

**United States Department of Labor
Employees' Compensation Appeals Board**

B.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Alexandria, VA, Employer**

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**Docket No. 13-1257
Issued: November 7, 2013**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 1, 2013 appellant, through his attorney, filed a timely appeal from an April 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he was totally disabled for work from July 27, 2009 to August 12, 2011 causally related to accepted bilateral plantar fasciitis.

On appeal, counsel asserts that all physicians of record supported that the accepted bilateral plantar fasciitis is ongoing, requiring permanent work restrictions. He contends that the employing establishment did not offer appellant work within his medical restrictions on and after July 27, 2009. Counsel also argues that the impartial medical examiner's report is insufficiently rationalized to represent the weight of medical opinion.

¹ 5 U.S.C. §§ 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before September 29, 2005 appellant, then a 42-year-old letter carrier, sustained bilateral plantar fasciitis, bilateral plantar fibromatosis and bilateral calcaneal spurs. It also accepted an aggravation of bilateral plantar fasciitis in 2009.²

Dr. Sheldon I. Laps, an attending podiatrist, treated appellant for chronic bilateral plantar fasciitis beginning on October 1, 2007. Appellant was released to part-time light duty on March 29, 2008.³ Beginning on April 15, 2008, he performed modified duty, delivering mail for four hours a day. Appellant received wage-loss compensation benefits for intermittent work absences prior to July 24, 2009, when he stopped work and did not return.⁴

In a July 30, 2009 report, Dr. Vincent Desiderio, an attending Board-certified orthopedic surgeon, noted appellant's four-year history of bilateral foot and ankle pain. X-rays demonstrated pes planus with heel spurs bilaterally. Dr. Desiderio diagnosed bilateral plantar fasciitis with probable posterior tibial tendinitis on the right. He held appellant off work through September 1, 2009.⁵ In a September 30, 2009 report, Dr. Desiderio opined that appellant's chronic bilateral plantar fasciitis with heel spurs was aggravated by "carrying a significantly heavy pack and walking on an uneven surface for several hours." He submitted periodic reports through April 15, 2010 holding appellant off work and recommending arch supports.

Appellant claimed compensation for total disability from July 27, 2009 to April 9, 2010.

In a March 19, 2010 report, Dr. Paul M. Taylor, an attending podiatrist, noted that appellant "attempted to return to work at various times over the past five years; however, on resuming" full duty he developed acute bilateral foot pain and could not continue working. He recommended a position that did not require prolonged walking or standing. On examination, Dr. Taylor noted tenderness in the arch and plantar aspects of both feet. He recommended soft orthotics. Dr. Taylor released appellant from care on March 31, 2010.

On May 24, 2010 OWCP obtained a second opinion from Dr. Robert Smith, a Board-certified orthopedic surgeon, who opined that appellant had congenital pes planus. Dr. Smith diagnosed mild plantar fasciitis with associated calcaneal spur. He opined that with appropriate

² By notice dated June 3, 2009, finalized July 24, 2009 and affirmed on February 1, 2010 under File No. xxxxxx936, OWCP terminated appellant's entitlement to wage-loss compensation benefits on the grounds that the medical evidence established he was no longer totally disabled for work, based on Dr. Robert Draper's opinion as the weight of the medical evidence. *See infra* note 4. On March 3, 2010 OWCP doubled File No. xxxxxx366 with File No. xxxxxx936, using xxxxxx936 as the master claim number. Following the doubling of appellant's claims, OWCP harmonized the various issues involved and no longer treated the termination as dispositive.

³ In a March 13, 2009 report, Dr. Didace Kabatsi, an attending internist, limited appellant to working four hours a day light duty.

⁴ On September 25, 2008 OWCP obtained a second opinion from Dr. Robert Draper, a Board-certified orthopedic surgeon, who found appellant able to perform full duty as a letter carrier.

⁵ A September 1, 2009 magnetic resonance imaging (MRI) scan of the right foot and ankle showed mild plantar fasciitis with mild degenerative changes at the right calcaneocuboid joint.

shoes and orthotics, appellant “should be able to return to regular duty work.” Dr. Smith found that there was “clearly no need for total disability from July 30, 2009” onward.

By decision dated June 8, 2010, OWCP denied appellant’s claim for wage-loss compensation commencing July 27, 2009 as Dr. Smith’s opinion established that the accepted plantar fasciitis did not cause total disability for work during the claimed period.

In a June 24, 2010 letter, counsel requested a telephonic hearing, held on September 27, 2010. Following the hearing, counsel submitted a September 27, 2010 statement asserting that Dr. Smith’s report was insufficiently rationalized to represent the weight of the medical evidence. Appellant submitted May 27 and July 27, 2010 chart notes from Dr. Desiderio, noting that appellant could have returned to light duty a few months prior to May 2010. He also provided October 13 and 26, 2010 reports from Dr. Taylor recommending orthotics.

By decision dated and finalized November 18, 2010, an OWCP hearing representative set aside the June 8, 2010 decision finding a conflict of medical opinion between Drs. Desiderio and Taylor, for appellant, and Dr. Smith, for the government, regarding the nature and extent of any continuing disability related to the accepted conditions. The hearing representative remanded the case for referral to an impartial medical examiner.

OWCP selected Dr. David C. Johnson, a Board-certified orthopedic surgeon, as the impartial medical examiner. Dr. Johnson submitted a March 28, 2011 report reviewing the medical record and statement of accepted facts. On examination, he noted mild tenderness in the soles of both feet, minimal bilateral heel spurs, no osteoarthritis, and no inflammation suggestive of plantar fasciitis. Dr. Johnson diagnosed “[c]onstitutional flatfeet with a temporary symptomatic aggravation of plantar fasciitis from 2005, re-aggravated in 2009.” He disagreed with Dr. Desiderio that appellant was totally disabled for work beginning on July 30, 2009 as there was no indication “of any pathology of such objective severity that would preclude” light-duty work. Dr. Johnson opined that appellant’s “total disability probably ceased after the first month, and he was capable of returning to at least light-duty work thereafter (both from the 2005 incident and the 2009 re-aggravation).” He permanently limited walking and standing to four hours a day. Dr. Johnson commented that appellant would benefit from orthotics.

Appellant separated from the employing establishment effective February 25, 2011. On August 15, 2011 he claimed wage-loss compensation for total disability from April 10, 2010 to August 12, 2011.

In a June 16, 2011 decision, OWCP denied wage-loss compensation on and after July 27, 2009. By decision dated August 3, 2011, an OWCP hearing representative set aside OWCP’s June 16, 2011 decision and remanded the case for further development. By decision dated August 19, 2011, OWCP found that appellant had established disability for work from July 27 to August 27, 2009, based on Dr. Johnson’s opinion that the accepted July 27, 2009 aggravation of bilateral plantar fasciitis ceased one month later. In a January 9, 2012 decision, an OWCP hearing representative set aside the August 19, 2011 decision as Dr. Johnson’s opinion required clarification regarding the nature and extent of the 2005 and 2009 temporary aggravations and the need for work restrictions and orthotics.

In a January 31, 2012 supplemental report, Dr. Johnson opined that the 2005 and 2009 temporary aggravations resolved in one month and that there was “no objective abnormality” precluding full-duty work. He stated that neither the 2005 or 2009 aggravations caused “any permanent aggravation of his constitutional flatfeet,” as imaging studies did not demonstrate midtarsal changes or expansion of the plantar calcaneal spur. Dr. Johnson opined that appellant’s subjective symptoms were out of proportion to objective findings on examination. He noted that any work restrictions were due only to appellant’s subjective complaints and not an objective worsening of the accepted plantar fasciitis. Dr. Johnson stated that appellant would benefit from orthotics.

By decision dated March 9, 2012, OWCP denied appellant’s claim for wage loss commencing July 27, 2009 finding that Dr. Johnson’s January 9, 2012 supplemental report was sufficient to establish that appellant was not totally disabled for work due to the accepted bilateral foot conditions.

In a March 25, 2012 letter, counsel requested a review of the written record. He asserted that Dr. Johnson’s opinion did not support that the accepted 2005 and 2009 aggravations ceased within one month without permanent residuals. Counsel submitted a March 26, 2012 statement asserting that Dr. Johnson’s opinion that appellant needed work restrictions and orthotics established the claimed disability for work.

By decision dated May 25, 2012, an OWCP hearing representative affirmed the March 9, 2012 decision denying appellant’s claim for wage loss for the period July 27, 2009 to August 12, 2011. The hearing representative found that Dr. Johnson’s opinion as impartial medical examiner was sufficiently rationalized to establish that appellant was not totally disabled for work due to the accepted conditions for the claimed period. The hearing representative noted that Dr. Johnson explained that appellant’s need for orthotics was not due to an objective worsening of the accepted condition but only to the underlying congenital condition.⁶

By decision dated April 26, 2013, OWCP affirmed its May 25, 2012 decision denying appellant’s claim for wage loss from July 27, 2009 to August 12, 2011. It found that the medical evidence did not establish total disability for work for that period. Dr. Johnson’s opinion as the impartial medical examiner was sufficiently rationalized to represent the weight of the medical evidence. OWCP noted that the case records from File Nos. xxxxxx366 and xxxxxx396 were combined and reviewed.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁷ Under FECA, the term “disability” is defined as an inability, due to an employment injury, to earn the wages the

⁶ Appellant appealed to the Board. By order issued December 21, 2012, the Board remanded the case to OWCP to double File No. xxxxxx781 with File No. xxxxxx366, to be followed by issuance of an appropriate merit decision. Docket No. 12-1476 (issued December 21, 2012).

⁷ *Joe D. Cameron*, 41 ECAB 153 (1989).

employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.⁸ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁹ Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹⁰ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹¹ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify her disability and entitlement to compensation.¹²

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹³ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁴ In situations where there are opposing medical 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 on a proper factual background, must be given special weight.¹⁵

ANALYSIS

Appellant claimed that he was totally disabled for work from July 27, 2009 to August 12, 2011 due to accepted bilateral plantar fasciitis, plantar fibromatosis and calcaneal spurs. He has the burden of establishing by the weight of the substantial, reliable and probative evidence that he was totally disabled for work for the claimed period due to the accepted foot conditions.¹⁶

Appellant submitted reports from July 30, 2009 to April 15, 2010 from Dr. Desiderio, an attending Board-certified orthopedic surgeon, who held appellant off work due to plantar fasciitis and heel spurs. Dr. Desiderio opined that carrying a mail satchel over uneven surfaces

⁸ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁰ *Gary J. Watling*, 52 ECAB 278 (2001).

¹¹ *Manuel Garcia*, 37 ECAB 767 (1986).

¹² *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹³ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹⁴ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹⁵ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁶ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

aggravated the accepted conditions. He noted in May 27 and July 27, 2010 reports that appellant could have returned to light duty a few months prior to May 2010. Dr. Taylor, an attending podiatrist, opined on March 19, 2010 that appellant developed acute bilateral foot pain and could not continue working.

OWCP obtained a second opinion from Dr. Smith, a Board-certified orthopedic surgeon, who opined on May 24, 2010 that appellant could work as a letter carrier if he wore appropriate shoes and orthotics. As Dr. Smith's opinion conflicted with the findings by Dr. Desiderio and Dr. Taylor, OWCP obtained an impartial opinion from Dr. Johnson, a Board-certified orthopedic surgeon, who submitted March 28, 2011 and January 31, 2012 reports explaining that appellant had temporary aggravations of plantar fasciitis in 2005 and 2009, superimposed on congenital pes planus. Dr. Johnson noted that there was no objective pathology on examination or in the record warranting total disability for work beginning on July 27, 2009. Also, imaging studies did not demonstrate an objective worsening of the accepted conditions, such as midtarsal changes or growth of the calcaneal spurs. Additionally, appellant exhibited symptom magnification. Based on Dr. Johnson's opinion, OWCP issued a March 9, 2012 decision denying appellant's claim for wage loss on and after July 27, 2009, affirmed by May 25, 2012 and April 26, 2013 decisions.

Dr. Johnson's opinion as impartial medical examiner contains a detailed explanation of why the objective findings of record did not support total disability for the claimed period. Also, his opinion was based on a statement of accepted facts and the complete medical record. The Board finds that Dr. Johnson's opinion is sufficient to establish that appellant was not totally disabled for work on and after July 27, 2009.¹⁷ Dr. Johnson's opinion clearly outweighs those of Dr. Desiderio and Dr. Taylor, who did not set forth objective findings supporting that appellant was totally disabled for work for the claimed period. Therefore, OWCP's April 26, 2013 decision denying appellant's claim for total disability compensation from July 27, 2009 to August 12, 2011 is proper under the law and facts of the case.

On appeal, counsel asserts that all physicians of record supported that the accepted condition is ongoing and permanent, requiring permanent work restrictions. He contends that the employing establishment did not offer appellant work within his medical restrictions on and after July 27, 2009. Counsel also argues that the impartial medical examiner's report is insufficiently rationalized to represent the weight of the medical evidence. As stated, Dr. Johnson's report is sufficiently rationalized to represent the weight of the medical evidence in this case. The Board notes that appellant did not submit evidence indicating that the employing establishment failed to provide appropriate light duty.

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 appellant has not established that he was disabled for work from July 27, 2009 to August 12, 2011 causally related to accepted bilateral foot conditions.

¹⁷ *Anna M. Delaney, supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 26, 2013 is affirmed.

Issued: November 7, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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