, which he found were consistent with mild peripheral osteoarthritis. Appellant underwent a second left ankle arthrogram on October 2, 2002. She underwent a third left ankle arthrogram with injection with steroid and anesthetic on September 17, 2003. In a note dated October 29, 2003, Dr. Levine reviewed appellant's x-rays and found screws and plates along her distal fibula with early changes of arthritis in both the ankle joint as well as the subtalar joint. On October 20, 2004 he found that her x-rays demonstrated the presence of osteophytes and narrowing along the anterior and posterior aspects of her ankle joint as well as a varus position of the hindfoot.

Appellant filed a recurrence (Form CA-2a) on April 22, 2010 and alleged that, due to her March 7, 1993 employment injuries, she could only stand for one hour at a time. She stopped work on that date. Appellant accepted a modified assignment on April 23, 2010. She filed claims for compensation (Form CA-7) due to intermittent periods of disability. OWCP accepted appellant's claimed recurrence of disability on June 29, 2010 and authorized wage-loss compensation through the supplemental rolls until September 13, 2010. Thereafter she returned to light-duty work, but had intermittent periods of disability when light-duty work was not available.

In notes dated May 10, July 13, and September 20, 2010, Dr. Sheldon S. Lin, a Board-certified orthopedic surgeon, diagnosed left ankle arthritis following her surgery. He found that appellant had 0 degrees of dorsiflexion and 30 degrees of plantar flexion. Dr. Lin reviewed her computerized tomography scan of the left ankle findings mild osteoarthritis in the medial gutter of the left ankle. He opined that this was latent effect of trauma status post open-reduction and internal fixation.

On August 30, 2011 the employing establishment removed appellant's light-duty position. On September 30, 2011 OWCP accepted a recurrence of disability and was paid compensation on the supplemental rolls until July 16, 2013 when she was placed on the periodic rolls.

OWCP referred appellant for a second opinion evaluation with Dr. Mark Berman, a Board-certified orthopedic surgeon on September 30, 2013. It provided him with a statement of accepted facts, which included her treatment with Drs. Levine and Lin. In a report dated October 7, 2013, Dr. Berman described appellant's history of injury and medical history. He noted that she was morbidly obese with chronic pain in her ankles bilaterally and difficulty walking. Dr. Berman found chronic venous stasis ulcer changes in the bilateral lower extremities and "massive edema bilaterally in the ankles." He attributed appellant's antalgic gait to her obesity. Dr. Berman opined that her left ankle fracture had completely healed and that she had reached maximum medical improvement. He concluded, "Clearly, at this time [appellant's] disability is related to her obesity and not to the fractures that she sustained." Dr. Berman also found that, based on review of Dr. Levine's records, appellant had developed tibiotalar or subtalar arthritis. He found that she was disabled due to her morbid obesity and unable to return to work. Dr. Berman opined that, "[Appellant] would have to undergo a massive weight

reduction plan to see if her pain is relieved, but clearly there would be no way to specifically state whether [her] arthritis at this point is a result of post[-]traumatic arthritis vs. arthritis as a result of severe obesity.”

OWCP requested Dr. Lin to comment on Dr. Berman’s report by letter dated November 12, 2013. Dr. Lin did not respond.

Because Dr. Berman could not explain whether appellant’s arthritis was post-traumatic or a result of her severe obesity, on February 6, 2014 OWCP referred her for another second opinion examination with Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon. In Dr. Lakin’s February 24, 2014 report, he described her history of injury and continuing left ankle pain especially with weather changes. He noted appellant’s medical treatment including both surgeries and injections on the left. Dr. Lakin listed the medical evidence provided for his review, including those of Dr. Levine and Dr. Lin. He reported that appellant had chronic swelling in both ankles and found venous stasis changes in her lower extremities. Dr. Lakin listed her right ankle range of motion as 5 degrees of dorsiflexion, 30 degrees of plantar flexion, and less than 10 degrees of inversion and eversion. On the left appellant exhibited 0 to 5 degrees of dorsiflexion, 0 to 30 degrees of plantar flexion, as well as eversion, and inversion of less than 10 degrees. Neither ankle had instability or osseous tenderness. Dr. Lakin found that appellant had full motor strength in her ankles. He responded to OWCP’s questions and opined that she had no disabling residuals of the trimalleolar fracture on the left or of the fractured medial malleolus on the right. Dr. Lakin found that appellant did not require further medical treatment. He determined that she was disabled due to obesity as she was 5’2” and weighed 360 pounds. Dr. Lakin specified that appellant’s modified work abilities were not due to her accepted employment injuries, but due to her morbid obesity.

On June 11, 2014 OWCP proposed to terminate appellant’s medical benefits and wage-loss compensation based on Dr. Lakin’s report. It allowed her 30 days to respond. Counsel responded on July 8, 2014 and asserted that Dr. Lakin had failed to provide medical reasoning in support of his conclusion that appellant had no ongoing residuals of her accepted conditions. He submitted a report dated July 5, 2014, from Dr. Gary L. Quartello, a podiatrist. Dr. Quartello reported that he had treated appellant for years and noted that she had experienced post-traumatic arthritis changes in her ankle. He noted, “I personally feel [appellant’s] situation is a combination problem of arthritis, a certain amount of instability, and balance due to the resultant skeletal formation post-trauma and her weight.”

In a decision dated July 15, 2014, OWCP terminated appellant’s medical benefits and wage-loss compensation effective that date. It found that the weight of the medical evidence rested with Dr. Lakin.

On July 21, 2014 counsel requested an oral hearing from OWCP’s Branch of Hearings and Review. During the hearing held on February 17, 2015, appellant testified that in 1993 she broke her left ankle and sustained a hairline fracture of her right. She described her two left ankle surgeries with grafts and screws and subsequent left ankle treatment and current symptoms. Appellant asserted that she had limited range of motion due to her hardware and arthritis. She attributed her weight gain to her sedentary lifestyle due to her ankle injury.

By decision dated April 30, 2015, OWCP's hearing representative found OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 15, 2014. She found that Dr. Lakin's report was entitled to the weight of the medical evidence and established that appellant's employment-related residuals and disability had ended.

Counsel requested reconsideration on October 14, 2015 and submitted pages 6, 7, and 8 of a report dated July 20, 2015 from Dr. Arthur Becan, an orthopedic surgeon, in support of this request.

In a decision dated January 7, 2016, OWCP denied modification of the April 30, 2015 decision. It reviewed the three pages of Dr. Becan's report and found that it was not sufficiently well-reasoned to establish causal relationship between appellant's accepted employment injury and the alleged disabling conditions of bilateral ankle arthropathy.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim, it has the burden of proof to establish that disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>6</sup> 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 has ceased or that it is no longer related to the employment.<sup>7</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits and wage-loss compensation effective July 15, 2014.

OWCP accepted appellant's claim for bilateral ankle fracture and authorized two surgeries on her left ankle. Appellant submitted medical evidence from Drs. Levine and Lu supporting that she developed traumatic osteoarthritis in her left ankle as a result of her accepted employment injuries. OWCP referred her to Dr. Berman for a second opinion evaluation on October 7, 2013 regarding appellant's ongoing disability and medical residuals. Dr. Berman reviewed appellant's medical history and performed a physical examination on October 7, 2013. He expressly noted that there was no way for him to specifically opine whether her left ankle arthritis was the result of post-traumatic arthritis due to her ankle fracture and surgeries, or arthritis as a result of severe obesity.

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<sup>6</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>7</sup> *Id.*

<sup>8</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>9</sup> *Id.*

OWCP procedures provide that if a second opinion report is equivocal, lacks rationale or fails to address the specified medical issues, the claims examiner should seek clarification or further rationale for that physician.<sup>10</sup> It is required to seek clarification from the second opinion physician and request a supplemental report to clarify inadequacies in the initial report.<sup>11</sup> Only if the second opinion physician does not respond or does not provide a sufficient response after being asked should the claims examiner request scheduling with another physician.<sup>12</sup>

Following the receipt of Dr. Berman's report, OWCP did not request a supplemental report from Dr. Berman and did not further develop the issue of whether appellant's arthritis was caused or contributed to by her accepted employment injuries. The Board finds that OWCP failed to properly develop the medical evidence in keeping with its procedures.

OWCP subsequently requested another second opinion report from Dr. Lakin regarding appellant's ongoing medical residuals and disability from work. Dr. Lakin determined in his February 24, 2014 report, that her accepted employment conditions had resolved with no medical residuals and no work-related disability. He did not address the findings of post-traumatic arthritis in by Drs. Levine, Lu, and Berman, although he specifically mentioned reviewing these reports as well as noting appellant's complaints of increased pain in the left ankle with weather changes. Based on this report from Dr. Lakin, OWCP terminated her medical compensation and wage-loss benefits.

The Board finds that, due to OWCP's failure to adequately develop the medical evidence submitted by Dr. Berman, the initial second opinion physician, OWCP has not adequately developed appellant's claim and has not met its burden of proof to terminate appellant's medical benefits and wage-loss compensation. It is well established that proceedings under FECA are not adversarial in nature and that while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.<sup>13</sup> As it failed to follow its procedures to request a supplemental report from Dr. Berman, OWCP cannot rely on Dr. Lakin's second opinion report to terminate appellant's medical benefits and wage-loss compensation.<sup>14</sup>

The Board finds that OWCP has failed to meet its burden of proof to terminate appellant's medical benefits and wage-loss compensation effective July 15, 2014.

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<sup>10</sup> *B.B.*, Docket No. 16-0734 (issued October 19, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (September 2010).

<sup>11</sup> *Id.*, see also *Ayanle A. Hashi*, 56 ECAB 234 (2004).

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

<sup>14</sup> *Supra* note 10.

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits and wage-loss compensation effective July 15, 2014.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 7, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 7, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board