

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

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L.C., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,  
FEDERAL EMERGENCY MANAGEMENT  
AGENCY, New Orleans, LA, Employer** )

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**Docket No. 11-648  
Issued: September 29, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 19, 2011 appellant filed a timely appeal from an August 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for compensation and a September 9, 2010 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the September 9, 2010 nonmerit decision.

**ISSUES**

The issues are: (1) whether appellant has established that she was disabled from February 11 to May 22, 2009 causally related to her accepted employment injury; and (2) whether OWCP properly denied her request to reopen her case for further review of the merits under 5 U.S.C. § 8128.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On February 6, 2009 appellant, then a 55-year-old housing adviser, filed a claim alleging that on February 4, 2009 she injured her right leg and ankle. OWCP accepted the claim for a right ankle sprain.<sup>2</sup>

An x-ray dated February 9, 2009 revealed a small avulsion fracture on the distal tip of the right fibula. An x-ray obtained February 12, 2009 revealed no clear-cut fracture. In a report dated February 12, 2009, Dr. John W. Noble, Jr., a Board-certified orthopedic surgeon, listed the history of injury as appellant injuring her right ankle when she slipped on a step. On examination, he found tenderness over the distal fibula. Dr. Noble diagnosed either a nondisplaced fracture of the fibula or ankle sprain. He asserted that the condition “needs to be treated as a nondisplaced fracture given the location of [appellant’s] tenderness” and placed her in “an ultra walker.” Dr. Noble advised that she should perform sedentary duty.

On March 5, 2009 Dr. Noble diagnosed a probable syndesmotom sprain that was “a very serious injury and acts more like a fracture than a sprain.” He recommended continued use of a walking boot. In a disability certificate dated March 20, 2009, Dr. Noble opined that appellant was unable to return to work until further notice. In an accompanying report, he found tenderness over the fibula and proximally on examination. Dr. Noble diagnosed a sprain or nondisplaced fracture of the right ankle and provided appellant with an air stirrup cast. On April 2, 2009 he discussed her continued complaints of pain. On examination Dr. Noble found no significant swelling but complaints of pain with palpation. He indicated that x-ray had not found a clear-cut fracture but that appellant could have an occult fracture. Dr. Noble diagnosed an ankle injury with delayed healing.

In a report dated September 29, 2009, Dr. Y. Yoko Broussard, a Board-certified internist, related that during a February 11, 2009 office visit appellant told him that she injured herself stepping down from a trailer at work. He stated that she related that an x-ray taken February 9, 2009 showed a small avulsion fracture.

On December 17, 2009 appellant submitted a claim for compensation from March 26 to December 31, 2009. The employing establishment indicated that she received leave without pay from February 11 to May 22, 2009. It terminated appellant for employment effective May 23, 2009 due to lack of work.

By letter dated March 5, 2010, OWCP requested that appellant submit reasoned medical evidence supporting her claim for disability.<sup>3</sup> In a report dated April 30, 2009, received by OWCP on January 7, 2010, Dr. Noble listed findings on examination of positive dorsalis pedis and posterior pulse and discussed her complaints of pain. He referred appellant for a magnetic

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<sup>2</sup> By decision dated April 1, 2009, OWCP denied appellant’s claim after finding that she did not establish that the injury occurred at the time, place and in the manner alleged. By decision dated May 26, 2009, it found that she had not submitted sufficient factual and medical evidence to support her claim. On November 17, 2009 OWCP vacated its April 1 and May 26, 2009 decisions and accepted the claim for right ankle sprain.

<sup>3</sup> On December 15, 2009 a reimbursement manager with Dr. Nobel’s office indicated that the doctor found that appellant could not work.

resonance imaging (MRI) scan study. An MRI scan study of the right ankle, performed on June 3, 2009, showed small erosions of the coboid with either post-traumatic or degenerative edema, a small tibiotalar, subtalar effusion, an old injury to the anterior talofibular ligament and tenosynovitis of the medial flexor tendons.

In a decision dated August 4, 2010, OWCP denied appellant's claim for compensation from February 11 to May 22, 2009. It found that she had not submitted medical evidence showing that she was disabled from work for the claimed period.

On September 1, 2010 appellant requested reconsideration. By decision dated September 9, 2010, OWCP denied her reconsideration request after finding that she did not submit evidence or raise argument sufficient to warrant reopening her case for further merit review under section 8128.

On appeal, appellant argues that she was experiencing difficulty finding a physician who accepted patients with federal workers' compensation injuries. She further maintains that she was unable to perform her employment.

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

The term disability as used in FECA<sup>4</sup> means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.<sup>5</sup> Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>6</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>7</sup> The Board will not require OWCP 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 employee's to self-certify their disability and entitlement to compensation.<sup>8</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*; 20 C.F.R. § 10.5(f).

<sup>5</sup> *Paul E. Thams*, 56 ECAB 503 (2005).

<sup>6</sup> *Id.*

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

<sup>8</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

shares responsibility to see that justice is done.<sup>9</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>10</sup>

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

OWCP accepted that appellant sustained right ankle sprain due to a February 4, 2009 employment injury. Appellant filed a claim for compensation for total disability from February 11 to May 22, 2009.

Appellant has the burden to establish causal relationship between her claimed disability and her employment injury through the submission of rationalized medical evidence.<sup>11</sup> On February 12, 2009 Dr. Noble discussed her history of injury when she slipped on a step at work. He diagnosed an ankle sprain or fracture and recommended that appellant work sedentary duty. On March 5, 2009 Dr. Noble diagnosed a sprain acting like a fracture that was a "serious injury." He prescribed a walking boot. In a report dated March 20, 2009, Dr. Noble listed findings of fibula tenderness and diagnosed a right ankle sprain or nondisplaced fracture. In an accompanying disability certificate, he asserted that appellant was unable to work until further notice. On April 2, 2009 Dr. Noble listed findings on examination of pain with palpation and diagnosed an ankle injury with delayed healing and a possible occult fracture. On April 30, 2009 he determined that appellant had a positive dorsalis pedis and posterior pulse on examination. Dr. Noble diagnosed an ankle injury and referred her for an MRI scan study.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>12</sup> The Board has reviewed Dr. Noble's reports and finds that his opinion is sufficient to warrant further development on the issue of whether appellant was able to perform her regular employment duties from February 11 to May 22, 2009. Dr. Noble diagnosed a sprain or fracture that he described as a serious injury. On February 12, 2009 he found that appellant could work sedentary employment and on March 20, 2009 he determined that she was totally disabled. Dr. Noble based his disability finding on clinical examination findings and his review of objective studies. He did not, however, provide rationale for his opinion or address the exact period of disability. Consequently, while the medical evidence from Dr. Noble is insufficiently rationalized to meet her burden of proof to establish that appellant experienced disability from February 11 to May 22, 2009 due to her employment injury, it raises an undisputed inference of causal relationship sufficient to require further development by OWCP.<sup>13</sup> Accordingly, the Board will remand the case to OWCP. On remand, OWCP should further develop the factual and medical record to determine whether appellant sustained any period of disability due to her

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<sup>9</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>10</sup> 20 C.F.R. § 10.121.

<sup>11</sup> *Richard O'Brien*, 53 ECAB 234 (2001).

<sup>12</sup> *See A.A.*, 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

<sup>13</sup> *Id.*

accepted employment injury. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

**CONCLUSION**

The Board finds that the case is not in posture for decision.<sup>14</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 9 and August 4, 2010 are set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 29, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>14</sup> In view of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request to reopen her case for further merit review under 5 U.S.C. § 8128 is moot.