

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

M.M., Appellant	)	
	)	
and	)	<b>Docket No. 18-0817</b>
	)	<b>Issued: May 17, 2019</b>
<b>DEPARTMENT OF THE NAVY, MILITARY</b>	)	
<b>SEALIFT COMMAND, NAVAL STATION,</b>	)	
<b>Norfolk, VA, Employer</b>	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On March 7, 2018 appellant, through counsel, filed a timely appeal from a January 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the January 29, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish total disability for the period June 1, 2016 to June 1, 2017, causally related to his accepted January 29, 2010 employment injury.

## **FACTUAL HISTORY**

On January 30, 2010 appellant, then a 29-year-old utility mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on January 29, 2010, he sustained a soft tissue injury to his left foot and a fracture of his second toe on the left side when the roller ran over his foot while he walked up the ship's gangway in the performance of duty. He stopped work on that date.

OWCP accepted his claim for fracture of one or more phalanges of the left foot, first and second digits, and left foot joint pain. It paid wage-loss compensation beginning March 16, 2010. On August 9, 2010 appellant returned to his date-of-injury position at the employing establishment. Subsequently OWCP accepted that on March 23, 2011 appellant sustained a recurrence of his January 29, 2010 employment injury.

On May 10, 2011 appellant underwent surgery on his left foot and stopped work. OWCP paid wage-loss compensation for total disability until November 30, 2011 when appellant returned to full duty.

On October 29, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of his accepted January 29, 2010 injury. He indicated that he returned to work, but could not wear steel toe shoes and could not stay on his feet for long periods of time. Appellant noted that he stopped work on August 30, 2015.

On November 17, 2015 appellant underwent a second authorized left foot surgery.

OWCP denied appellant's recurrence claim by decision dated December 22, 2015. It found that the medical evidence of record was insufficient to establish that he sustained a change or worsening of his accepted January 29, 2010 injury such that he was totally disabled from work beginning August 30, 2015.

On January 8, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on September 14, 2016.

OWCP received a May 16, 2016 report by Dr. Blake E. Moore, a Board-certified orthopedic surgeon. He related that appellant was six months status postsurgery, had finished his work hardening program, and was doing excellent. Upon physical examination of appellant's left foot, Dr. Moore observed healed plantar and dorsal incisions from his two left foot surgeries. He reported no pain and indicated that appellant was able to single stance weight-bear. Dr. Moore diagnosed status post neuroma revision excision. He reported that appellant could return to regular-duty work without restrictions.

In a report dated August 5, 2016, Dr. Moore indicated that appellant complained of recurrent pain in his left foot and noted difficulties with his job because of the pain. He related

that the employing establishment was unable to release appellant to full duty because of his restrictions regarding what tasks he could perform. Upon physical examination of appellant's left foot, Dr. Moore observed no areas of swelling or tenderness and good pulses to both the dorsalis pedis and posterior tibial. Neurological and sensation examination were intact. Dr. Moore related that plain films of the left foot showed unchanged alignment with no osseous or ligamentous pathology. He provided an assessment of continued left lower extremity pain despite primary and revision second interspace neuroma excision. Dr. Moore indicated that he did not have any diagnostic possibilities and he was unsure of the cause of appellant's continued pain. He noted: "I do not see any reason why [appellant] should not be able to do all of the capacities of his job at this point based off his physical exam[ination] findings."

Appellant was also treated by Dr. Michael G. Charles, a Board-certified family physician, who indicated in an August 19, 2016 report that appellant continued to complain of bilateral leg pain. Dr. Charles referred appellant to a physical medicine specialist for evaluation. He recommended that appellant work a desk job off the ship until he got a proper diagnosis and treatment for his leg pains.

In a September 23, 2016 report, Dr. Joshua B. Macht, a Board-certified internist, described appellant's history of injury and noted that he currently complained of severe left foot and ankle pain. Upon physical examination of appellant's left foot, he observed tenderness upon palpation about the medial ankle and the region overlying his scars and mild tenderness upon palpation about the great toe. Dr. Macht diagnosed traumatic injury to left foot and ankle with left great toe distal phalanx fracture and postoperative state of left foot.

By decision dated November 29, 2016, an OWCP hearing representative affirmed the December 22, 2015 decision, with modification. He found that the medical evidence of record was sufficient to establish that appellant was totally disabled from work for the period November 17, 2015 through his release to full duty on May 16, 2016, but that the evidence of record did not support continuing disability for any period after May 16, 2016. The hearing representative noted that the evidence of record established that on November 17, 2015 appellant underwent authorized surgery for his accepted left foot condition and that he was disabled from work following this procedure until May 16, 2016, when Dr. Moore released him to regular duty.

OWCP paid wage-loss compensation for the period November 17, 2015 to May 16, 2016.

Appellant began to receive medical treatment from Dr. Sun Kwon, specializing in physical medicine and rehabilitation. In reports dated March 30 to April 26, 2017, Dr. Kwon related appellant's complaints of chronic pain secondary to left foot neuroma and noted that appellant had been off work due to injury since August 2015. Upon physical examination of appellant's left foot, he observed tenderness to palpation on the left foot front plantar surface and intact sensation to light touch. Range of motion of appellant's left ankle was full. Dr. Kwon diagnosed plantar neuroma of the left foot and chronic pain syndrome.

On May 8, 2017 appellant filed a claim for compensation (Form CA-7) for wage-loss compensation for the claimed period January 2 to May 1, 2017. On June 5, 2017 he filed another Form CA-7 claiming wage-loss compensation for the period June 1, 2016 to June 1, 2017.

OWCP issued development letters dated May 8 and June 5, 2017 to appellant informing him that the evidence received was insufficient to establish that he was totally disabled from work

for the period June 1, 2016 to June 1, 2017. It requested that he submit additional evidence to establish that he was unable to work during the claimed period as a result of his accepted January 29, 2010 employment injury.

In a May 31, 2017 note, Dr. Moore related that appellant had called his office because he noted an error in his medical records. Appellant clarified that he did not go to physical therapy or work hardening because OWCP had not approved it. Dr. Moore approved appellant being out of work until he sought a second opinion.

By decision dated June 9, 2017, OWCP denied appellant's claim for wage-loss compensation for the period January 2 to May 1, 2017. It found that the medical evidence submitted was insufficient to establish that he was unable to work during the claimed period due to his accepted January 29, 2010 employment injury.

OWCP received a May 30, 2017 report by Dr. Kwon. Dr. Kwon indicated that appellant sustained a left foot crush injury and neuroma at work on January 29, 2010, which required surgery. He related that appellant's injury was affecting his ability to work, tolerance of activities, and daily function. Dr. Kwon authorized appellant to return to work with restrictions of no lifting over 30 pounds, no negotiation more than one flight of stairs, and no standing more than 30 minutes with 10-minute breaks.

On June 19, 2017 appellant, through counsel, requested a telephonic hearing before a representative from OWCP's Branch of Hearings and Review.<sup>4</sup>

In a June 19, 2017 statement, appellant asserted that Dr. Moore had incorrectly noted in his medical records that he had gone to therapy and work hardening. He alleged that this incorrect assumption was why Dr. Moore noted that he could not find a reason for appellant's continued pain. Appellant pointed out that Dr. Moore had acknowledged his incorrect statement in a May 31, 2017 note.

By decision dated July 6, 2017, OWCP denied appellant's claim for wage-loss compensation for the period June 1, 2016 to June 1, 2017. It found that the medical evidence submitted was insufficient to establish that he was unable to work during the claimed period due to his accepted January 29, 2010 employment injury.

On July 12, 2017 appellant, through counsel, requested a telephonic hearing before a representative from OWCP's Branch of Hearings and Review.

In a July 13, 2017 report, Dr. Kwon related appellant's complaints of chronic pain secondary to a January 29, 2010 employment injury. He provided physical examination findings and diagnosed chronic pain syndrome, plantar neuroma of the left foot, headaches, and peripheral vascular disease and also noted his chronic use of opiate drugs for therapeutic purposes. Dr. Kwon noted that functionally he was independent in all activities of daily living and that he ambulated without a cane.

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<sup>4</sup> Appellant also requested reconsideration of the June 9, 2017 decision. By letter dated July 22, 2017, counsel requested that OWCP proceed with a telephonic hearing before the Branch of Hearings and Review.

Appellant received treatment from Dr. Beverly Roberts-Atwater, Board-certified in physical medicine and rehabilitation. In a September 8, 2017 report, Dr. Roberts-Atwater reviewed appellant's history of injury and related his complaints of continued left foot pain and difficulty walking. Upon physical examination of appellant's left foot, she observed mild atrophy on the lateral top of the left foot and decreased range of motion on the cuneiform bones with pain. Dr. Roberts-Atwater diagnosed plantar neuroma of the left foot, chronic pain syndrome, and injury of the plantar nerve on the left.

A September 25, 2017 nerve conduction velocity (NCV) and electromyography (EMG) studies showed no evidence of a left tibial or peroneal motor mononeuropathy or of a left sural sensory or left superficial peroneal sensory mononeuropathy.

On November 27, 2017 a hearing was held, which addressed OWCP's June 9 and July 6, 2017 denial decisions. The record was held open for 30 days.

Following the hearing, OWCP received a December 29, 2017 report by Dr. Kwon who noted that appellant had chronic pain secondary to left foot neuroma, status post removal of neuroma surgery following a January 29, 2010 work injury. Upon physical examination, Dr. Kwon observed tenderness to palpation of the left foot front plantar. He diagnosed chronic pain syndrome and plantar neuroma of the left foot.

By decision dated January 29, 2018, an OWCP hearing representative affirmed the June 9 and July 6, 2017 decisions.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>6</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>7</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>8</sup>

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>9</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>10</sup> An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> *See B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>7</sup> *See D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *id.*

<sup>8</sup> *See Edward H. Horton*, 41 ECAB 301 (1989).

<sup>9</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

<sup>10</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.<sup>11</sup> When, however, the medical evidence of record establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.<sup>12</sup>

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>13</sup> The evidence submitted must be reliable, probative, and substantial.<sup>14</sup> The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty, and must include objective findings in support of its conclusions.<sup>15</sup>

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.<sup>16</sup> To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>17</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability for the period from June 1, 2016 to June 1, 2017, causally related to his accepted January 29, 2010 employment injury.

The medical evidence received in support of appellant's claim includes reports by Dr. Moore dated May 16, 2016 to May 31, 2017. In a May 16, 2016 report, Dr. Moore noted that appellant was six months status postsurgery and was doing excellent. Upon physical examination of appellant's left foot, he observed no pain and indicated that appellant was able to single stance weight-bear. Dr. Moore opined that appellant could return to full-duty work without restrictions. In an August 5, 2016 report, he provided additional examination findings of no areas of swelling or tenderness and good pulses to both the dorsalis pedis and posterior tib of the left foot. Neurological and sensory examinations were intact. Dr. Moore related that he was unsure of the cause of appellant's continued pain. He reported: "I do not see any reason why [appellant] should not be able to do all of the capacities of his job at this point based off his physical exam[ination] findings." The Board finds that these reports do not support appellant's claimed disability. On the contrary, Dr. Moore reported unremarkable examination findings and concluded that appellant was able to return to full-duty work.

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<sup>11</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>12</sup> *See V.G.*, Docket No. 18-0936 (issued February 6, 2019).

<sup>13</sup> *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> 20 C.F.R. § 10.501(a)(2).

<sup>16</sup> *See S.G.*, Docket No. 18-1076 (issued April 11, 2019).

<sup>17</sup> *See B.K.*, *supra* note 6; *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

Appellant has alleged that Dr. Moore's conclusion regarding his work status was based on the mistaken information that he had completed a work hardening program. In a May 31, 2017 note, Dr. Moore acknowledged his error in noting that appellant had completed a work hardening program. He reported that he was "approving [appellant] being out of work until he sought a medical opinion." Dr. Moore, however, did not provide medical rationale explaining how appellant's accepted left foot injury precluded him from returning to full duty work after his second surgery.<sup>18</sup> The Board has found that medical evidence must include rationale explaining how the physician reached the conclusion that he or she is supporting.<sup>19</sup> Dr. Moore failed to explain how appellant's inability to work from June 1, 2016 to June 1, 2017 was causally related to his accepted January 29, 2010 employment injury.

Appellant was also treated by Dr. Charles. In an August 19, 2016 report, Dr. Charles related appellant's complaints of continued bilateral leg pain. He recommended that appellant work a desk job off the ship until he got a proper diagnosis and treatment for his leg pains. Dr. Charles did not opine that appellant was totally disabled from work, but that he could work with specific restrictions. He did not, however, provide an opinion or specify that he could only work light duty due to his January 29, 2010 employment injury. Accordingly, Dr. Charles' report fails to establish disability from work during the claimed time period due to appellant's accepted left foot injury.<sup>20</sup>

Similarly, in a May 30, 2017 report, Dr. Kwon authorized appellant to return to work with restrictions of no lifting over 30 pounds, no negotiation more than one flight of stairs, and no standing more than 30 minutes with 10-minute breaks. He did not, however, explain how these restrictions were related to his accepted January 29, 2010 employment injury. Dr. Kwon did not provide an explanation or refer to objective examination findings to support his opinion that appellant could only work with specific restrictions. His opinion is, therefore, of diminished probative value and is insufficient to establish appellant's claim.<sup>21</sup>

In a September 23, 2016 report, Dr. Macht reviewed appellant's history of injury and noted his current complaints of severe left foot and ankle pain. He provided examination findings and diagnosed traumatic injury to left foot and ankle with left great toe distal phalanx fracture and postoperative state of left foot. Dr. Macht did not, however, provide an opinion regarding appellant's inability to work. As he did not address the relevant issue of disability from employment, his report is of diminished probative value and is insufficient to establish appellant's claimed disability.<sup>22</sup> Likewise, Dr. Kwon's March 30 to April 26, 2017 reports also do not address appellant's claimed disability.

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<sup>18</sup> See *K.W.*, 59 ECAB 271 (2008).

<sup>19</sup> *Beverly A. Spencer*, 55 ECAB 501 (2004).

<sup>20</sup> See *M.C.*, Docket No. 16-1238 (issued January 26, 2017).

<sup>21</sup> *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

<sup>22</sup> See *William A. Archer*, 55 ECAB 674 (2004).

The Board finds that the medical evidence submitted is insufficient to establish that appellant was totally disabled for the period June 1, 2016 to June 1, 2017 as a result of his January 29, 2010 employment injury.

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 met his burden of proof to establish total disability for the period June 1, 2016 to June 1, 2017, causally related to his accepted January 29, 2010 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 29, 2018 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2019  
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board