



## **FACTUAL HISTORY**

The Office accepted that on September 26, 2005 appellant, then a 31-year-old correction officer, sustained a right ankle strain in the performance of duty.<sup>1</sup> Appellant stopped work on January 22, 2006. On February 2, 2006 Dr. Guido LaPorta, a podiatrist, performed arthroscopic surgery with percutaneous distraction and applied an external fixation device to treat appellant's traumatic right ankle arthritis. He noted a history of trauma that occurred many years prior to the right ankle with arthritis spurring to the anterior distal tibia and the dorsal aspect of the talar dome of the right ankle. On March 9, 2006 Dr. LaPorta performed surgery to remove the external fixation device from appellant's right lower extremity.

On March 20, 2006 Dr. Elaine A. O'Donnell, an attending podiatrist, released appellant to return to light-duty work on March 30, 2006.<sup>2</sup>

By decision dated April 21, 2006, the Office denied appellant's request for authorization of his February 2 and March 9, 2006 right ankle surgeries on the grounds that there was insufficient medical evidence addressing how the surgeries were causally related to the accepted September 26, 2005 employment injury.

On May 15, 2006 appellant filed a claim to buy back 240 hours of sick leave he used from January 23 to April 2, 2006.

In treatment notes dated March 15 to May 26, 2006, Dr. O'Donnell listed findings on physical and x-ray examination. She advised that appellant was status post severe right ankle arthritis. Appellant was also status post arthroscopic surgery and removal of the external fixator of the right foot/ankle secondary to ankle distraction.

In a June 6, 2006 report, Amy Brill, a physical therapist, addressed the treatment of appellant's right ankle.

By letters dated June 20, 2006, the Office advised appellant about the deficiencies in his claim. It requested that he provide additional factual and medical evidence to support his disability for the claimed period.

Reports from Ms. Brill addressed the treatment of appellant's right ankle from March 20 to August 8, 2006.

In treatment notes dated June 29 and August 27, 2006, Dr. O'Donnell listed findings on physical and x-ray examination. She advised that appellant had post-traumatic arthritis secondary to trauma to the right ankle. Appellant also had pain. Dr. O'Donnell released him to return to full-duty work as of July 11, 2006.

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<sup>1</sup> The record reflects that appellant rolled over on his right ankle while conducting a fence security check.

<sup>2</sup> The record indicates that appellant was scheduled to return to light-duty work at the employing establishment on April 3, 2006.

In an undated letter, the employing establishment stated that appellant performed light-duty work from April 3 to July 11, 2006 until he was released to full-duty work by an attending physician. Appellant was unable to perform light-duty work from January 23 to April 2, 2006 due to his employment-related right ankle injury as it required that his leg be placed in traction.

On September 20, 2006 Dr. Arnold T. Berman, an Office medical adviser, reviewed the medical record. He noted that appellant had preexisting arthritic changes of the ankle joint with flattening of the talar dome at the time of the September 26, 2005 employment injury. Dr. Berman also noted that appellant sustained a right ankle fracture in 2001, but did not know if the ankle fracture was work related. He advised that the appropriate treatment for the accepted condition should have been a brace or cast immobilization followed by a period of rehabilitation for two months. There was no evidence of record to establish that the employment-related right ankle sprain aggravated appellant's preexisting ankle osteoarthritis. Dr. Berman recommended that the February 2 and March 9, 2006 right ankle surgeries not be authorized as employment related.

In a February 3, 2006 x-ray report of appellant's right ankle, Dr. Frank A. Piro, a Board-certified radiologist, advised that arthritic changes were seen at the ankle and subtalar joints. The ankle joint appeared slightly widened. Spurs were found at both joints. No subluxation or dislocation was found. Dr. Piro stated that an external metallic skeletal traction device that he placed across the right ankle obscured some of the bones of the hindfoot and midfoot which could have reduced the examination's sensitivity. In an October 21, 2006 x-ray report of appellant's left ankle, he found, among other things, a fixation screw in relation to the fourth and fifth proximal metatarsals.

In a December 8, 2006 x-ray report of appellant's left ankle, Dr. Jose L. Gonzalez, a Board-certified radiologist, advised that the operative screw which was at the base of the fourth and fifth metatarsals had been surgically removed.

In a November 29, 2007 form report, Dr. O'Donnell provided a history of the September 26, 2005 employment injury. She advised that appellant had arthritic changes and flattening of the talar dome which caused pain in his right ankle. Dr. O'Donnell indicated with an affirmative mark that the condition was caused or aggravated by the September 26, 2005 employment injury. She advised that appellant could perform his usual job duties with no restrictions as of March 2, 2007.

On August 31, 2009 Dr. Morley Slutsky, an Office medical adviser, reviewed the medical record.<sup>3</sup> He concurred with Dr. Berman's opinion that the February 2 and March 9, 2006 right ankle surgeries should not be authorized as they were not causally related to the September 26, 2005 employment injury. Dr. Slutsky advised that the medical evidence of record did not establish that the accepted employment injury aggravated, accelerated or exacerbated appellant's preexisting ankle condition.

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<sup>3</sup> Dr. Slutsky reviewed the medical record because the Office determined that it appeared Dr. Berman was not provided with a statement of accepted facts based on his recommendation that appellant undergo an orthopedic examination. Also, it was unclear as to whether Dr. Berman reviewed the entire medical record.

By decision dated September 2, 2009, the Office denied appellant's claim for leave buy back on the grounds that the medical evidence did not establish that he was totally disabled from January 23 to April 2, 2006 due to the September 26, 2005 employment injury.

On September 5, 2009 appellant, through counsel, requested a telephone hearing with an Office hearing representative. In a January 21, 2006 treatment note, Dr. O'Donnell provided a history that he was running when he twisted his right ankle. Appellant experienced increased pain since this incident. Dr. O'Donnell listed findings on physical and x-ray examination which included arthritic changes within the right ankle joint, flattening of the talar dome and questionable multiple fractures. She advised that appellant was a candidate for reconstructive surgery, scoping and possible reconstruction of the lateral right ankle ligaments. In an undated addendum to January 21, 2006 treatment note, Dr. O'Donnell advised that surgery was performed due to his right ankle injury. In an undated form report, she indicated with an affirmative mark that appellant's peroneal tendon damage was caused by the twisting of his ankle as he walked. Dr. O'Donnell advised that he could return to work with restrictions. She also advised that appellant sustained permanent disability and further surgeries were necessary. In an undated work capacity evaluation (Form OWCP-5c), Dr. O'Donnell advised that he was unable to perform his usual job. Appellant could work eight hours a day with permanent restrictions. In a September 4, 2009 report, Dr. O'Donnell provided a history that appellant twisted his lateral ankle while walking at work. She stated that he sustained a partially torn peroneal tendon fracture of the fifth metatarsal and post-traumatic arthritis of the right ankle. Future surgery would be necessary.

In a September 27, 2005 medical record, the employing establishment's health unit provided a history that on September 26, 2005 appellant sustained a right ankle injury while walking on a sidewalk during a fence check.

In a March 9, 2006 x-ray report of appellant's right ankle, Dr. David Sabbar, Board-certified in nuclear medicine, found evidence of bony absorption involving the tip of the right lateral malleolus with osteoporosis and soft tissue swelling. An inflammatory process in this region could not be excluded. Dr. Sabbar suggested comparisons with a magnetic resonance imaging scan of the right ankle.

In a March 8, 2010 decision, an Office hearing representative affirmed the September 2, 2009 decision, finding that the medical evidence did not support disability for the period January 23 to April 2, 2006 due to the September 26, 2005 employment injury.

### **LEGAL PRECEDENT**

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.<sup>4</sup> Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.<sup>5</sup> Whether a particular

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<sup>4</sup> *David H. Goss*, 32 ECAB 24 (1980).

<sup>5</sup> *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.<sup>6</sup>

In situations where compensation is claimed for periods where leave was used, the Office has the authority to determine whether the employee was disabled during the period for which compensation is claimed.<sup>7</sup> It determines whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed for leave buy back, after which the employing establishment will determine whether it will allow the employee to buy back the leave used.<sup>8</sup>

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his claimed injury and his employment.<sup>9</sup> To establish a causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration, as well as findings upon physical examination of appellant and his medical history, state whether the employment factors caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his or her opinion.<sup>10</sup>

### ANALYSIS

The Office accepted that appellant sustained a right ankle strain while conducting a fence security check in the performance of duty on September 26, 2005. Appellant subsequently filed a claim for leave buy back for 240 hours of disability from January 23 to April 2, 2006, a period of disability related to his right ankle surgeries. The Board finds, however, that the medical evidence does not support that his accepted ankle stress caused or contributed to the need for surgery.

Dr. O'Donnell's treatment notes found that appellant had post-traumatic right ankle arthritis for which he underwent surgeries and was secondary to trauma to the right ankle. She opined that the surgeries were performed as a result of a right ankle injury. To the extent that Dr. O'Donnell attributed the arthritic right ankle condition and resultant surgeries to the September 26, 2005 employment injury, the arthritic condition is not an accepted condition. She did not adequately explain how the September 26, 2005 sprain accepted by the Office would cause or contribute to appellant's preexisting right ankle arthritis or need for surgery. Dr. O'Donnell did not provide full history of appellant's treatment for his right ankle with

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<sup>6</sup> *Edward H. Horten*, 41 ECAB 301 (1989).

<sup>7</sup> *Laurie S. Swanson*, 53 ECAB 517 (2002); *see also* 20 C.F.R. § 10.425, which provides: "The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing [establishment]. Forms CA-7 and CA-7b are used for this purpose."

<sup>8</sup> *Laurie S. Swanson*, *supra* note 7.

<sup>9</sup> *Donald W. Long*, 41 ECAB 142 (1989).

<sup>10</sup> *Id.*

reference to the fracture noted in 2001.<sup>11</sup> In forms reports, Dr. O'Donnell checked a box marked yes to indicate that appellant's arthritic pain and peroneal tendon damage were caused or aggravated by the September 26, 2006 employment injury. It is well established that reports which only address causal relationship with a check mark without more by way of medical rationale do not explain adequately how the incident caused the injury. This evidence is insufficient to establish causal relationship and is of diminished probative value.<sup>12</sup> Dr. O'Donnell did not explain how the diagnosed arthritic degeneration or tendon damage were caused or contributed to by the September 26, 2005 sprain.<sup>13</sup> The Board notes that pain is generally considered a symptom, not a firm medical diagnosis.<sup>14</sup> Dr. O'Donnell found that appellant could return to work with restrictions, but she did not provide sufficient opinion explaining how his disability during the claimed period was causally related to the accepted employment condition.<sup>15</sup> She also failed to provide an opinion on the causal relationship between appellant's disability during the claimed period and the accepted employment injury in a Form OWCP-5c which addressed his ability to work full time with restrictions and September 4, 2009 report which found that he had a partially torn peroneal tendon fracture of the fifth metatarsal and post-traumatic arthritis of the right ankle that required surgery.<sup>16</sup> The Board finds that Dr. O'Donnell's reports are insufficient to support his claim of employment-related disability for the hours claimed.

The reports of Ms. Brill, a physical therapist, are of no probative value in establishing appellant's claim. A physical therapist is not a "physician" as defined under the Federal Employees' Compensation Act.<sup>17</sup>

The diagnostic test results of Dr. Piro, Dr. Gonzalez and Dr. Sabbar are insufficient to establish appellant's claim as the physicians did not address the issue of causal relation.<sup>18</sup>

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<sup>11</sup> See *Charlene R. Herrera*, 44 ECAB 361, 370 (1993) (finding that appellant has the burden of proof in establishing that a condition not accepted by the Office is causally related to employment factors).

<sup>12</sup> See *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

<sup>13</sup> See *Gloria J. McPherson*, 51 ECAB 441 (2000) (the opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant).

<sup>14</sup> *C.F.*, 60 ECAB \_\_\_\_ (Docket No. 08-1102, issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

<sup>15</sup> *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>16</sup> *Id.*

<sup>17</sup> See 5 U.S.C. § 8101(2); *A.C.*, 60 ECAB \_\_\_\_ (Docket No. 08-1453, issued November 18, 2008).

<sup>18</sup> See cases cited, *supra* note 15.

The employing establishment's health unit note did not provide an opinion addressing the causal relation of appellant's disability for the claimed period to the September 26, 2006 employment injury.<sup>19</sup>

The Board finds that appellant failed to provide sufficient medical evidence to establish that his claimed disability from November 6, 2004 to March 10, 2006 was causally related to his accepted September 26, 2005 employment injury. Appellant did not meet his burden of proof.

On August 31, 2009 Dr. Slutsky reviewed the medical evidence and found that the February 2 and March 9, 2006 right ankle surgeries were not medically necessary. He explained that there was insufficient evidence of record to establish that the September 26, 2005 employment injury had aggravated, accelerated or exacerbated appellant's preexisting right ankle arthritis or talar dome flattening. Dr. Slutsky provided medical rationale to support his opinion that the February 2 and March 9, 2006 right ankle surgeries were not medically necessitated due to the accepted condition. The Board finds that his report is sufficient to establish that any disability from work due to the right ankle surgeries was not work related.

On appeal, appellant contends that the Office's decision is contrary to fact and law. For reasons previously stated, the Board finds that appellant did not submit sufficient medical evidence in support of his claim.

### **CONCLUSION**

The Board finds that appellant failed to establish that he was disabled for 240 hours from January 23 to April 2, 2006 due to his accepted employment injury.

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<sup>19</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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