

**United States Department of Labor
Employees' Compensation Appeals Board**

K.J., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Miami, FL, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 16-1805
Issued: February 23, 2018**

Appearances:
Martin Kaplan, Esq., for the appellant¹
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 12, 2016 appellant, through counsel, filed a timely appeal from a September 1, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision of the case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ Appellant timely requested oral argument. By order dated January 4, 2018, the Board exercised its discretion and denied her request as her arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 16-1805 (issued January 4, 2018).

ISSUE

The issue is whether appellant met her burden of proof to establish total disability for the period commencing February 22, 2015, causally related to her accepted employment conditions.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On March 20, 2014 appellant, then a 48-year-old supervisory transportation security officer, filed an occupational disease claim (Form CA-2) alleging that she developed plantar fasciitis and tendinitis as a result of factors of her federal employment. Her work duties consisted of prolonged standing and walking to checkpoints. Appellant first became aware of her condition on January 18, 2014 and related it to her federal employment on January 23, 2014. She stopped work on April 30, 2014, returned to part-time limited-duty work on May 26, 2014, and worked intermittently until October 4, 2014.

Dr. Augustine A. Bollo, a podiatrist, treated appellant from January 23 to September 8, 2014, for work-related bilateral foot injuries. He diagnosed strain of muscle or tendon of bilateral lower legs, bilateral Achilles tendinitis and bilateral plantar fasciitis. Dr. Bollo noted that conservative treatment had failed and he, therefore, recommended surgery. On April 30, 2014 he performed plantar fasciotomies on both feet. On September 24, 2014 Dr. Bollo performed another bilateral endoscopic plantar fasciotomy as well as bilateral tarsal tunnel decompression, and bilateral decompression of medial and lateral plantar nerves. He diagnosed bilateral plantar fasciitis and bilateral tarsal tunnel syndrome. In a September 22, 2014 return to work slip, Dr. Bollo released appellant to return to work on October 13, 2014 with restrictions of limited walking and standing no more than 30 minutes. On October 6, 2014 he repeated his diagnoses and opined that appellant's present conditions were work related, as they were caused by excessive standing and walking in her job.

On January 9, 2015 OWCP accepted bilateral Achilles tendinitis and bilateral tarsal tunnel syndrome. It also authorized the September 24, 2014 surgery. OWCP paid appellant wage-loss compensation benefits from November 2, 2014 to February 7, 2015.

On January 27, 2015 Dr. Bollo noted appellant's symptoms of burning and throbbing foot pain, swelling of the right ankle, tenderness of the medial, lateral, and gutter ankle, and bilateral tenderness of the tibialis and the spring ligament. He diagnosed bilateral tarsal tunnel syndrome, postoperative decompression and bilateral plantar fasciitis. Dr. Bollo advised that appellant could resume a sedentary position with limited walking and standing. In a February 3, 2015 return to work slip, Dr. Bollo returned appellant to work on February 9, 2015 in a sedentary position with an ankle brace and open-toe shoe.

⁴ Docket No. 15-1637 (issued June 28, 2016), *denying petition for recon.*, Docket No. 15-1637 (issued March 17, 2017).

The employing establishment offered appellant a limited-duty job as a supervisory transportation security officer effective February 9, 2015. The job duties included recurrent/certified training for a maximum of eight hours a day, online learning center activities for a maximum of two hours a day, and administrative and clerical duties for a maximum of eight hours a day. The position was in conformance with Dr. Bollo's February 3, 2015 medical restrictions. Appellant accepted the position.

Appellant was again examined by Dr. Bollo on February 9, 2015 for severe burning and throbbing foot pain and back pain which presented abruptly after she had been sitting for eight hours. Dr. Bollo noted positive findings and diagnosed bilateral tarsal tunnel syndrome, postoperative decompression, and bilateral Achilles tendinitis. He advised that appellant was totally disabled for one week due to increased pain and difficulty walking. In a treatment note dated February 17, 2015, Dr. Bollo noted improvement in pain symptoms since she had been off work. He advised that appellant could resume modified sedentary work on February 23, 2015.

Appellant submitted claims for compensation (Form CA-7) for total disability for the periods from April 20, 2014 to February 7, 2015, and February 8 to 21, 2015. In an attached time analysis form (Form CA-7a), she noted that on February 8, 2015 the employing establishment could not accommodate her restrictions. She worked eight hours on February 9, 2015, but from February 10 to 21, 2015, her physician took her off work.

In a February 12, 2015 statement, T.S., an employing establishment training specialist, noted that appellant reported for training on February 9, 2015 and was assigned to complete her pending online learning courses. T.S. met with appellant regarding her schedule while with the training department and advised appellant that she would need to change her shift from 5:00 a.m. -1:30 p.m. to 4:00 a.m. – 12:30 p.m.. Appellant noted that the 5:00 a.m. to 1:30 p.m. shift was assigned as an accommodation and that she could not change it. She further inquired about obtaining CA-7 forms. Appellant stated that she was having pain in her foot and the pain was radiating up her leg to her back. She stayed at the airport until her husband arrived. Appellant called T.S. and indicated that, pursuant to her physician's orders, she would not be returning to work until after February 17, 2015, when she was scheduled to be reevaluated.

A March 23, 2015 electromyogram (EMG) revealed motor delays in the lateral plantar nerve and sensory delays in the sural nerve. On March 23, 2015 Dr. Bollo treated appellant for left tinea pedis, bilateral tarsal tunnel syndrome, bilateral mononeuritis of the lower limb, Achilles tendinitis, plantar fasciitis, and muscle or tendon strain of the lower leg.

By decision dated May 12, 2015, OWCP denied appellant's claim for compensation for the period February 8 to 21, 2015.

On May 19, 2015 appellant requested reconsideration. She submitted a March 9, 2015 note from Dr. Bollo who treated her for left tinea pedis, bilateral tarsal tunnel syndrome, bilateral mononeuritis of the lower limb, Achilles tendinitis, plantar fasciitis and strain of the muscle and or tendon of the lower leg. On April 27, 2015 he indicated that appellant continued to have pain and weakness in both legs after her 2014 surgery. Dr. Bollo advised that appellant's chronic kidney disease precluded treatment by medication. He noted that appellant worked at an airport and walked a long distance to get to her duty station. Appellant noted difficulties walking short

distances, which placed additional stress on the affected areas. Dr. Bollo noted that appellant's condition remained unchanged and the previous restrictions regarding walking remained in place. In an April 27, 2015 duty status report (Form CA-17), he released appellant to return to work full-time with restrictions.

On May 22, 2015 the employing establishment offered appellant a limited-duty job as a supervisory transportation security. The position was in conformance with the medical restrictions set forth by Dr. Bollo on April 27, 2015.

Appellant submitted several claims for compensation (Form CA-7) for total disability for the period February 22 to May 16, 2015.

Dr. Bollo treated appellant on May 29, 2015 for burning and throbbing foot pain. He noted findings and diagnosed bilateral tarsal tunnel syndrome. Dr. Bollo recommended that appellant wear an ankle brace and return to modified duty.

In a June 12, 2015 letter, OWCP requested that appellant submit additional information to support her claim for compensation. It asked that she submit medical evidence establishing that total disability was due to the accepted condition for the period claimed.

A June 19, 2015 functional capacity evaluation revealed that appellant was able to "perform a minimum" of sedentary duties. The physical therapist administering the testing noted that appellant terminated most activities due to increased subjective pain. He further noted that there were inconsistencies throughout the testing that blurred test results and indicated submaximum effort. The physical therapist added that based on self-limited results no formal recommendations could be made.

By decision dated June 24, 2015, OWCP denied modification of its May 12, 2015 decision.⁵

Appellant submitted several claims for compensation (Form CA-7), for total disability for period May 17 to June 13, 2015.

In a July 2, 2015 note, Dr. Bollo reported treatment of appellant for left tinea pedis, bilateral tarsal tunnel syndrome, bilateral mononeuritis of the lower limb, Achilles tendinitis, plantar fasciitis, and strain of the muscle and/or tendon of the lower leg. Examination revealed bilateral tenderness of the tibialis posterior, spring ligament and retrocalcaneal bursae, decreased strength bilaterally in the peroneus brevis and posterior tibialis, and absent ankle reflexes bilaterally. Dr. Bollo diagnosed bilateral tarsal tunnel syndrome and bilateral Achilles tendinitis. He noted exhausting all treatment options, but appellant continued to have residual numbness, sensitivity to arches and global pain that was unexplainable. Dr. Bollo recommended ankle sleeves and care by a neurologist. He noted that appellant could work mostly sedentary work

⁵ On July 28, 2015 appellant appealed the June 24, 2015 decision to the Board. In a June 28, 2016 decision, the Board affirmed the June 24, 2015 decision. The Board found that appellant failed to establish disability for the period beginning February 8 to 21, 2015 causally related to the accepted employment injury. Docket No. 15-1637 (issued June 28, 2016), *petition for recon. denied*, Docket No. 15-1637 (issued March 17, 2017).

duty with limited standing and walking. In a duty status report (Form CA-17) dated July 2, 2015, Dr. Bollo noted clinical findings of tarsal tunnel pain and returned appellant to work full-time with restrictions. Appellant also provided physical therapy records from February 23 to March 16, 2016.

By decision dated October 13, 2015, OWCP denied appellant's claim for compensation for the period February 22 to May 16, 2015.

Appellant submitted physical therapy notes from February 20 to March 9, 2015, an EMG dated March 23, 2015 and reports from Dr. Bollo dated March 23 and July 2, 2015, all previously of record.

On October 29, 2015 counsel requested an oral hearing before an OWCP hearing representative which was held on July 12, 2016. Appellant asserted that the limited-duty position entailed excessive walking which violated Dr. Bollo's restrictions.

Appellant submitted additional medical evidence. On July 11, 2016 Dr. Jose A. Rivera, a podiatrist, treated her for bilateral foot pain when standing or walking. He noted that appellant underwent bilateral plantar fasciotomy in April 2014, endoscopic plantar fasciotomy and bilateral tarsal tunnel release due to continued symptoms. Appellant reported being treated by Dr. Bollo who recommended sedentary work. She related that she was unable to perform even sedentary work due to painful symptoms when weight bearing. Examination revealed positive Tinel's sign at the tarsal tunnel region, sensory deficit along the plantar foot, hypersensitivity along the medial arch bilaterally, and tenderness to palpation plantar medial heel bilaterally. Dr. Bollo diagnosed bilateral tarsal tunnel, bilateral plantar fasciitis, and difficulty walking. Dr. Rivera opined that appellant exhausted all treatment options from a podiatry standpoint and recommended she see a neurologist. He recommended strict sedentary-type work.

On July 20, 2016 Dr. Paul L. Ginsberg, a Board-certified neurologist, treated appellant for migraines, spontaneous laughing and crying, and anxiety. He found no weakness of arms or legs, no atrophy, intact sensation, and intact reflexes. Dr. Ginsberg diagnosed pseudobulbar affect, anxiety, insomnia due to anxiety and fear, phobic anxiety disorder, and polyneuropathy. He noted checking past notes and finding no connection to a work injury.

By decision dated September 1, 2016, an OWCP hearing representative affirmed the decision dated October 13, 2015 denying compensation commencing February 22, 2015.

LEGAL PRECEDENT

A claimant has the burden of proof to establish by a preponderance of the evidence that he or she is disabled from work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.⁶ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.⁷ The issue

⁶ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁷ *Id.*

of whether a particular injury causes disability from work must be resolved by competent medical evidence.⁸ To meet this burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting causal relationship between the alleged disabling condition and the accepted 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. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled from work as a result of the accepted employment injury.¹⁰

ANALYSIS

The Board finds that the medical evidence of record is insufficient to establish total disability for the claimed period.

On February 9, 2015 Dr. Bollo treated appellant for severe burning and throbbing foot pain and back pain which presented after she had sat for eight hours. He diagnosed bilateral tarsal tunnel syndrome, postoperative decompression, and bilateral Achilles tendinitis. Dr. Bollo advised that due to the increased pain and difficulty walking appellant was off work for a week. On February 17, 2015 he noted improved foot pain. Dr. Bollo noted no changes on examination and diagnosed bilateral tarsal tunnel syndrome, postoperative decompression, and bilateral Achilles tendinitis. He returned appellant to modified sedentary work on February 23, 2015. While Dr. Bollo indicated that appellant was totally disabled until February 23, 2015,¹¹ he did not specifically explain how any accepted employment condition caused or contributed to total disability beginning February 22, 2015. As noted, part of appellant's burden of proof includes submitting rationalized medical evidence which supports a causal relationship between the period of disability and the accepted injury.¹² Therefore, these reports are insufficient to meet appellant's burden of proof.

Dr. Bollo submitted additional reports after February 22, 2015, but did not specifically explain how or why appellant was disabled due to her accepted employment conditions. Instead, he indicated that appellant could work full-time within restrictions. For example, on July 2, 2015 Dr. Bollo treated appellant and diagnosed bilateral tarsal tunnel syndrome and bilateral Achilles tendinitis. He indicated that he exhausted treatment options and appellant could perform sedentary work. These reports are of no probative value in establishing the claimed period of

⁸ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁹ C.S., Docket No. 08-2218 (issued August 7, 2009).

¹⁰ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹¹ The claimed period of wage loss from February 8 to 21, 2015 was adjudicated separately and is not before the Board on the present appeal. See *supra* note 5.

¹² *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

disability from February 22 to May 16, 2015 as Dr. Bollo noted appellant could perform sedentary work full time.¹³

In a July 11, 2016 report from Dr. Rivera who treated her for bilateral foot pain. Appellant reported that she was still symptomatic and was unable to perform even sedentary-type work due to pain on weight bearing. Dr. Rivera diagnosed bilateral tarsal tunnel, bilateral plantar fasciitis, and difficulty walking and recommended strict sedentary-type work. This report is of limited probative value as he did not indicate that appellant was unable to perform the sedentary duty provided by the employing establishment.¹⁴

On July 20, 2016 Dr. Ginsberg examined appellant and offered diagnoses for several conditions, but found that there was no connection to a work injury. Thus, Dr. Ginsberg did not support that appellant had any disability causally related to her accepted employment conditions.

Appellant also provided physical therapy records. However, the Board has held that treatment notes signed by physical therapists¹⁵ have no probative value as these providers are not considered physicians as defined under FECA,¹⁶ and thus are not competent to render a medical opinion.

Consequently, appellant has not submitted medical evidence establishing that she was totally disabled from work during the claimed period, causally related to her accepted employment conditions.

On appeal counsel asserts that OWCP shifted the burden of determining whether a limited-duty job offer was suitable to appellant and it did not determine if there was an abandonment of suitable employment. The Board notes that matters pertaining to offers of suitable work and abandonment of suitable work pertain to 5 U.S.C. § 8106(c). However, OWCP has not invoked this provision. Instead, it found that appellant did not meet her burden of proof to establish total disability for the period claimed. 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. The Board notes that appellant failed to submit rationalized medical evidence which supports a causal relationship between the period of disability and the accepted employment conditions.

¹³ See *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁴ See *id.*

¹⁵ *V.W.*, Docket No. 16-1444 (issued March 14, 2017) (where the Board found that physical therapy reports do not constitute competent medical evidence because a physical therapist is not a "physician" as defined under FECA).

¹⁶ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under the FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

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 failed to establish total disability for the period commencing February 22, 2015, causally related to her accepted employment conditions

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2018
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