



## **ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish that he was intermittently totally disabled during the period July 30 through December 4, 2008; and (2) whether appellant established that he was disabled from December 22 through 23, 2010.

## **FACTUAL HISTORY**

On October 27, 2006 appellant, then a 40-year-old vocational training instructor, filed a notice of occupational disease alleging that he developed right ankle discomfort, pain, swelling and a limp due to his employment duty of standing six hours a day. OWCP noted that he had a previous injury to his ankle in 1989 which was work related. Appellant underwent a right subtalar joint fusion with local bone graft on December 7, 2007. By decision dated March 6, 2008, OWCP accepted his claim for aggravation of right ankle arthritis.

Appellant alleged that he sustained a consequential left knee injury as a result of his accepted right ankle condition. On October 6, 2008 Dr. Road Al-Shaikh, an orthopedic surgeon, recommended that appellant join a gymnasium to have access to stationary bicycles and a swimming pool as he was unable to walk, run or hike due to his right ankle injury. He noted that appellant received orthotics for both feet and recommended therapeutic shoes. Dr. Al-Shaikh stated, "I believe that with proper therapeutic shoes and joining a gymnasium, [appellant] will be able to perform his duties as a vocational training instructor."

OWCP authorized leave buyback from November 27, 2006 through April 5, 2007 in the amount of \$8,640.72.

On October 29, 2008 Dr. Al-Shaikh indicated that on October 3, 2008 appellant reported left knee pain. He described appellant's December 2006 right subtalar joint fusion and work duties of seven hours standing and walking on uneven surfaces as well as wearing safety shoes. Dr. Al-Shaikh found left knee swelling, medial joint line tenderness and mild crepitus with motion. He also found a positive McMurray's test medially. Dr. Al-Shaikh stated:

"Because of [appellant's] right ankle surgery, he has been compensating on his left leg since December 2007. [He] has returned to his regular duties as an instructor. Because of his current duties, he has placed much stress to his left leg to be able to compensate for his right ankle. Because of the amount of hours and the work [appellant] currently performs, this has affected [his] left leg, specifically, his left leg/knee."

Dr. Al-Shaikh concluded that appellant's current left knee condition was a consequence of his right ankle injury.

Dr. Al-Shaikh examined appellant on March 24, 2009 and stated that he injured his left knee due to a twisting event when walking and over compensating from right ankle pain which was associated with a work-related injury. He found moderate swelling in the left knee with medial joint line tenderness, as well as mild crepitus with motion and a positive McMurray's sign medially. Dr. Al-Shaikh diagnosed internal derangement of the knee.

In a report received by OWCP on May 13, 2009, Dr. Al-Shaikh stated that appellant underwent left knee surgery on April 29, 2009 and that his disability commenced on that date. He performed a left knee partial medial and lateral meniscectomy and patellofemoral chondroplasty with plica resection on April 29, 2009.

OWCP authorized compensation from April 28 through July 5, 2009. Appellant returned to full-duty work on July 6, 2009. By decision dated October 7, 2009, OWCP accepted his claim for osteoarthritis of the ankles and feet, fracture of the right calcaneus, traumatic arthropathy of the right ankle and foot, internal derangement of the left knee, malunion of a fracture on the left and bilateral lower leg osteoarthritis.

On January 20, 2010 Dr. Al-Shaikh performed a right subtalar joint fusion realignment with local bone graft and removal of hardware. Appellant returned to work on September 22, 2010.

On January 19, 2010 appellant indicated that he used sick leave beginning with six hours on July 30, 2008 due to left knee pain. On January 27, 2009 he signed a claim for compensation requesting compensation for leave buyback from July 30 through December 4, 2008.

In a letter dated February 19, 2010, OWCP requested additional factual and medical evidence from appellant supporting his claim of intermittent total disability. It allowed 30 days for a response.

By decision dated October 4, 2010, OWCP denied appellant's claim for leave buyback due to recurrent intermittent total disability for the period July 30 through December 4, 2008. It found that he had not submitted the necessary medical opinion evidence. Appellant requested an oral hearing before an OWCP hearing representative on October 29, 2010.

Dr. Al-Shaikh completed a report on October 27, 2010 addressing appellant's sick leave usage due to his left knee. He noted that appellant used sick leave pending approval of his left knee condition. Dr. Al-Shaikh stated, "It is also agreed that [appellant] had reason to use sick leave for this period or any other period not covered on this letter due to his pain to his left knee which after examination it revealed positive for McMurray's medially." He noted that appellant was instructed to "provide cold therapy to the left knee and to minimize excessive standing and walking if possible when pain was present." Dr. Al-Shaikh listed appellant's dates of missed work due to his left knee injury and pain as July 30, September 29 and 30, October 1 and 24, November 10, 12 and 17 and December 2 and 4, 2008.

Appellant submitted a note from Dr. Al-Shaikh dated December 22, 2010 in which Dr. Al-Shaikh examined appellant's left knee, right ankle and left foot. Dr. Al-Shaikh stated that appellant had a well-healed subtalar osteotomy with revision of previous fusion. He performed a fluoroscopic evaluation of the osteotomy site with normal findings. Dr. Al-Shaikh noted that appellant had significant localized pain to the calcaneocuboid joint which was significant with inversion and eversion. He recommended a calcaneocuboid joint fusion and provided appellant with orthotics. Dr. Al-Shaikh reported no change in work status.

Appellant filed a claim for compensation on December 30, 2010 requesting compensation for leave without pay from December 22 through 23, 2010. OWCP notified appellant on

January 13, 2011 that the December 30, 2010 claim for compensation was received. It requested additional medical evidence and allowed 30 days for a response.

In a note dated January 17, 2011, Dr. Al-Shaikh stated that he examined appellant on December 22, 2010 as a follow-up to the osteotomy. He noted that appellant reported pain requiring over-the-counter medication to treat his left ankle condition. Dr. Al-Shaikh stated that appellant required a calcaneocuboid joint fusion due to significant pain resulting from inversion and eversion of this joint which resulted in removal from work to allow appellant time to recover from pain and to avoid excessive walking and standing for a period of time.

By decision dated February 14, 2011, OWCP denied appellant's claim for compensation from December 22 to 23, 2010. It noted that Dr. Al-Shaikh's December 22, 2010 report indicated that appellant had no change in work status.

Appellant testified at the oral hearing on March 17, 2011. He stated that Dr. Al-Shaikh advised him that when he had pain in his knee or ankle such that he could not go to work, not to report to the physician's office. Appellant noted that he used sick leave and did not have physician's excuses for the intermittent dates claimed.

On March 18, 2011 Dr. Al-Shaikh performed a right calcaneocuboid joint fusion for calcaneocuboid degenerative joint disease.

In a report dated March 29, 2011, Dr. Al-Shaikh addressed appellant's leave usage due to his left knee. He noted that following the December 2006 surgery appellant compensated with his left leg. Dr. Al-Shaikh noted that appellant's left knee demonstrated a positive McMurray's test medially. He noted that appellant used his sick leave pending approval of his left knee condition. Dr. Al-Shaikh stated, "It is also agreed that [appellant] had reason to use sick leave for this periods or any other periods not covered on this letter due to his discomfort to his left knee, which has previously revealed and tested positive for McMurray's medially." He listed July 30, September 29 and 30, October 1 and 24, November 10, 12 and 17 and December 4, 2008 as dates that appellant missed work due to his left knee condition.

OWCP entered appellant on the periodic rolls on April 4, 2011.

By decision dated June 6, 2011, the hearing representative noted that appellant filed a claim for compensation on January 27, 2009 requesting leave buyback for intermittent periods of total disability from July 30 through December 4, 2008. She found that Dr. Al-Shaikh's letters of October 27, 2010 and March 29, 2011 were authorizations for appellant to self-certify his disability during the period July 30 through December 4, 2008 and that appellant did not seek medical attention on the dates for which disability was claimed. The hearing representative concluded that there were no contemporaneous medical records supporting appellant's disability for work during the period claimed. She affirmed OWCP's October 28, 2010 decision.

## LEGAL PRECEDENT -- ISSUE 1 & 2

An employee seeking benefits under FECA<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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 hurts 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.<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 employees to self-certify their disability and entitlement to compensation.<sup>8</sup>

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>9</sup> 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 supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>10</sup> Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> 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).

<sup>6</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

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

<sup>8</sup> *Id.*

<sup>9</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>10</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>11</sup>

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

Appellant filed a claim for compensation, alleging that he had intermittent periods of total disability from July through December 2008 due to his consequential left knee injury. On October 6, 2008 Dr. Al-Shaikh, an attending physician, recommended that appellant join a gymnasium to have access to stationary bicycles and a swimming pool as he was unable to walk, run or hike due to his right ankle injury. He did not mention appellant's left knee condition or any period of disability due to this condition. Dr. Al-Shaikh completed a note dated October 29, 2008 indicating that appellant reported knee pain on October 3, 2008. He concluded that appellant's current left knee condition was a consequence of his right ankle injury as the result of over compensation as well as the prolonged standing and walking required in his job duties. Dr. Al-Shaikh did not address any specific periods of disability due to this condition. In a note dated March 24, 2009, he stated that appellant injured his left knee due to a twisting event when walking and over compensating from right ankle pain which was associated with a work-related injury. Dr. Al-Shaikh diagnosed internal derangement of the knee. He did not provide any period of total disability due to appellant's left knee condition. Dr. Al-Shaikh first attributed disability to appellant's left knee condition in his undated report received by OWCP on May 13, 2009. He stated that appellant underwent left knee surgery on April 29, 2009 and that his disability commenced on that date. The Board finds that there is no contemporaneous medical evidence addressing any period of disability before April 29, 2009 due to appellant's left knee condition.

Appellant also submitted two similar reports from Dr. Al-Shaikh dated October 27, 2010 and March 29, 2011. Dr. Al-Shaikh noted that appellant used sick leave pending approval of his left knee condition. He stated that appellant had reason to use sick leave due to pain in his left knee. Dr. Al-Shaikh also stated, "It is also agreed that [appellant] had reason to use sick leave for this period or any other period not covered on this letter due to his pain to his left knee...." He listed appellant's dates of missed work due to his left knee injury and pain as July 30, September 29 and 30, October 1 and 24, November 10, 12 and 17 and December 2 and 4, 2008.

As noted, when a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurts 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. Dr. Al-Shaikh's 2010 and 2011 reports do not provide objective findings of disability other than a positive McMurray's sign medially and attribute appellant's disability to pain. He did not explain why these findings would result in intermittent periods of disability. Furthermore, Dr. Al-Shaikh appears to be explicitly stating that appellant could self-certify his disability and entitlement to compensation in contradiction of Board precedent.<sup>12</sup> Due to the lack of findings and the general nature of these

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<sup>11</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>12</sup> *See Kharabi, supra* note 6.

reports, the Board finds that Dr. Al-Shaikh has not submitted sufficient medical opinion evidence to support appellant's intermittent total disability from July 30 through December 4, 2008.

Appellant may submit new evidence or 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.

### **ANALYSIS -- ISSUE 2**

Appellant has also alleged that he was totally disabled from December 22 through 23, 2010. He submitted a note dated December 22, 2010 in which Dr. Al-Shaikh reported examining appellant's left knee, right ankle and left foot. OWCP accepted appellant's claim for right subtalar joint fusion with local bone graft on December 7, 2007. It also accepted his claim for aggravation of right ankle arthritis, primary osteoarthritis of the ankles and feet, fracture of the right calcaneus, traumatic arthropathy of the right ankle and foot, internal derangement of the left knee, malunion of a fracture on the left and bilateral lower leg osteoarthritis. Dr. Al-Shaikh performed a fluoroscopic evaluation of the right ankle osteotomy site on December 22, 2010. This test was normal. However, Dr. Al-Shaikh also noted that appellant had localized pain to the right calcaneocuboid joint which was significant with inversion and eversion. He recommended a right calcaneocuboid joint fusion and provided appellant with orthotics.

In a note dated January 17, 2011, Dr. Al-Shaikh stated that he examined appellant on December 22, 2010 as a follow-up to the right ankle osteotomy. He stated that appellant required a right calcaneocuboid joint fusion due to significant pain resulting from inversion and eversion of this joint. Dr. Al-Shaikh stated this condition resulted in his decision to remove appellant from work to allow him time to recover from pain and to temporarily avoid excessive walking and standing.

The Board finds that appellant has submitted medical evidence specifically addressing the period of disability claimed. Appellant requested six hours of sick leave on December 22, 2010<sup>13</sup> and 10 hours on December 23, 2010. He is entitled to compensation for any time he missed for work due to medical treatment resulting from his accepted employment injuries. OWCP's procedure manual provides that claimants are entitled up to four hours of compensation due to routine medical appointments.<sup>14</sup> Furthermore, Dr. Al-Shaikh examined appellant on December 22, 2010 and found that the right ankle calcaneocuboid joint required fusion due to the significant pain appellant experienced with inversion and eversion. The Board finds that the medical evidence consisting of Dr. Al-Shaikh's determination on December 22, 2010 that appellant required additional surgery to his right ankle, an accepted condition; the fact that he underwent this surgery on March 18, 2011; as well as Dr. Al-Shaikh's January 17, 2011 statement that he removed appellant from work on December 22, 2010 to allow him time to recover from pain and to avoid excessive walking and standing are sufficiently detailed and

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<sup>13</sup> The Board notes that appellant worked four shifts of 10 hours each during a regular workweek.

<sup>14</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

contemporaneous to establish his temporary total disability on December 22 and 23, 2010 due to his accepted right ankle condition.

The Board finds that the medical evidence is sufficient to establish appellant's entitlement to compensation on December 22 and 23, 2010 due to his accepted right ankle condition for which appellant previously underwent two surgeries accepted by OWCP. On remand, OWCP will undertake the necessary development of the factual evidence to authorize compensation benefits for these dates.

**CONCLUSION**

The Board finds that appellant did not submit sufficient medical opinion evidence to establish that he was totally disabled for intermittent periods from July 30 through December 4, 2008. The Board further finds that he has established entitlement to compensation benefits on December 22 and 23, 2010.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed. The February 14, 2011 decision is set aside and the case remanded for further development consistent with this opinion of the Board.

Issued: August 13, 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