

FACTUAL HISTORY

On June 17, 2009 appellant, then a 40-year-old contracting officer, injured her right foot when she slipped on a wet floor in the performance of duty. She filed a Form CA-1 for traumatic injury and continuation of pay (COP) on that day. In a January 27, 2010 report, Dr. John L. Zboinski, a podiatrist, examined appellant and observed pain, antalgic gait, edema and point tenderness to the third and fourth metatarsals and toes. He pointed out that these findings remained consistent since July 13, 2009. Dr. Zboinski diagnosed right foot sprain/strain and possible ligamentous disruption and attributed the condition to the June 17, 2009 employment incident. His previous August 19 and December 16, 2009 notes advised that appellant was not disabled and resumed full-time work. A November 30, 2009 note from Dr. Moris B. Girgis, a Board-certified family practitioner, released her to work effective December 3, 2009.² By decision dated April 30, 2010, OWCP accepted appellant's traumatic injury claim for right foot sprain.³

On May 10, 2010 appellant filed a Form CA-7 claim for intermittent disability compensation for the period June 17, 2009 to May 10, 2010. She specified in an appended Form CA-7a time analysis form that she claimed compensation for 20 hours of leave without pay (LWOP) taken on June 26 and 29 and November 17, 2009.⁴

In a May 5, 2010 note, Dr. Zboinski related that appellant continued to exhibit right foot symptoms. He assessed that she was partially disabled and limited to light duty. A July 7, 2010 magnetic resonance imaging (MRI) scan obtained by Dr. Vidya Malhotra, a Board-certified diagnostic radiologist, showed mild degenerative changes of the first metatarsophalangeal and interphalangeal joints and Morton's neuroma affecting the third interspace. Subsequent follow-up notes from Dr. Zboinski dated July 14, August 25, October 13 and November 24, 2010, determined that appellant was not disabled.

OWCP informed appellant in a January 28, 2011 letter that additional evidence was needed to establish her claim. It gave her 30 days to submit a rationalized medical report from a qualified physician explaining how her accepted right foot condition led to her intermittent disability from June 17, 2009 to May 10, 2010.⁵ Appellant submitted a copy of Dr. Zboinski's November 24, 2010 note.

² The case record indicates that appellant requested leave for June 22, 26 and 29, July 2 and November 17, 2009 due to her right foot condition. Each absence was approved by the employing establishment.

³ OWCP originally denied the claim by decision dated December 28, 2009. Its hearing representative reversed this decision on April 20, 2010.

⁴ The case record contains several leave requests pertaining to a left knee condition sustained on November 28, 2009. This condition was not accepted by OWCP and is not presently before the Board.

⁵ OWCP also advised appellant in an October 26, 2010 letter that her June 26, 2009 work stoppage suggested the possibility of a recurrence of disability and that she should consider filing a Form CA-2a. It did not receive this form.

By decision dated March 22, 2011, OWCP denied appellant's compensation claim, finding that the medical evidence did not sufficiently establish an intermittent disability.⁶

On April 18, 2011 appellant requested an oral hearing. She submitted a March 28, 2011 letter from Dr. Zboinski opining that she needed custom-molded orthotics to provide biomechanical support, alleviate pain and increase her physical function.

In a June 15, 2011 notice, OWCP's Branch of Hearings and Review scheduled an August 2, 2011 oral hearing for 2:00 p.m. at 201 Varick Street, Room 740, New York, NY 10014. OWCP's hearing representative advised appellant that postponement of the hearing would only be permitted upon receipt of documentation showing her nonelective hospitalization or that the death of a spouse, parent or child prevented her attendance. The notice was mailed to her address of record.

On August 17, 2011 OWCP's hearing representative found that appellant failed to appear at the scheduled hearing, did not contact OWCP prior or subsequent to the hearing to explain her failure to appear and therefore abandoned her request.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury. 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.⁷ 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.⁸

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁹ 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.¹⁰

⁶ OWCP noted that the June 26 and 29, 2009 dates referenced in appellant's CA-7a form were within the 45-day COP period.

⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁸ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁹ *Laurie S. Swanson*, 53 ECAB 517, 520 (2002). *See also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

¹⁰ *Jefferson*, *supra* note 7.

ANALYSIS -- ISSUE 1

OWCP accepted appellant's traumatic injury claim for right foot sprain arising from the June 17, 2009 employment incident. Thereafter, appellant claimed wage-loss compensation for intermittent disability, asserting that she incurred 20 hours of LWOP for June 26 and 29 and November 17, 2009 and submitted medical evidence.

The Board finds that appellant did not establish her entitlement to wage-loss compensation because the medical evidence did not sufficiently demonstrate that she was intermittently disabled due to her accepted condition. In a May 5, 2010 treatment note, Dr. Zboinski found her to be partially disabled and recommended light-duty work. However, while he identified partial disability, he did not present any medical rationale setting forth the pathophysiological mechanism by which appellant's right foot sprain rendered her unable to perform her regular employment.¹¹ Moreover, Dr. Zboinski did not specify the dates of disability.¹²

Dr. Girgis' November 30, 2009 note advising that appellant could return to work on December 3, 2009, Dr. Malhotra's July 7, 2010 MRI scan report and Dr. Zboinski's March 28, 2011 letter in favor of orthotics were of limited probative value because none offered an opinion as to whether the accepted right foot sprain caused disability on any of the specific claimed dates.¹³ Finally, Dr. Zboinski's remaining notes from August 19, 2009 to November 24, 2010, did not support appellant's claim because they indicated that she was not disabled. In the absence of rationalized medical opinion evidence, appellant failed to meet her burden of proof to establish that she had disability causally related to the accepted injury on any of the claimed dates.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁴ 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.¹⁵ OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.¹⁶

¹¹ *Emma R. Bowman*, Docket No. 94-2431 (issued September 13, 1996); *Arita M. Cruz*, Docket No. 94-1694 (issued June 11, 1996).

¹² *M.F.*, Docket No. 08-1927 (issued April 16, 2009).

¹³ *Tracy A. Thorsen*, Docket No. 93-1232 (issued July 21, 1994).

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

¹⁵ 20 C.F.R. § 10.617(b).

¹⁶ See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The legal authority governing abandonment of hearings rests with OWCP's procedure manual, which provides that a hearing can be considered abandoned only under very limited circumstances.¹⁷ All three of the following conditions must be present: (1) the claimant has not requested a postponement; (2) the claimant has failed to appear at a scheduled hearing; and (3) the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, OWCP's hearing representative will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.¹⁸

ANALYSIS -- ISSUE 2

The case record shows that OWCP's Branch of Hearings and Review scheduled an oral hearing at a particular time and place on August 2, 2011. Written notice was properly addressed and duty mailed to appellant on June 15, 2011.¹⁹ Appellant did not request postponement and failed to appear at the appointed time, date and location. After 10 days elapsed, OWCP did not receive any notification from her explaining her failure to appear. Therefore, under these circumstances, the Board finds that appellant abandoned her request for a hearing.

Appellant contends on appeal that she provided notification for her failure to appear to OWCP on August 22, 2011. As noted, such notification must be received within 10 days of the scheduled hearing. Because 20 days elapsed from August 2 to 22, 2011, OWCP properly found that appellant abandoned her request for an oral hearing.

The Board points out that appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.²⁰ However, appellant may submit new evidence or argument as part of a formal 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.

CONCLUSION

The Board finds that appellant did not establish her entitlement to wage-loss compensation. Furthermore, the Board finds that OWCP properly determined that she abandoned her request for an oral hearing.

¹⁷ *Claudia J. Whitten*, 52 ECAB 483 (2001).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

¹⁹ *See Newton D. Lashmett*, 45 ECAB 181 (1993) (mailbox rule).

²⁰ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the August 17 and March 22, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 7, 2012
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