

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

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**T.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Youngstown, OH, Employer**

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**Docket No. 07-1387  
Issued: October 18, 2007**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 25, 2007 appellant filed a timely appeal from a September 28, 2006 merit decision of the Office of Workers' Compensation Programs which denied her claim and an April 3, 2007 decision which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

**ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish that she was totally disabled for the periods April 16 to 24 and May 18 to September 15, 2005; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On March 1, 2005 appellant, then a 46-year-old mail processing clerk working limited duty,<sup>1</sup> filed a Form CA-2, occupational disease claim, alleging that pain and swelling in her feet

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<sup>1</sup> The record indicates that the limited-duty assignment was for another injury.

was caused by employment factors. In support of her claim, she submitted reports dated March 4 and 7, 2005 from an attending podiatrist, Dr. John Flauto, who diagnosed bilateral tarsal tunnel syndrome and noted that her condition had been progressive since January 5, 2005. Dr. Flauto advised against extended ambulation and standing. On May 13, 2005 the Office accepted that appellant sustained bilateral tarsal tunnel syndrome.

On June 17, 2005 appellant filed a Form CA-7, claim for compensation, for the period April 16 to 24, 2005 and continued to submit compensation claims for periods to October 14, 2005. By letters dated July 1 and 12 and August 19 and 30, 2007, the Office informed appellant of the type medical evidence she needed to submit to support her claims for total disability.

Appellant thereafter submitted a May 20, 2005 report in which Dr. Flauto advised that appellant had been under his care since May 18, 2005 for pain and swelling and could tentatively return to work on June 27, 2005. In an attending physician's report dated July 15, 2005, Dr. Flauto advised that appellant could not work. In reports dated May 20, June 7, July 12, August 1 and 25, 2005, he reiterated his diagnosis and noted that appellant was somewhat better because she was not working. Dr. Flauto recommended surgery, noting that she would then be off work for two to three months.

On September 16, 2005 appellant underwent left tarsal tunnel release and received wage-loss compensation beginning on that date.<sup>2</sup> On April 4, 2006 she was referred to a nurse to assist her return to work. By decision dated April 3, 2006, the Office denied appellant's claim for compensation for the period April 16 to 24 and May 18 through September 15, 2005. On April 26, 2006 she requested a review of the written record and submitted an April 21, 2006 report in which Dr. Flauto advised:

"On multiple occasions I have explained that [appellant] is unable to stand for more than 10 minutes to 20 minutes related to her bilateral tarsal tunnel syndrome. She has extreme discomfort in the bilateral heels after ambulation. Sometimes this pain will last for hours."

He stated that he continued to recommend that she be off work and described job duties of loading and unloading an automated machine which required her to be on her feet for her entire shift except for two 15-minute breaks.

On May 12, 2006 appellant underwent right tarsal tunnel release and plantar fasciotomy. She returned to work on August 2, 2006 but stopped again on August 3, 2006 due to leg and foot pain and swelling.<sup>3</sup> Appellant returned to limited duty on September 6, 2006. By decision dated

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<sup>2</sup> Appellant submitted a number of additional medical reports regarding her follow-up care that are not relevant to the time periods at issue in this case.

<sup>3</sup> On July 10, 2006 the Office issued a preliminary decision that an overpayment in compensation in the amount of \$626.68 had been created because appellant had been paid at an incorrect pay rate for the period September 16, 2005 to June 23, 2006. Appellant was found not at fault. She requested waiver and by decision dated August 15, 2006, the Office finalized the overpayment decision. Appellant has not filed an appeal with the Board of this decision.

September 28, 2006, an Office hearing representative affirmed the April 3, 2006 decision. On September 14, 2006 the Office accepted that appellant sustained employment-related right plantar fasciitis. Appellant stopped work again on December 29, 2006 when she underwent authorized left plantar fasciotomy and she thereafter received appropriate compensation. On March 23, 2007, through her attorney, she requested reconsideration and resubmitted Dr. Flauto's April 21, 2006 report. By decision dated April 3, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was duplicative or irrelevant.

### **LEGAL PRECEDENT**

Under the Federal Employees' Compensation Act<sup>4</sup> the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>5</sup> Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act<sup>6</sup> and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>7</sup> Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>8</sup>

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>9</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision regarding whether appellant met her burden of proof to establish that she was totally disabled for the periods April 16 to 24 and May 18 to September 15, 2005. On May 13, 2005 the Office accepted that appellant sustained employment-related bilateral tarsal tunnel syndrome and later expanded the claim to include plantar fasciitis. Appellant had surgical repairs on September 16, 2005 and May 16 and December 29, 2006 and received compensation beginning September 16, 2005 and continuously

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>6</sup> *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

<sup>7</sup> *Donald E. Ewals*, 51 ECAB 428 (2000).

<sup>8</sup> *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

<sup>9</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

thereafter except for periods between surgical procedures. She, however, did not receive wage-loss compensation for the periods April 16 to 24 and May 18 to September 15, 2005.

In support of her alleged disability for these periods, appellant submitted numerous reports from Dr. Flauto, an attending podiatrist, who noted on March 7, 2005 that she should avoid extended ambulation and on July 15, 2005 advised that she was totally disabled. In an April 21, 2006 report, Dr. Flauto advised that appellant could not stand for more than 15 to 20 minutes due to extreme discomfort and went on to describe work duties where she was constantly on her feet loading and unloading an automated machine. The record, however, indicates that, at the time appellant filed this claim, she was working limited duty for another injury.

Proceedings under the Act are not adversarial in nature. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence.<sup>10</sup> The record does not contain a position description for this limited-duty job such that the Board can make an informed decision as to whether appellant was totally disabled for the periods at issue in this case.<sup>11</sup> The case must therefore be remanded to the Office. On remand, the Office should obtain a description of appellant's work duties during the period April 16 to 24 and May 18, 2005. After such further development as it deems necessary, the Office shall issue an appropriate decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision regarding whether appellant met her burden of proof to establish that she was totally disabled for the periods April 16 to 24 and May 18 to September 15, 2005. In view of the Board's disposition of the first issue, the question of whether the Office properly denied merit review by its April 3, 2007 decision is moot.

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<sup>10</sup> See *Donald R. Gervasi*, 57 ECAB \_\_\_\_ (Docket No. 05-1622, issued December 21, 2005).

<sup>11</sup> The Board also notes that an employee is entitled to be paid expenses incident to an examination required by the Secretary which in the opinion of the Secretary is necessary and reasonable, including transportation and loss of wages incurred in order to be examined. 5 U.S.C. § 8123(b); see *Bobbie F. Cowart*, 55 ECAB 746 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 28, 2006 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: October 18, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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