

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

D.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-908
Issued: July 19, 2013**

Appearances:

*Dionne E. Webster-Cox, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2013 appellant, through her attorney, filed a timely appeal from an October 24, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her disability compensation claim. 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 has met her burden of proof to establish that she was disabled from work for the period November 2, 2009 to January 25, 2010 as a result of her employment-related conditions.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 12, 2010 appellant, then a 33-year-old mail clerk, filed an occupational disease claim alleging that she sustained nerve damage and foot strain as a result of constantly being on her feet on hard concrete in the performance of duty. She first became aware of her condition and realized it resulted from her employment on September 27, 2009. Appellant did not stop work. OWCP accepted her claim for left foot and leg pain and neuritis on the left side.

In an October 16, 2009 progress note, Dr. Jeffrey Schwalb, a podiatrist, related appellant's complaints of fairly constant, sharp and burning-type discomfort in the medial aspect of her left ankle at the deltoid ligament and tarsal tunnel area. Upon examination, he observed that pain elicited upon direct palpation of the medial aspect left ankle at the level of the deltoid ligament and at the level of the tarsal tunnel. No pain was elicited upon direct palpation anterior, lateral or posterior ankle mortise. Tinel's sign was mildly positive. Dr. Schwalb diagnosed left medial ankle synovitis with inflammation of deltoid ligament secondary to pathomechanics.

In a December 3, 2009 electromyography (EMG) and nerve conduction study, Dr. Sheila Simpson, Board-certified in physical medicine and rehabilitation, related appellant's complaints of pain, numbness and tingling in the left ankle and foot since October 2009. She observed moderate electrodiagnostic evidence of a left superficial peroneal sensory neuropathy. Dr. Simpson reported normal nerve conduction studies of the left medial and left lateral plantar nerves with no evidence of a left tarsal tunnel syndrome and normal studies of the left peroneal, left posterior tibial and left sural nerves with no evidence of a left lumbar radiculopathy.

In a February 23, 2010 medical note, Dr. Lawrence B. Rubin, a podiatrist, indicated that he examined appellant on February 23, 2010. He diagnosed mid-foot strain causing joint pain and neuritis of interim-dorsal cutan nerves.

In a March 9, 2010 report, Dr. Jeffrey Kraft, an osteopath, stated that appellant had been his patient for several years and had suffered from chronic mid-foot strain, which caused joint pain and neuritis of the intermediate dorsal cutaneous nerve. He opined that this condition was directly related to her employment, which required standing for eight hours a day working on a machine.

In an April 14, 2010 report, Dr. Kraft noted that appellant was seen in his office on September 8, October 12 and 16, 2009 and February 16, 2010. He stated that appellant developed a sore left foot and leg due to standing eight hours a day at work.

On August 18, 2010 appellant submitted a claim for disability compensation for the period November 2, 2009 to January 25, 2010. In an undated statement, she explained that in September 2009 her leg and foot began to bother her. On September 30, 2009 appellant felt an enormous amount of pain in her left leg and took aspirin. She stated that the next two days were her off days so she nurtured her leg with muscle relaxer cream. On October 2, 2009 appellant returned to work even though she was still in pain. On October 8, 2009 she went to see her doctor because she was in so much pain that she could hardly stand. Appellant stated that she had to be off work for a few weeks in October and then again from November 3, 2009 through

January 23, 2010. She reported that she underwent two x-rays and an ultrasound but it was not until she had an EMG that her podiatrist diagnosed her with nerve damage.

On August 24, 2010 OWCP advised appellant that the evidence submitted was insufficient to establish that she was disabled from work as a result of her employment injury for the period November 2, 2009 to January 25, 2010 and requested additional evidence to establish her claim.

In a September 13, 2010 report, Dr. Schwalb stated that appellant was initially examined on October 16, 2009 with the chief complaint of fairly constant, sharp, burning-type discomfort in the left ankle and leg. He noted that a diagnostic EMG and NCV study was performed and revealed left superficial peroneal sensory neuropathy. Dr. Schwalb opined that appellant was unable to work from November 2, 2009 to January 25, 2010 as a result of her presenting condition and treatment regimens.

In a decision dated February 10, 2011, OWCP denied appellant's claim for disability compensation for the period November 2, 2009 to January 25, 2010 finding that the medical evidence failed to establish that she was totally disabled during that period as a result of her employment injury.

On March 3, 2011 appellant requested a hearing, which was held on June 10, 2011. She stated that one day while she was working her leg started hurting and it just would not go away. When the pain became so unbearable appellant sought medical treatment from her doctor. She continued to work, but the pain became more intolerable so she kept returning to the doctor for treatment. Appellant was referred to Dr. Schwalb who put a cast on her leg in November 2009. She explained that the only treatment she received from November 2009 to February 2010 was when Dr. Schwalb put a cast on her leg and told her to stop work. Appellant stated that she did not have any other accidents or injuries or experience any changes in her work duties around November 2009.

In progress notes dated October 19 and 26, November 2, 23 and 30, December 10 and 30, 2009, and January 13, 2010, Dr. Schwalb related his treatment of appellant's left foot and ankle. Appellant stated that she still felt discomfort in the medial aspect of the left ankle, but it felt better with a wrap on. Dr. Schwalb noted that she had an unna boot dressing. Upon examination, he observed no edema in the left ankle and pain elicited upon direct palpation of the medial aspect of the left ankle. Range of motion of the left ankle was decreased with mild discomfort. Dr. Schwalb stated that appellant's left ankle remained symptomatic but somewhat improved. He diagnosed medial synovitis of the left ankle with inflammation of deltoid ligament. Dr. Schwalb recommended that appellant keep her foot immobilized and the boot dressing dry and intact. In a November 23, 2009 report, he noted that he removed the cast and recommended that she continue with a surgical shoe. X-rays were negative for fracture or dislocation. In a November 30, 2009 report, Dr. Schwalb stated that appellant remained symptomatic despite three weeks of immobilization. He noted that an EMG indicated a neurological component such as tarsal tunnel syndrome or radiculopathy. In December 10 and 30, 2009 reports, Dr. Schwalb stated that appellant remained off work at this time. In a January 13, 2010 report, he stated that she may return to work on January 25, 2010.

In a January 20, 2010 disability certificate, Dr. Schwalb indicated that appellant was totally incapacitated from November 2, 2009 to January 25, 2010. He noted that she could return to work on January 25, 2010 with no restrictions.

In a May 24, 2011 report, Dr. Kraft stated that appellant had been his patient since May 2004. He noted that, on October 8, 2009, she began to complain of leg and foot pain with swelling and related that she believed it was caused from standing at work for eight hours a day. Dr. Kraft noted diagnoses of medial ankle synovitis with inflammation of deltoid ligament secondary to “path mechanics.” He reviewed her medical records and treatment. Dr. Kraft opined that appellant was unable to work from November 2, 2009 to January 25, 2010 due to her foot injury caused by nerve damage as a result of standing eight hours a day.

In disability certificates dated from April 29 and August 17, 2010, and February 1 and May 31, 2011, Dr. Rubin stated that appellant was totally incapacitated from April 29 to May 9, 2010; August 17 to 30, 2010; February 1 to 6, 2011; and May 24 to June 3, 2011 for neuritis and chronic pain. He noted that appellant was not ready to return to work and recommended rest and elevation. Appellant also submitted handwritten progress notes from Dr. Rubin dated from February 23, 2010 to May 31, 2011.

By decision dated August 5, 2011, an OWCP hearing representative modified the February 10, 2011 decision denying appellant’s claim for disability compensation. It affirmed that the evidence did not establish that appellant was totally disabled for the period November 2, 2009 to January 25, 2010. OWCP also found, however, that appellant was entitled to up to four hours of wage-loss compensation for medical treatment on November 2, 23 and 30, December 3, 10 and 30, 2009 and January 13, 2010.

On December 12, 2011 appellant, through counsel, submitted a request for reconsideration. She alleged that appellant was injured while performing job duties and this injury left her temporarily totally disabled from November 2, 2009 to January 25, 2010.

In a December 1, 2011 report, Dr. Schwalb stated that appellant was off work from November 2, 2009 to January 25, 2010 due to medial ankle synovitis with associated superficial peroneal sensory neuropathy of the left lower extremity. He opined that excessive weight bearing required by her employment exacerbated her condition and rendered her more symptomatic, which could lead to further disability.

In a decision dated October 24, 2012, OWCP denied modification of the August 5, 2011 decision denying appellant’s claim for disability compensation for the period November 2, 2009 to January 25, 2010.

LEGAL PRECEDENT

Under FECA, 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.² For each period of disability claimed, the employee must establish that he or she was disabled for work as a result of

² See *Prince E. Wallace*, 52 ECAB 357 (2001).

the accepted employment injury. Disability is not synonymous with a physical impairment which may or may not result in 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 the injury has no disability as that term is used in FECA.³

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. 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 reliable, probative and substantial medical opinion evidence.⁴ Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.⁵ 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 his or her disability and entitlement to compensation.⁶

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 shares responsibility to see that justice is done.⁷

ANALYSIS

OWCP accepted appellant's claim for left foot and leg pain and left foot neuritis. Appellant claimed that she was disabled from work for the period November 2, 2009 to January 25, 2010 as a result of her employment injury. OWCP paid compensation for medical treatment on November 2, 23 and 30, December 3, 10 and 30, 2009, and January 13, 2010. Appellant bears the burden to establish through medical evidence that she was totally disabled for the remaining time period and that her disability was causally related to her accepted injury.⁸ The Board finds that this case is not in posture for decision.

The Board notes initially that the reports from Dr. Simpson and Dr. Rubin were silent regarding the issue of disability. The relevant medical evidence of record consists mostly of progress notes from Dr. Schwalb dated from October 16, 2009 to September 13, 2010. He observed that pain elicited upon direct palpation of the medial aspect of the left ankle and decreased range of motion with mild discomfort. Tinel's test was mildly positive. Dr. Schwalb diagnosed left ankle medial synovitis with inflammation of deltoid ligament. He recommended

³ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁴ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁵ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁶ *Amelia S. Jefferson*, *supra* note 4.

⁷ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

⁸ *Supra* note 4; *see also V.P.*, Docket No. 09-337 (issued August 4, 2009).

that appellant keep her foot immobilized in a cast and keep the boot dressing dry and intact. In a November 30, 2009 report, Dr. Schwalb stated that appellant remained symptomatic despite three weeks of immobilization. He noted that an EMG indicated a neurological component such as tarsal tunnel syndrome or radiculopathy. In December 10 and 30, 2009 reports, Dr. Schwalb stated that appellant remained off work at this time. In a January 13, 2010 report, he stated that appellant may return to work on January 25, 2010. In a January 20, 2010 disability note and September 13, 2010 report, Dr. Schwalb opined that appellant was unable to work from November 2, 2009 to January 25, 2010 as a result of her present condition and treatment regimens. In a December 1, 2011 report, Dr. Schwalb explained that appellant was off work from November 2, 2009 to January 25, 2010 due to medial ankle synovitis with associated superficial peroneal sensory neuropathy of the left lower extremity.

As previously stated, 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.⁹ The Board notes that, while none of Dr. Schwalb's reports are completely rationalized, they are consistent in indicating that appellant was disabled from work as a result of her left foot condition for the period November 2, 2009 to January 25, 2010.

Dr. Schwalb diagnosed left ankle medial synovitis with inflammation of deltoid ligament and reported that an EMG suggested a neurological component such as tarsal tunnel syndrome or radiculopathy. He recommended that appellant keep her left ankle immobilized and also noted that after three weeks of immobilization appellant remained symptomatic. In a January 20, 2010 disability note and September 13, 2010 report, Dr. Schwalb stated that she was unable to work from November 2, 2009 to January 25, 2010 due to her medial ankle synovitis with associated superficial peroneal sensory neuropathy of the left lower extremity and treatment regimens. Although his reports do not fully describe why appellant was disabled, he does provide an unequivocal opinion, based on examination and diagnostic findings, that appellant was unable to work for the period November 2, 2009 to January 25, 2010. The Board also notes that Dr. Schwalb's opinion on disability is not contradicted by any substantial medical or factual evidence of record. Instead, other physicians, such as Dr. Kraft, also opined that appellant was unable to work from November 2, 2009 to January 25, 2010 due to her left foot condition. While these reports are insufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between her condition and her inability to work for the period November 2, 2009 to January 25, 2010 and are sufficient to require OWCP to further develop the medical evidence and case record.¹⁰

Accordingly, the Board will remand the case to OWCP. On remand, OWCP should prepare a statement of accepted facts which includes a detailed employment history, job description and specific functions performed by appellant. It should further develop the medical record to determine whether appellant has established that she was totally disabled as a result of her left foot condition for the period November 2, 2009 to January 25, 2010. Following this and

⁹ *Supra* note 7.

¹⁰ *See N.B.*, Docket No. 12-1368 (issued January 28, 2013).

any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 19, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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