

On appeal appellant's counsel argued that OWCP erred in failing to follow the Board's remand instructions. Appellant contends that OWCP failed to consider the new evidence submitted with her reconsideration request.

FACTUAL HISTORY

This case has previously been before the Board. In an October 23, 2012 decision, the Board set aside an October 7, 2011 OWCP decision denying reconsideration.² The Board found that appellant submitted pertinent new and relevant evidence and advanced a relevant legal argument not previously considered. The Board remanded the case to OWCP to conduct a merit review as to whether it met its burden of proof to terminate appellant's compensation and to consider the new evidence that had been submitted with her request. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.³

In progress notes and treatment reports submitted following appellant's placement on the periodic rolls, Dr. James Clancy, a treating podiatrist, listed physical findings and diagnosed left foot complex regional pain syndrome. He concluded that appellant was totally disabled for work due to her employment injuries.

On August 20, 2009 appellant was referred for a second opinion evaluation with Dr. Peter Millheiser, a Board-certified orthopedic surgeon, to determine her work capability. On September 2, 2009 Dr. Millheiser found that appellant no longer had any residuals or disability due to the accepted conditions. He noted the lack of supporting objective evidence.

On October 7, 2009 Dr. Gary Richman, a treating physician, conducted an initial consultation and diagnosed left foot and ankle neuritis and possible left foot complex regional pain syndrome type 1. In subsequent reports, he found that appellant had sensitivity to light touch over the lateral aspect of her left foot, no edema or skin color changes. On February 3 and March 25, 2010 Dr. Richman diagnosed left foot complex regional pain syndrome type 1 and left ankle and foot neuritis.

OWCP found a conflict in medical opinion between Dr. Millheiser, an OWCP referral physician, and Drs. Clancy and Richman, appellant's treating physicians, on the issue of whether her accepted employment injury had resolved. On February 5, 2010 it referred appellant to Dr. Steven E. Naide, a Board-certified orthopedic surgeon, selected as the impartial medical referee.

In a March 15, 2010 report, Dr. Naide reviewed the medical record, a statement of accepted facts and the list of submitted questions. He provided findings on physical examination

² Docket No. 12-1057 (issued October 23, 2012).

³ On October 27, 2006 appellant, then a 46-year-old transportation screener, filed a traumatic injury claim alleging that on October 5, 2006 she injured her left foot when another employee lost his footing, fell backwards and landed on appellant's left foot. OWCP accepted the claim for left foot and ankle crushing injury, which was subsequently expanded to include left lower limb reflex sympathetic dystrophy. Appellant stopped work on October 15, 2006 and has not returned. By letter dated September 9, 2008, OWCP placed appellant on the periodic rolls for temporary total disability.

and diagnosed status post crush left foot injury, rule out complex regional pain syndrome and healed left 2nd and 3rd metatarsal fractures. In response to the questions posed by OWCP, he noted the accepted diagnoses of metatarsal fractures, foot and ankle reflex sympathetic dystrophy, foot and ankle pain and left foot crush injury. Dr. Naide found that the metatarsal fractures and crush injury had clearly healed and there was no objective continuing evidence to support a diagnosis of reflex sympathetic dystrophy. He found that appellant had no disability or residuals due to her accepted employment conditions based on the lack of objective findings. Dr. Naide noted that appellant's subjective complaints of pain outweighed the objective findings. The examination showed no evidence of any continuing residuals of left lower extremity reflex sympathetic dystrophy. Dr. Naide related that there were no signs of any atrophy, skin color or temperature changes on physical examination and a magnetic resonance imaging (MRI) scan showed no patchy osteoporosis. A December 2008 bone scan was equivocal for reflex sympathetic dystrophy.

In a supplemental November 22, 2010 report, Dr. Naide reviewed an August 4, 2010 bone scan. He stated that it was not consistent with reflex sympathetic dystrophy. Dr. Naide determined that appellant did not have any ongoing left foot reflex sympathetic dystrophy.

On February 11, 2011 Dr. Richman provided physical findings and diagnosed left foot complex regional pain syndrome type 1 and left ankle and foot neuritis. Appellant was released to sedentary work with activities as tolerated.

By decision dated March 24, 2011, OWCP terminated appellant's wage-loss compensation and medical benefits, effective March 25, 2011. It found that her employment-related conditions resolved without residuals.

On September 16, 2011 appellant's counsel requested reconsideration and submitted a medical report in support of her request. He contended that OWCP erred in relying on Dr. Naide's opinion as it was speculative and unsupported by objective evidence.

On September 11, 2011 Dr. Richman reviewed Dr. Naide's report and disagreed with his conclusions. He stated that the physical findings of Dr. Naide were not representative of appellant's condition as it was conducted shortly after appellant had the third in a series of lumbar sympathetic nerve blocks. Dr. Richman stated that patients with complex regional pain syndrome had lesser symptomology after such blocks. He noted this was consistent with his findings on examination following the blocks. Dr. Richman related that the negative bone scans did not rule out complex regional pain syndrome while a positive triple phase bone scan had indicated the possibility of such a condition. He stated that appellant continued to exhibit findings consistent with complex regional pain syndrome including discoloration, restricted motion and swelling. As a result of her condition appellant was restricted to sedentary work.

By decision dated February 28, 2013, OWCP denied modification of the termination decision. It found that Dr. Naide's opinion supported termination of her benefits. OWCP reviewed Dr. Richman's report, which it found to be speculative and insufficient to outweigh the special weight accorded to Dr. Naide as the impartial medical examiner.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁴ After it has determined that an employee has disability causally related to her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

Section 8123(a) of FECA provides in pertinent part: 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 who shall make an examination.⁹ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹⁰

ANALYSIS

OWCP accepted the claim for left foot and ankle crushing injury and left lower limb reflex sympathetic dystrophy. On March 24, 2011 it terminated appellant's compensation benefits effective March 25, 2011 based on the opinion of the impartial medical examiner, Dr. Naide. The issue to be determined is whether OWCP met its burden of proof to terminate appellant's compensation benefits.

OWCP relied on the August 20, 2010 medical opinion of Dr. Naide, a Board-certified orthopedic surgeon, who was selected to resolve the conflict in the medical opinion evidence between Dr. Millheiser, an OWCP referral physician, and Drs. Clancy and Richman, appellant's treating physicians. Drs. Clancy and Richman, appellant's treating physicians, opined that appellant continued to suffer from residuals from her accepted October 5, 2006 employment injury. Dr. Millheiser, an OWCP referral physician, disagreed with Drs. Clancy and Richman

⁴ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *Kathryn E. Demarsh*, *supra* note 7; *James F. Weikel*, 54 ECAB 660 (2003).

⁹ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁰ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

and opined that appellant no longer had any residuals or disability due to the accepted employment injury. Thus, there was a conflict of medical opinion evidence between appellant's physicians and OWCP's referral physician on the issues of medical residuals and disability. OWCP properly referred appellant to Dr. Naide to resolve the conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

On March 15, 2010 Dr. Naide, based upon a physical examination, statement of accepted facts and review of the medical and factual histories, concluded that appellant no longer had any residuals from her accepted employment injury. He stated that the metatarsal fractures and crush injury had clearly healed and there was no objective evidence supporting a diagnosis of reflex sympathetic dystrophy. Dr. Naide found appellant had no disability or residuals due to her accepted employment conditions based on the lack of any objective findings. He stated that his examination showed no evidence of any continuing residuals of left lower extremity reflex sympathetic dystrophy. In support of this conclusion, Dr. Naide related that there were no signs of any atrophy, skin color or temperature changes on physical examination, an MRI scan showed no patchy osteoporosis and a December 2008 bone scan was equivocal for reflex sympathetic dystrophy. In a supplemental November 22, 2010 report, he reviewed an August 4, 2010 triple phase bone scan, which he related was not consistent with reflex sympathetic dystrophy. Thus, Dr. Naide opined that appellant did not have any ongoing left foot reflex sympathetic dystrophy.

The Board finds Dr. Naide had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Naide is a specialist in the appropriate field. At the time benefits were terminated, he clearly opined that appellant had no work-related reason for disability. Dr. Naide's opinion as set forth in his report of March 15, 2010 and November 22, 2010 supplemental report found to be probative evidence and reliable. The Board finds that Dr. Naide's opinion constitutes the special weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted conditions of left foot and ankle crushing injury and left lower limb reflex sympathetic dystrophy had ceased.

Prior to the termination of her compensation benefits, appellant submitted a February 11, 2011 report from Dr. Richman diagnosing left foot complex regional pain syndrome type 1 and left ankle and foot neuritis. No rationale was given by Dr. Richman for continued employment-related residuals and disability. As he was on one side of a conflict which was resolved by Dr. Naide and his report does not otherwise provide new findings or medical rationale, Dr. Richman's February 11, 2011 report is insufficient to establish that there are any continuing conditions or residuals due to the accepted October 5, 2006 work injury.¹¹

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury.¹²

¹¹ See *I.J.*, 59 ECAB 408 (2008); *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹² See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

ANALYSIS -- ISSUE 2

Following OWCP's March 24, 2011 decision terminating her compensation benefits, appellant's counsel requested reconsideration and submitted a September 11, 2011 report from Dr. Richman. In his report, Dr. Richman noted his disagreement with Dr. Naide's conclusion and opined that appellant continued to have residuals and disability due to her complex regional pain syndrome. The Board has long held that reports from a physician, who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹³ Dr. Richman had been on one side of the conflict resolved by Dr. Naide.

Thus, the Board finds that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between her condition on and after March 25, 2011 and the accepted left foot and ankle crushing injury and left lower limb reflex sympathetic dystrophy. Therefore, appellant has failed to meet her burden of proof.

On appeal appellant's counsel argues that OWCP did not follow the Board's instructions on remand and failed to consider the new evidence submitted with her reconsideration request. Contrary to appellant's contentions, OWCP reviewed both her argument and the September 11, 2011 report from Dr. Richman. It found Dr. Richman's report to be speculative and insufficient to create a new conflict with Dr. Naide. OWCP also addressed and rejected appellant's arguments that Dr. Naide's report was speculative and insufficient to constitute the weight of the evidence.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits and that appellant has failed to meet her burden of proof in establishing any continuing disability or medical residuals on or after March 25, 2011.

¹³ See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 28, 2013 is affirmed.

Issued: January 10, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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