

ISSUES

The issues are: (1) whether appellant has established entitlement to wage-loss compensation beginning January 15, 2011, causally related to his accepted June 3, 2007 injury; (2) whether OWCP abused its discretion by denying appellant authorization for surgery to treat a foot bone lesion; and (3) whether appellant abandoned his request for an oral hearing before OWCP's hearing representative.

FACTUAL HISTORY

On June 4, 2007 appellant, then a 56-year-old security screener, filed a traumatic injury claim alleging that on June 3, 2007 he sustained a fractured right fifth metatarsal when he took a step while working and felt a "pop" in his foot. OWCP accepted the claim for closed fracture of the fifth right metatarsal with nonunion of the fracture. Appellant was treated at St. Johns' Hospital. He returned to full-time limited duty on June 13, 2007. On November 20, 2007 appellant underwent surgery for an authorized open reduction and internal fixation of the fracture. On November 10, 2008 he underwent authorized open reduction and internal fixation using a bone graft. Appellant returned to full-time limited-duty work after surgery. On March 18, 2009 he was released to regular duty.³

On January 14, 2011 OWCP received a request for authorization to debride skin/tissue, debride tissue/muscle, and treat a foot bone lesion. This request arose from an October 5, 2010 report from Dr. Judith W. Smith, a Board-certified orthopedic surgeon, who provided an impression of deep ulcer with abscess formation and cellulites in an insulin-dependent diabetic and recommended surgery.

In a January 14, 2011 letter, OWCP advised appellant of the deficiencies in his claim and requested additional evidence including a copy of the surgical report with an opinion from his physician addressing how the need for surgery was the result or a consequence of the accepted work injury. Appellant was provided 30 days to submit the requested information.

On February 14, 2011 appellant filed CA-7 and CA-7a forms claiming compensation for leave without pay due to disability for work commencing January 15, 2011.

In a February 16, 2011 letter, OWCP advised appellant that additional factual and medical information was required before his wage-loss disability claim could be processed. It noted that he was released to regular-duty work on March 18, 2009 and requested a statement as to whether he had sustained any other right foot injuries or conditions since his return to work. OWCP also requested a medical opinion from his physician that addressed how the claimed disability was the result of the accepted conditions and work injury. It noted that preexisting or nonwork-related conditions had to be addressed and distinguished. Appellant was again provided 30 days to submit the requested information.

³ On July 13, 2009 appellant was issued a schedule award for one percent permanent impairment of the right leg. On January 4, 2010 an OWCP hearing representative affirmed the schedule award decision. This aspect of the claim is not before the Board in the present appeal.

In response, OWCP received multiple diagnostic tests dated October 5 and 6, 2010 and January 26, 2011. In duty status reports dated January 4 and February 25, 2011, Dr. Larry Chase, a Board-certified internist, diagnosed a foot ulcer and opined that appellant could not work. He indicated that appellant could return to work for half-day duties on February 28, 2011 and full-time duties on March 7, 2011. A copy of Dr. Smith's October 5, 2010 report was resubmitted.

By decision dated March 23, 2011, OWCP denied the requested surgical procedure, finding that the medical evidence did not address how the need for the surgery was the result of the accepted work-related conditions.

In another March 23, 2011 decision, OWCP denied appellant's claim for compensation beginning January 15, 2011 on the grounds that the medical evidence submitted was insufficient to support disability due to the accepted right fifth metatarsal fracture or surgeries.

On April 12, 2011 OWCP received two requests from appellant dated April 5 and 6, 2011 requesting a telephonic hearing on the March 23, 2011 decisions before an OWCP hearing representative.

By letter dated May 18, 2011, OWCP notified appellant that his hearing would be held on July 13, 2011 at 2:15 p.m. eastern time. He was given a toll-free number and a pass code to access the hearing. The notice was mailed to his address of record. Appellant did not contact OWCP on the date of the hearing or thereafter.⁴

By decision dated August 4, 2011, OWCP found that appellant abandoned his requested hearing. It noted that the hearing was scheduled for July 13, 2011 but he failed to appear as instructed. The decision found that there was no evidence that appellant contacted OWCP either prior or subsequent to the scheduled hearing to explain his failure to participate. OWCP concluded that he abandoned his oral hearing request.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁵ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." In general the term disability under FECA means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.⁶ This meaning is expressed as disability for work.⁷ A claimant

⁴ On June 21, 2011 a Steve Whiting telephoned OWCP and advised that he wanted to confirm the hearing status. OWCP informed Mr. Whiting that authorization was needed prior to discussing appellant's case.

⁵ 5 U.S.C. § 8102(a).

⁶ 20 C.F.R. § 10.5(f). See also *William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁷ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁸

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. When, however, 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 his or her employment, the employee is entitled to compensation for any loss of wage-earning capacity resulting from the employment injury.⁹ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant is not entitled to wage-loss compensation beginning January 15, 2011 causally related to the June 3, 2007 employment injury. The Board finds that he submitted insufficient rationalized medical evidence addressing how residuals of his accepted fracture of the fifth metatarsal or his authorized surgeries caused him to become totally disabled beginning January 15, 2011.

On October 5, 2010 Dr. Smith provided an impression of deep ulcer with abscess formation and cellulites in an insulin-dependent diabetic and recommended surgical treatment, to include debride skin/tissue, debride tissue/muscle and treat foot bone lesion. But Dr. Smith did not provide a rationalized medical explanation as to how the June 3, 2007 work injury or surgeries caused or contributed to the conditions diagnosed in 2010 or the need for surgery. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹¹ As Dr. Smith did not provide a rationalized medical explanation as to how the residuals of appellant's June 3, 2007 employment injury prevented appellant from continuing in his employment, appellant has not met his burden of proof.

⁸ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁰ *Fereidoon Kharabi*, *supra* note 8.

¹¹ *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

The medical evidence from Dr. Chase is also insufficient to establish appellant's claim. In duty status reports of January 4 and February 25, 2011, Dr. Chase opined that appellant's foot ulcer disabled him for work. He noted that appellant could return to work for half-day duties on February 28, 2011 and full-time duties on March 7, 2011. Although Dr. Chase opined that appellant was disabled from a foot ulcer, he failed to provide any medical opinion as to how the residuals of the June 3, 2007 employment injury or surgeries prevented him from continuing to work in 2011. Furthermore, OWCP has not accepted a foot ulcer condition. Appellant has not met his burden of proof to establish that he is entitled to wage-loss compensation beginning January 15, 2011.

The diagnostic evidence of record fails to contain a rationalized medical opinion as to how the diagnosed conditions are causally related to appellant's accepted work injury and how such conditions prevented appellant from continuing to work during the claimed period. Thus, appellant did not meet his burden of proof.

Appellant may submit new evidence of 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.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA states in pertinent part: The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.¹² In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.¹³ OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.¹⁴

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.¹⁵ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹⁶

¹² 5 U.S.C. § 8103.

¹³ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

¹⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990); *D.A.*, Docket No. 09-936 (issued January 13, 2010).

¹⁵ *See Dona M. Mahurin*, 54 ECAB 309 (2003); *see also Debra S. King*, 44 ECAB 203, 209 (1992).

¹⁶ *See Debra S. King*, *supra* note 15; *Bertha L. Arnold*, 38 ECAB 282 (1986).

ANALYSIS -- ISSUE 2

OWCP accepted that on June 3, 2007 appellant sustained a right foot fracture of the fifth metatarsal with nonunion of right foot fracture and two subsequent surgical procedures. It received a request for additional surgical services to debride skin/tissue, debride tissue/muscle and treat foot bone lesion. As noted, the medical evidence does not establish that the need for the requested procedure is the result of the accepted right foot conditions.

In an October 5, 2010 report, Dr. Smith provided an impression of deep ulcer with abscess formation and cellulites and recommended the above surgical procedures. Dr. Smith provided no rationalized medical explanation as to how the June 3, 2007 work injury or its surgeries necessitated the above surgical procedures. This is important given the fact appellant is an insulin-dependent diabetic. The Board has held that medical evidence offering no opinion on the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁷ As Dr. Smith did not provide a rationalized medical explanation as to how the residuals of appellant's June 3, 2007 employment injury caused appellant's ulcer and necessitated the requested surgical intervention, appellant has not met his burden of proof.

The reports from Dr. Chase as well as the diagnostic evidence of record are of limited probative value as there is no medical opinion explaining how residuals of the accepted employment injury necessitated the requested surgery. Therefore, appellant did not meet his burden of proof.

As appellant has not established that the requested surgical procedures is due to the effects of an employment-related condition, the Board finds OWCP did not abuse its discretion in denying appellant's surgical request. He may submit new evidence of 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.

LEGAL PRECEDENT -- ISSUE 3

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.¹⁸ Unless otherwise directed in writing by the claims examiner, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.¹⁹ OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.²⁰

¹⁷ See *supra* note 10.

¹⁸ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

¹⁹ 20 C.F.R. § 10.617(b).

²⁰ See *Michelle R. Littlejohn*, 42 ECAB 463 (1991). It is presumed in absence of evidence to the contrary that a notice mailed to an individual in the ordinary course of business was received.

The authority governing the abandonment of hearings rests with OWCP's procedure manual, which provides that a hearing can be abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his request for a hearing and return the case to the district OWCP.²¹

ANALYSIS -- ISSUE 3

By decisions dated March 23, 2011, OWCP denied appellant's request for surgery and his claim for wage-loss compensation for the period January 15, 2011 and continuing. Appellant timely requested a telephonic hearing. In a May 18, 2011 letter, sent to his address of record, OWCP advised him that a hearing was scheduled for July 13, 2011 at 2:15 p.m. eastern time. It instructed appellant to telephone a toll-free number and enter a pass code to connect with the hearing representative. Appellant did not telephone at the appointed time. He did not request a postponement of the hearing or explain his failure to appear at the hearing within 10 days of the scheduled hearing date of July 13, 2011.²² While appellant contended on appeal that he had spoke to a Department of Labor representative on July 17, 2011, there is no report of such telephone call on record. The Board, therefore, finds that he abandoned his request for a hearing.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his disability commencing January 15, 2011 was causally related to the June 30, 2007 employment injury. As appellant has not established that the requested surgery is due to the effects of an employment-related condition, OWCP has not abused its discretion in denying appellant's surgical request. The Board further finds that appellant abandoned his request for an oral hearing.

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999). *See also G.J.*, 58 ECAB 651 (2007).

²² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 4 and March 23, 2011 are affirmed.

Issued: April 4, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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