United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 16-1861**
	)	**Issued: June 1, 2017**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, METROPOLITAN CORRECTIONAL CENTER, New York, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 20, 2016 appellant filed a timely appeal from a June 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 established a recurrence of total disability for intermittent periods from January 20, 2011 through June 21, 2013, causally related to an accepted April 13, 2006 left foot injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on April 13, 2006 appellant, then a 39-year-old intelligence research specialist, twisted his left ankle in the performance of duty when he stepped on a loose brick while walking to his vehicle, causing a left foot sprain. It later expanded the claim to accept a left calcaneal cyst and resolved early osteomyelitis of the left ankle. OWCP paid wage-loss compensation for total disability from May 29, 2006 through September 11, 2008, when appellant returned to work in a modified-duty position.[2] Appellant noted in an affidavit of earnings and employment (Form EN1032) signed on July 1, 2007, that he was self-employed as of January 17, 2006 in a "management/consulting company for entertainment." He did not report any earnings from the enterprise.

Appellant submitted medical evidence regarding his medical treatment while receiving compensation for total disability. In a June 8, 2006 report, Dr. Peter F. DiPaolo, an attending Board-certified orthopedic surgeon, diagnosed a left calcaneal fracture and left ankle sprain. On August 8, 2006 he diagnosed status post left ankle fracture, post-traumatic retrocalcaneal bursitis, and post-traumatic peroneal tendinitis. On November 30, 2006 Dr. Di Paolo performed surgical excision of a "painful callus of the late lateral calcaneus, authorized by OWCP. He performed surgical superficial wound drainage on December 20, 2006, authorized by OWCP.[3]

On August 21, 2007 OWCP obtained a second opinion from Dr. Salvatore Corso, Board-certified in orthopedic surgery and sports medicine, who opined that appellant was totally disabled from work due to postoperative osteomyelitis. On December 9, 2007 Dr. Corso opined that surgical debridement was the only effective cure for osteomyelitis.

Dr. John Feder, an attending Board-certified orthopedic surgeon, opined on September 4, 2007 that appellant's osteomyelitis had resolved.[4]

On February 21, 2008 OWCP found a conflict of medical opinion between Dr. Feder, for appellant, and Dr. Corso, for the government, regarding the presence of osteomyelitis and the need for additional surgery. To resolve the conflict, it selected Dr. Peter Lesniewski, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Lesniewski provided an April 7, 2008 report, diagnosing chronic osteomyelitis in a quiescent state, with active plantar fasciitis, and scar sensitivity. He provided supplemental reports on May 14 and 16, 2008, noting that appellant's plantar fasciitis was unrelated to the accepted injury, but the scar hypersensitivity

[2] Effective April 13, 2008, OWCP reduced appellant's compensation based on a selected modified-duty position provided by the employing establishment. In a September 12, 2008 worksheet, it noted that it conducted an informal wage-earning capacity determination for the period April 13 to May 10, 2008, based on an offered limited-duty position at retained pay.

[3] A February 22, 2007 magnetic resonance imaging (MRI) scan of the left ankle showed osteomyelitis of the lateral aspect of the calcaneus, with an abscess identified in the soft tissues.

[4] Appellant participated in physical therapy from January to March 2008.

was related. Dr. Lesniewski found that appellant had attained maximum medical improvement (MMI) and could return to full duty in his date-of-injury position.[5]

By notice dated June 27, 2008, OWCP advised appellant of its proposal to terminate his wage-loss compensation and medical benefits, based on Dr. Lesniewski's opinion that the accepted injury had resolved without residuals. It afforded appellant 30 days to submit evidence or argument in support of continued compensation.

Dr. DiPaolo provided reports dated from April 9 to September 10, 2008, finding that appellant could work limited duty for four hours a day due to a continued painful scar and osteomyelitis. He opined that appellant's left calcaneus fracture, callus, and surgery were directly related to the April 13, 2006 employment injury, but that the resolved plantar fasciitis was unrelated to the accepted injury.

In a July 1, 2008 affidavit of earnings and employment (Form EN1032), appellant noted his self-employment "year-round" in a "consulting/management company." He did not report any earnings.

In a July 14, 2008 report, Dr. Michael Livingston, an attending podiatrist, diagnosed left foot peroneal brevis tendinitis, scar formation in the lateral aspect of the left heel with edema, an osseous irregularity of the lateral border of the left calcaneus, abducted digiti minimi tendinitis at the calcaneal insertion, infracalcaneal heel spur, and left foot plantar fasciitis.

By decision dated September 12, 2008, OWCP terminated appellant's wage-loss compensation benefits, finding him medically able to return to full-duty work, based on Dr. Lesniewski's opinion as the special weight of the medical evidence. It noted that appellant remained entitled to medical benefits for treatment of the accepted injury.[6]

In a December 30, 2008 report, Dr. Livingston diagnosed neuritis, synovitis, and adhesive capsulitis of the left heel.[7] He administered a perineural injection. Dr. Livingston found that appellant was totally disabled from work from August 6 to November 5, 2007, and

[5] In an August 7 and September 9, 2008 supplemental reports, Dr. Lesniewski found appellant able to work eight hours a day with no restrictions in his sedentary date-of-injury position.

[6] In a September 16, 2008 letter, appellant, through his than counsel, requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. In a December 2, 2008 letter, counsel withdrew his request for an oral hearing.

[7] A December 30, 2008 MRI scan of the left foot and ankle showed postsurgical changes of the posterolateral aspect of the heel with prominent scar formation but no focal neuroma. There were no findings suggestive of "soft tissue or osseous infection."

partially disabled for work since November 5, 2007. He continued to administer injections through July 2010 to "break up adhesive capsulitis and scar formation about the region of pain."[8]

The employing establishment removed appellant from employment, effective July 7, 2010. A notification of personnel action (Form SF-50) dated July 7, 2010 noted that appellant was removed for misuse of an employing establishment credential, off-duty misconduct for engaging in unapproved outside employment, and "failure to maintain accountability."

An August 11, 2010 MRI scan showed mild chronic plantar fasciitis, mildly increased insertional Achilles tendinitis, and chronic, unchanged scar remodeling of the anterior tibiofibular ligament. Dr. Livingston opined on August 24, 2010 that the MRI scan results indicated that appellant might require surgery.

On September 3, 2010 appellant filed a notice of recurrence of disability (Form CA-2a), claiming that it commenced May 5, 2010 while performing full-time modified duty at the employing establishment. He noted that he was separated from the employing establishment on July 7, 2010. On the reverse of the form, appellant asserted that since leaving the employing establishment, he was self-employed as the chief executive officer of True Familia Consulting, providing "expertise and professional advice" for 20 hours a week, but had not received wages. He checked boxes indicating that he did not claim compensation for wage loss. In September 24 and October 7, 2010 letters, OWCP notified appellant that as his case remained open for medical care and he did not claim wage-loss compensation, he did not have to file a claim for recurrence of disability.

On January 20, 2011 Dr. Livingston performed a partial left calcanectomy with removal of scar tissue and adhesions, and neurolysis of the left calcaneal nerve, authorized by OWCP. Appellant's postoperative course was complicated by development of a deep venous thrombosis (DVT) in the left leg, requiring hospitalization from January 31 to February 26, 2011. Dr. Livingston provided periodic reports through April 2011, noting that appellant was not yet permitted to bear weight on his left foot. Appellant participated in physical therapy in April and May 2011.

In a May 25, 2012 affidavit of earnings and employment (Form EN1032), appellant noted that he was self-employed for intermittent days each month, but did not report any earnings.

[8] On May 15, 2009 appellant claimed a schedule award (Form CA-7). He provided a February 13, 2009 report by Dr. David Weiss, an orthopedic surgeon. Dr. Weiss found 25 percent permanent impairment of the left leg under Table 17-2, page 550 of the sixth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). On May 12, 2010 OWCP obtained a second opinion from Dr. Stanley Soren, a Board-certified orthopedic surgeon, who found that appellant attained MMI. Referring to Table 16-2 of the A.M.A., *Guides*, Dr. Soren found five percent permanent impairment of the left leg due to a class 1 left calcaneal fracture. An OWCP medical adviser reviewed Dr. Sorenson's report on July 14, 2010 and concurred with his impairment rating. By decision dated August 2, 2010, OWCP issued a schedule award for five percent permanent impairment of the left lower extremity. The period of the award, 14.4 weeks, ran from April 24 through August 2, 2010.

On June 21, 2012 Dr. Livingston performed a left ankle arthrotomy with subtotal synovectomy, and a modified Brostrom-Gould lateral ankle stabilization. He placed a fiberglass cast and instructed appellant not to bear weight on his left lower extremity through August 7, 2012. OWCP authorized the procedure.

On January 24, 2013 Dr. Livingston performed a left Achilles tendon repair, resection of Haglund deformity, and a resection of a retrocalcaneal left heel spur. OWCP authorized the procedures. In progress notes through September 3, 2013, Dr. Livingston found appellant "10 percent disabled."

On September 17 and October 2 and 7, 2013 appellant submitted claims for compensation (Form CA-7) for the period January 20, 2011 through June 21, 2013 due to surgical recovery and attendance at physical therapy.[9] He explained that he owned, operated, and managed True Familia Consulting, an entertainment consulting business, from his home. Appellant was also the sole employee. He acted "in an advisory capacity on professional matters such as security, entertainment, management, marketing and branding," performed accounting and bookkeeping, and purchased merchandise and supplies. Appellant attached federal tax returns showing $40,640.00 in total income and a $22,014.00 net loss in 2010, and $1,200.00 in total income and a $37,752.00 net loss in 2011.

In October 2 and 4, 2013 letters, the employing establishment asserted that as appellant was removed from employment due to misconduct unconnected to the accepted injury, he was "not entitled to further compensation benefits."

By decision dated November 21, 2013, OWCP denied appellant's claims for wage-loss compensation for total disability from January 20, 2011 through June 21, 2013, finding that he was removed for cause effective July 7, 2010. Appellant did not stop work due to the accepted injuries. OWCP further found that there was no medical evidence that he could not have continued to perform his modified job as of the date of his removal.

In a November 26, 2013 letter, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Appellant submitted additional reports from Dr. Feder finding appellant temporarily totally disabled from November 26, 2013 through April 8, 2014 due to left Achilles tendinitis. Dr. Livingston found appellant "10 percent disabled" from December 23, 2013 through February 24, 2015.[10]

By decision dated May 5, 2014, an OWCP hearing representative remanded the case to OWCP to obtain medical evidence addressing the claimed periods of disability. The hearing representative noted that Dr. Livingston did not specifically address periods of total disability from work, or if the accepted injuries prevented appellant from participation in True Familia Consulting.

[9] Appellant submitted CA-7 forms for similar periods on September 5, 2012. OWCP notified him that the forms were incomplete. Appellant then submitted a second set of claim forms on September 17, 2013.

[10] September 24, 2014 nerve conduction velocity and electromyography studies of the left lower extremity showed left medial calcaneal neuropathy, without evidence of left lumbosacral neuropathy.

In a November 7, 2014 letter, OWCP requested that appellant provide additional information about his employment history, including how many hours a day he worked, his specific duties and responsibilities, and the amount of any wages received.

In a second November 7, 2014 letter, OWCP requested that the employing establishment provide documentation pertaining to appellant's removal, "including the removal notice, with appeal rights, and the notice of proposed removal." The employing establishment did not respond to OWCP's request.

Appellant responded by November 21 and December 1, 2014 letters, contending that he did not return to work, had no alternate work, and performed no duties of employment.

In a January 28, 2015 letter, OWCP requested that Dr. Livingston provide additional rationale regarding whether appellant was disabled from work for the claimed periods due to sequelae of the accepted April 13, 2006 left foot injury. It noted that appellant "underwent surgery on January 20, 2011, March 1, and June 21, 2012. For each of these dates, please indicate for what dates [appellant] was incapable of either sitting, intermittent standing and ambulating, and what dates he became capable of sitting, intermittent standing and ambulating again. Please explain what clinical findings and test results [were] considered in reaching [those] conclusions…."

In February 28, 2015 reports, Dr. Livingston released appellant to full-time sedentary duty, with up to two hours of standing and walking, and no restriction on driving to and from work. He noted that appellant had continued left retrocalcaneal pain due to medial calcaneal nerve neuropathy. Dr. Livingston found appellant totally disabled for work through April 2015.

By decision dated June 15, 2015, OWCP denied appellant's claim for wage-loss compensation for January 20, 2011 through June 21, 2013, finding that the medical evidence of record was insufficient to support total disability due to consequences of the accepted left foot injury for the claimed periods. It indicated that the issue of whether or not he was removed for cause was moot due to a lack of factual evidence.

In a June 22, 2015 letter, appellant requested a telephonic hearing. At the hearing, held February 8, 2016, he contended that the employing establishment removed him for filing an Equal Employment Opportunity complaint based on disability. Appellant noted that, as of November 7, 2014, he no longer worked for True Familia Consulting. He submitted additional medical evidence.

In a July 21, 2015 report, Dr. Feder found appellant totally disabled for work due to Achilles tendinitis, neuritis, and medial calcaneal neuropathy.[11] He requested authorization for left ankle surgery and physical therapy. Dr. Feder provided a November 3, 2015 follow-up report reiterating the findings and diagnoses from the July 21, 2015 examination.

[11] Appellant participated in physical therapy in March 2015. An April 20, 2015 MRI scan of the left hind foot demonstrated "insertional Achilles tendinosis with a nine millimeter linear focus of intrasubstance mucinous degeneration or focal longitudinal splitting along the lateral aspect of the distal tendon" without a tendon tear, and mild paratenonitis.

Dr. Livingston provided periodic reports from October 22, 2015 through January 27, 2016, diagnosing left Achilles tendinitis and "other bursitis" of the left ankle and foot. In a January 27, 2016 letter, he noted that the April 13, 2006 employment injury necessitated surgical procedures on January 20, 2011, June 21, 2012, and January 24, 2013. Each necessitated a minimum 12-week recovery period. Dr. Livingston found appellant disabled from work from January 20 through April 14, 2011, June 21 to September 13, 2012, and January 24 through April 18, 2013.

By decision dated June 10, 2016,[12] an OWCP hearing representative affirmed the June 15, 2015 decision, finding that the medical evidence of record did not support total disability for the claimed period. OWCP also found that the factual record failed to support wage loss, as his CA-1032 forms were ambiguous as to whether he had actual earnings, and his November 21, 2014 letter noted that he did not return to alternate work and had no days or hours of employment.

LEGAL PRECEDENT

OWCP's implementing regulations define a "recurrence of disability" as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[13] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury is withdrawn or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.[14] Appellant has the burden of proof to establish that there was no medically appropriate light duty available for the claimed period.[15]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and to show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[16] This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to

[12] OWCP initially issued the decision on April 7, 2016, but sent it to an incorrect address. OWCP reissued the decision on June 10, 2016.

[13] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.a (June 2013). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

[14] *J.F.*, 58 ECAB 124 (2006).

[15] *Id*.

[16] *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

employment factors and supports that conclusion with sound medical reasoning.[17] An award of compensation may not be made on the basis of surmise, conjecture, speculation, or on appellant's unsupported belief of causal relation.[18]

ANALYSIS

OWCP accepted that appellant sustained a left foot and ankle injury on April 13, 2006. Following a period of total disability, appellant returned to modified duty on September 12, 2008. He claimed a recurrence of disability commencing May 5, 2010, and was separated from the employing establishment effective July 7, 2010. Appellant was then self-employed as an entertainment manager for True Familia Consulting.

Appellant claimed wage-loss compensation for temporary total disability for the period January 20, 2011 through June 21, 2013, during which time he underwent left foot and ankle surgeries on January 20, 2011, June 21, 2012, and January 24, 2013, approved by OWCP. OWCP denied the claim by June 10, 2016 decision, finding the factual evidence inadequate to establish that appellant was earning wages as of January 20, 2011, and the medical evidence inadequate to support a total disability for work for the period claimed.

Appellant provided factual evidence regarding his employment from January 20, 2011 through June 21, 2013. In an affidavit of earnings and employment (Form EN1032) dated May 25, 2012, he reported his self-employment in True Familia Consulting. Appellant previously explained that he was the sole employee and worked 20 hours a week, but had not received any wages. He described advisory, fiduciary, and managerial duties. Yet, in November 21 and December 1, 2014 letters, appellant asserted that he performed no duties of employment. Federal income tax returns showed business income of $40,640.00 in 2010 and $1,200.00 in 2011, with net losses of $22,014.00 and $37,752.00 respectively. Although appellant's statements regarding his wages are somewhat conflicting, the federal tax returns establish that appellant had business income in 2010 and 2011. However, the dates of his work activities are not of record. OWCP requested a detailed account of appellant's work activities in a November 7, 2014 letter, including number of hours worked each day, duties performed, and wages earned. Appellant's November 21 and December 1, 2014 letters did not provide the information requested. Thus, there is insufficient evidence to establish that he had actual earnings immediately prior to January 20, 2011.

In support of the medical aspect of his claim, appellant provided several reports from Dr. Livingston, an attending podiatrist, who performed the surgical procedures. On January 27, 2016 Dr. Livingston found that appellant was totally disabled for all work from January 20 through April 14, 2011 due to postsurgical status and DVT of the left leg. Appellant was also totally disabled from June 21 to September 13, 2012, and January 24 through April 18, 2013 due to periods of postsurgical recovery. However, Dr. Livingston did not explain why appellant would have been totally disabled from his sedentary, date-of-injury job for the claimed periods, or specify which clinical findings and test results supported a complete inability to work. OWCP

[17] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[18] *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

requested such an explanation in its January 28, 2015 letter. As Dr. Livingston did not provide such rationale, his opinion is insufficient to meet appellant's burden of proof in establishing total disability for work from January 20, 2011 through June 21, 2013.[19]

On appeal, appellant contends that his November 7, 2014 letter and 2010 and 2011 federal income tax returns documented his earnings from October 1, 2011 to August 31, 2012, and that the medical evidence was sufficient to establish the claimed period of disability. He notes that he had to surrender his apartment three years ago as he had no wages, and that OWCP had no reason to deny his claim for recurrence of disability. As found above, the factual record does not contain sufficient information documenting appellant's earnings, and the medical evidence is insufficiently rationalized to meet his burden of proof.

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.

CONCLUSION

The Board finds that appellant has not established a recurrence of total disability for intermittent periods from January 20, 2011 through June 21, 2013, causally related to an accepted April 13, 2006 left foot injury.

[19] *Deborah L. Beatty*, 54 ECAB 340 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 10, 2016 is affirmed.

Issued: June 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board