

injured his back and knees. OWCP accepted the claim on July 9, 2007 for a lumbar sprain, and bilateral contusions to the knees and lower legs. On October 29, 2007 it accepted left Achilles tendinitis and a left foot sprain, and on January 7, 2008 accepted a left medial meniscus tear. Appellant worked intermittently in a light-duty position. He had left knee surgery on January 8, 2008 and the employing establishment indicated that he returned to a light-duty job on February 11, 2008.

On November 10, 2008 appellant filed a claim for compensation from September 8 to October 8, 2008. He submitted a September 8, 2008 report from Dr. Angelo Agee, a podiatrist, indicating that appellant underwent left foot surgery, described as “first metatarsal hardware removal with first metatarsal exostectomy, partial arthroplasty interphalangeal joint left first digit.” The record also contains a September 5, 2008 report from Dr. Warner Pinchback, Jr., an orthopedic surgeon, indicating that appellant was treated for complaints of right knee pain. Dr. Pinchback noted that a magnetic resonance imaging (MRI) scan for the right knee was scheduled. In a September 15, 2008 report, Dr. Pinchback noted that appellant had a 1985 Achilles tendon repair, and he indicated that the current MRI scan showed what appeared to be a chronic tear of the posterior horn of the right medial meniscus. He recommended arthroscopic surgery.

In a report dated September 16, 2008, Dr. Agee stated that appellant suffered from degenerative joint disease as a result of a previous injury that required surgery on September 24, 2007. He stated that the September 8, 2008 surgery was an attempt to decrease appellant’s discomfort by removing the surgical plate, and a resection of bone in the left great toe joint.

The case was referred to an OWCP medical adviser for evaluation. In a report dated October 6, 2006, the medical adviser opined that the left toe metatarsal phalangeal (MP) joint surgery was not related to an accepted condition. The medical adviser stated that a foot sprain did not require “fusion, etc.” of the MP joint.

By report dated November 3, 2008, Dr. Pinchback indicated that appellant continued to have right knee pain. He indicated that appellant was scheduled for knee surgery on December 2, 2008. In a report dated December 3, 2008, Dr. Pinchback stated that appellant should remain on work restrictions with no prolonged standing or walking and no stooping or bending. A nurse’s report dated December 20, 2008 indicated that appellant did not undergo right knee surgery as scheduled.

By decisions dated February 26, 2009, OWCP denied the claims for compensation from September 8 to October 8, 2008 and December 2 to 16, 2008. Appellant requested a hearing before an OWCP hearing representative, which was held on November 4, 2009.

With respect to a continuing employment-related condition, OWCP prepared a statement of accepted facts and referred appellant to Dr. Timothy Holt, an orthopedic surgeon. In a report dated March 27, 2009, Dr. Holt noted that appellant had surgery in September 2008 and appellant attributed the surgery to wearing a cast for his Achilles tendon surgery. He stated that, as to the left great toe, this could have been aggravated secondary to wearing a cast, but he did not believe it was directly related to the employment injury. Dr. Holt opined that the original

injury had resolved, but appellant would continue to have problems with his knees due to his weight. In a report dated June 18, 2009, he stated that appellant's primary problem was obesity, but appellant "would have a minimal amount of disability" related to the employment injury. Dr. Holt reported that appellant had some cartilaginous injury and associated pain, and his injury was secondary to the cast wearing, which was not directly related to the employment injury.

In a report dated December 1, 2009, Dr. Agee stated that appellant was ambulating in a cast at the time of the injury to the first MP joint as documented by a Dr. Sims on September 13, 2007.² He indicated that surgical intervention was required to fuse the joint, but the surgical plate failed. By report dated November 18, 2009, Dr. Pinchback noted that appellant was two weeks post arthroscopic surgery on the right knee.

By decision dated February 1, 2010, an OWCP hearing representative remanded the case for further development. The hearing representative stated that appellant had military service-related injuries to his foot, leg and back. The hearing representative stated that OWCP should obtain records prior to the May 17, 2007 injury as appellant apparently had longstanding problems and refer the case for a second opinion evaluation.

In letters dated February 4, 2010, OWCP requested that the employment establishment, as well as Drs. Agee and Pinchback, submit medical evidence regarding treatment prior to May 17, 2007. On March 1, 2010 the employing establishment submitted some medical records, noting that the employing establishment did not have access to appellant's veteran file without the consent of appellant. On March 15, 2010 Dr. Pinchback submitted reports commencing January 23, 2009. In a letter dated March 17, 2010, OWCP requested that appellant submit medical evidence from the Veterans Administration regarding his back, legs and feet. By letter dated May 25, 2010, it stated that it could not proceed with a second opinion evaluation without VA medical records. OWCP stated that it was enclosing a Form CA-57 (Authorization for Release of Information) that appellant should sign and return within 14 days.

In a report dated March 8, 2010, Dr. Agee stated that appellant had surgery on September 24, 2007 for a fusion, the first MP joint with dorsal exostectomy of dorsal boney prominences, and a second procedure September 8, 2008 "to decrease his discomfort via removal of the surgical plate and resection of the bone." He indicated that he did not have treatment notes prior to March 2007.

By decision dated July 22, 2010, OWCP denied the claims for compensation from September 8 to October 8, 2008 and December 2 to 16, 2008. It stated that it had not received the CA-57 form and could not proceed with the case.

Appellant requested a hearing with an OWCP hearing representative, which was held on November 1, 2010. At the hearing he indicated that he had obtained a "service-connected award" regarding his left Achilles tendon.

² The record contains a report dated September 13, 2007 from a podiatrist, Dr. Lance Sims, reporting that appellant had a left Achilles repair 20 years earlier and had reinjured it again in May 2007. Dr. Sims diagnosed Achilles injury resulting in inflammation and worsening of the first MP joint, with a hallux limitus deformity. He indicated surgery was scheduled September 24, 2007.

By decision dated January 12, 2011, the hearing representative affirmed the prior decision. The hearing representative found it was “imperative” that medical records be obtained from the VA in order to render an appropriate decision, and appellant had failed to supply the necessary evidence.³

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁶

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁷ Findings on examination are generally needed to support a physician’s opinion that an employee is disabled for work. When a physician’s statements regarding an employee’s ability to work consist only of repetition of the employee’s complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁸ 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 employees to self-certify their disability and entitlement to compensation.⁹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁰ Rationalized medical evidence is medical evidence which includes a physician’s rationalized medical opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. 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

³ The record also contains a November 12, 2010 OWCP decision regarding wage-earning capacity. Appellant’s representative did not request review of this decision on appeal.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁷ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹ Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹²

ANALYSIS

In the present case, there are two different periods of disability claimed: September 8 to October 8, 2008 and December 2 to 16, 2008. As to the December 2008 claim for disability, the Board notes that appellant had been scheduled for right knee surgery on that date. Dr. Pinchback had stated in this November 3, 2008 report that appellant was scheduled for knee surgery on December 2, 2008. There is, however, no evidence that appellant underwent surgery at that time. Dr. Pinchback provided a December 3, 2008 report with no mention of any surgery or total disability. He indicated only that appellant should continue work restrictions. The December 20, 2008 nurse's report clearly stated that appellant did not undergo right knee surgery.

The Board finds there was no probative medical evidence presented as to any employment-related total disability from December 2 to 16, 2008. Appellant did not meet his burden of proof regarding this claim for compensation.

As to the claim for compensation from September 8 to October 8, 2008, this presents a different issue. Appellant did undergo left foot surgery on September 8, 2008. The issue is whether that surgery, and the accompanying disability for work, was employment related. This is clearly a medical issue, and an OWCP hearing representative had directed further development of the medical evidence in the February 1, 2010 decision. The claim for compensation from September 8 to October 8, 2008 was subsequently denied because OWCP made a determination that the issue could not be resolved without the submission of some military service-connected medical reports. But the issue of what is a sufficient medical background for a second opinion physician to render an opinion on the issue presented is one that should be resolved by the physician, not OWCP.

The evidence from Dr. Agee indicated that the September 8, 2008 surgery was a result of the September 24, 2007 left MP joint surgery. As the hearing representative noted in her February 1, 2010 decision, it appeared that OWCP had accepted the September 24, 2007 surgery as employment related. The case should be sent to a second opinion physician, in accord with the hearing representative's direction, with respect to the claim for compensation from September 8 to October 8, 2008. If the second opinion physician finds, based on the history provided and review of medical records, that a reasoned opinion on the issue presented cannot be made without certain VA medical records, then OWCP may pursue the issue at that time.

¹¹ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹² *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

The case will accordingly be remanded to OWCP for further development of the medical evidence with respect to the claim for disability from September 8 to October 8, 2008. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision with respect to the claim for compensation from September 8 to October 8, 2008, and the case is remanded for further development of the medical evidence. Appellant did not meet his burden of proof with respect to the claim for compensation from December 2 to 16, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 12, 2011 is affirmed with respect to the claim for compensation from December 2 to 16, 2008, and set aside and remanded for further action consistent with this decision of the Board regarding compensation from September 8 to October 8, 2008.

Issued: November 4, 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