

causally related to her accepted August 3, 2018 employment injury; and (2) whether appellant has met her burden of proof to establish continuing residuals or disability, on or after February 14, 2019, causally related to her accepted August 3, 2018 employment injury.

FACTUAL HISTORY

On August 3, 2018 appellant, then a 56-year-old city carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on even date she injured her left ankle and right knee when she fell down steps while in the performance of duty. She stopped work on that date. On September 12, 2018 OWCP accepted appellant's claim for left ankle sprain.

Appellant was first paid wage-loss compensation on the supplemental rolls on October 19, 2018. She remained on the supplemental rolls through February 14, 2019.

On December 7, 2018 Dr. Peter Strassberg, a Board-certified internist, found that appellant had mild tenderness in her left ankle and foot, but no significant swelling. He noted that her left ankle intermittently collapsed and that she was unable to return to her date-of-injury position carrying up to 70 pounds.

On December 28, 2018 Dr. Strassberg examined appellant and reported limited range of motion, slight tenderness, and no swelling in her left ankle. He found that she was capable of performing light-duty work, but could not perform heavy lifting or very heavy work. Dr. Strassberg opined that appellant's left ankle would give way if she had to perform significant walking with a heavy sack.

On January 3, 2019 OWCP referred appellant, a statement of accepted facts, and a list of questions to Dr. Andrew Farber, an osteopath specializing in orthopedic surgery, for a second opinion evaluation.

On January 4, 2019 Dr. Strassberg noted limited range of motion, slight tenderness, and slight swelling in appellant's left ankle. He opined that appellant's ankle was "not as steady as it could be." Dr. Strassberg found that she could not lift more than 25 pounds due to her left ankle instability.

In a January 31, 2019 report, Dr. Farber noted appellant's history of injury and listed the duties of her date-of-injury position, including carrying a mailbag weighing up to 35 pounds, walking and standing outside in all weather and lifting sacks or parcels weighing up to 70 pounds. He noted that she reported 10/10 pain in the left ankle both with and without movement. On physical examination Dr. Farber found that appellant's left ankle had no swelling or tenderness to palpation. He reported no gross instability. Dr. Farber found that appellant's strength was normal. He noted no objective or subjective findings on physical examination. Dr. Farber opined that appellant's work-related condition had resolved, but that she had not reached maximum medical improvement. He determined that she could return to her date-of-injury job with no restrictions.

By decision dated February 15, 2019, OWCP terminated appellant's wage-loss compensation effective February 9, 2019.³

OWCP subsequently received a February 27, 2019 treatment note indicating Dr. Strassberg's findings of slight tenderness in appellant's ankle and foot, with full range of motion and no swelling. Dr. Strassberg opined that she could not return to full duty as she had difficulty walking on an uneven surface with heavy weights.

In a March 6, 2019 note, Dr. Andrew M. Somberg, a Board-certified orthopedic surgeon, noted appellant's history of injury on August 3, 2018 and diagnosed sprain of the left ankle. He reported that she could perform sedentary work with no lifting over 15 pounds.

On March 22, 2019 appellant underwent a left ankle magnetic resonance imaging (MRI) scan which demonstrated small tibiotalar joint effusion with mild-to-moderate chondral fissuring and subchondral edema in the distal tibia and talar dome or high-grade tendinosis of the distal posterior tibialis tendon with focal edema, tibiotalar chondromalacia, and moderate tarsal metatarsal joint degenerative changes.

On May 14, 2019 Dr. Somberg examined appellant and reviewed her MRI scan. He diagnosed sprain of the left ankle and found that she could perform sedentary work lifting no more than 15 pounds.

On March 5, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She alleged that she was still experiencing pain and tenderness in her left ankle and was unable to return to full-duty work. During the June 24, 2019 hearing, appellant testified that she had not returned to work.

By decision dated August 8, 2019, OWCP's hearing representative found that the weight of the medical evidence rested with Dr. Farber's January 17, 2019 report which established that appellant could resume full-duty work. He further found that pretermination notice was not necessary as she was on the supplemental rolls for less than one year. OWCP's hearing representative determined that the date of the termination was February 14, 2019 and modified OWCP's February 15, 2019 decision to reflect that date.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.⁴ 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.⁵ Its burden of proof includes the necessity of furnishing rationalized medical

³ This decision supersedes OWCP's February 7, 2019 decision which did not contain appeal rights.

⁴ *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁵ *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

opinion evidence based on a proper factual and medical background.⁶ OWCP is not required to provide pretermination notice when a claimant has been on the supplemental rolls for less than one year.⁷

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.⁸ 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.⁹ When there exists opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective February 14, 2019.

OWCP accepted appellant's August 3, 2018 traumatic injury claim for left ankle sprain. It authorized wage-loss compensation benefits beginning September 18, 2018.

Appellant provided a series of reports from Dr. Strassberg dated through January 4, 2019, noting findings on physical examination including limited range of motion, slight tenderness, and slight swelling in appellant's left ankle. Dr. Strassberg found that she could not return to full-duty work.

OWCP referred appellant for a second opinion evaluation with Dr. Farber, and in his January 31, 2019 report, he reported no swelling or tenderness to palpation on physical examination of her left ankle. Dr. Farber further reported no gross instability and normal strength. He found that appellant's work-related condition had resolved, but that she had not reached maximum medical improvement. Dr. Farber determined that she could return to her date-of-injury job with no restrictions.

Appellant's treating physician and OWCP's second opinion physician disagreed regarding her findings on physical examination and on her ability to return to full-duty work. As such, the Board finds that a conflict of medical opinion exists relative to this issue. OWCP should have

⁶ *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(a)(3) (February 2013).

⁸ 5 U.S.C. § 8123(a); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

⁹ 20 C.F.R. § 10.321; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

¹⁰ *A.E.*, *supra* note 8; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

resolved the conflict of medical opinion evidence before terminating compensation.¹¹ As it failed to resolve the conflict of medical opinion evidence, the Board finds that it failed to meet its burden of proof to terminate appellant's wage-loss compensation.¹²

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective February 14, 2019.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 4, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.