

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

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M.A., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Riverdale, IL, Employer )

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**Docket No. 19-1119  
Issued: November 25, 2019**

Appearances:

*Case Submitted on the Record*

Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 22, 2019 appellant, through counsel, filed a timely appeal from a March 18, 2019 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 March 18, 2019 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 her burden of proof to establish a recurrence of total disability on June 2, 4, 5, 11, 16, 18, and 20, 2018 causally related to the accepted October 12, 2017 employment injury.

## **FACTUAL HISTORY**

On October 28, 2017 appellant, then a 51-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 12, 2017 she sprained her left ankle while in the performance of duty.<sup>4</sup> She stopped work on October 27, 2017. OWCP accepted appellant's claim for left ankle sprain of the tibiofibular ligament and left leg posterior tibial tendinitis. Appellant received continuation of pay (COP) from October 27 through December 10, 2017 and OWCP paid her wage-loss compensation benefits on the supplemental rolls beginning December 11, 2017.

Appellant continued to receive medical treatment. In an April 26, 2018 examination note, Dr. Paul F. DeFrino, a Board-certified orthopedic surgeon, recounted appellant's complaints of left ankle pain. He reported a history of medial talar osteochondral defect (OCD) lesion and post-tibial tendinitis and an October 12, 2017 date of injury. Dr. DeFrino administered a cortisone injection in appellant's left ankle joint and advised that if the injection did not resolve her discomfort she should consider ankle surgery. He completed a work status note indicating that appellant could work sedentary duty.

On May 2, 2018 appellant returned to part-time, limited-duty work. OWCP paid wage-loss compensation benefits beginning May 2, 2018 on the supplemental rolls for partial disability.

Dr. DeFrino continued to treat appellant. In a May 24, 2018 narrative report, he recounted appellant's complaints of left ankle pain. Dr. DeFrino reported left lower extremity examination findings of normal sensation of the dorsal plantar aspect of the foot and intact dorsalis pedis and pulses. He recommended that appellant undergo left ankle arthroscopic surgery. Dr. DeFrino completed a work status note indicating that appellant could work sedentary duty. He noted diagnoses of posterior tibial tendon dysfunction (PTTD) and talar OCD.

In a June 14, 2018 report, Dr. DeFrino related that appellant was on sedentary duty, but was complaining of continued pain and discomfort because she "had to get up and do a little bit of walking while she worked." He reported examination findings of normal sensation on the dorsal and plantar aspects of the foot and intact dorsalis pedal and posterior and tibial pulses. Dr. DeFrino recommended that appellant maintain her present work restrictions, which included sedentary duty, including limited walking and standing.

On June 19, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for the period May 26 to June 8, 2018. On the reverse side of the claim form, the employing establishment confirmed that appellant was in a leave without pay (LWOP) status for 37.35 hours. On an attached time analysis form (Form CA-7a), appellant claimed eight hours of LWOP on June 2, 4,

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<sup>4</sup> Under File No. xxxxxx498, OWCP accepted appellant's claim for left hamstring strain, gait abnormality, and left knee internal derangement as causally related to a March 11, 2014 employment incident. It has administratively combined File No. xxxxxx498 with the current file, File No. xxxxxx948, and has designated the latter as the master file.

and 5, 2018.<sup>5</sup> OWCP paid wage-loss compensation for 8.79 hours from May 26 to June 1, 2018 and 4.35 hours from June 6 to 8, 2018.

In a letter dated June 25, 2018, OWCP advised appellant that it was unable to pay the entirety of her claim because there was insufficient medical evidence to establish total disability from work on June 2, 4, and 5, 2018. It requested that she submit additional evidence to establish that she was unable to work her modified-duty assignment on the claimed dates due to her accepted October 12, 2017 employment injury.

On June 29, 2018 appellant accepted a modified-duty assignment as a city letter carrier. The duties of the modified assignment were answering a telephone for six hours, pegging audits for two to three hours, and filing for two to three hours. The physical requirements included sitting, data entry, and writing for three to six hours.

On July 12, 2018 appellant filed another Form CA-7 claiming wage-loss compensation for the period June 9 to 22, 2018. On the reverse side of the claim form, the employing establishment confirmed that appellant was claiming 42.34 hours. On the attached Form CA-7a, appellant claimed eight hours of LWOP on June 11, 18, and 20, 2018 and six hours of LWOP on June 16, 2018. With the exception of June 15 and 21, 2018 where the form indicated “doctor’s visit,” appellant indicated that her reason for using leave was “incapacitated.”<sup>6</sup> OWCP paid wage-loss compensation for 20.34 hours of LWOP from June 9 to 21, 2018.

In a letter dated July 16, 2018, OWCP advised appellant that it was unable to pay the entirety of her claim because there was insufficient medical evidence to establish disability from work for the remaining hours claimed on June 11, 16, 18, and 20, 2018<sup>7</sup> due to her accepted employment injury. It afforded appellant 30 days to submit medical evidence establishing disability.

In a July 26, 2018 report and letter, Dr. DeFrino indicated that appellant had been under his care since May 24, 2018 and would continue under his care until surgery. He related that appellant was on sedentary duty, but continued to complain of discomfort and pain with periods of walking. Dr. DeFrino completed a work status note, which indicated that appellant could work desk work only with no extended walking or standing.

In a June 4, 2018 work status note, Dr. DeFrino related that appellant’s activity was limited to walking or standing only occasionally. He also instructed appellant to elevate her left leg to minimize pain and swelling. On August 1, 2018 appellant underwent authorized left ankle surgery and stopped work.<sup>8</sup>

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<sup>5</sup> Appellant also claimed the following LWOP hours: three hours on May 26, 2018; two hours on May 30 and 31, and June 8, 2018; 1.79 hours on June 1, 2018 and 2.36 hours on June 7, 2018.

<sup>6</sup> Appellant also claimed the following LWOP hours: 2.05 hours on June 9, 2018; 2.25 hours on June 12, 2018; 2.07 hours on June 13, 2018; 2.00 hours on June 15, 2018; and 1.97 hours on June 19, 2018.

<sup>7</sup> The Board notes that appellant was not compensated for six hours of wage-loss compensation on June 11, 2018, four hours on June 16, 2018, and six hours each on June 18 and 20, 2018.

<sup>8</sup> An August 1, 2018 operative report demonstrated that appellant underwent left ankle arthroscopy with debridement, drilling OCD talar lesion, posterior tibial tendon reconstruction with debridement posterior tibial tendon,

By decision dated September 10, 2018, OWCP denied appellant's claim for wage-loss compensation for total disability from work on June 2, 4, 5, 11, 16, 18, and 20, 2018. It found that the medical evidence of record failed to establish that she was disabled for work on the claimed dates as a result of her accepted October 12, 2017 employment injury.

On September 14, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on February 1, 2019. She testified that she was released for sedentary duty, but she still had to get up and walk to find parcels. Appellant asserted that she was unable to work because her ankle was swelling too badly.

OWCP continued to receive examination reports and work status notes by Dr. DeFrino dated September 6 to October 11, 2018, which related that appellant should remain off work for tibia tendinitis.

In a November 8, 2018 report and work status note, Dr. DeFrino released appellant to light duty with restrictions of walking up to 1 hour with 15-minute rests and lifting up to 15 pounds. He continued to treat appellant and provide examination reports dated November 29, 2018 to January 5, 2019 regarding her progress after her left ankle surgery.

By decision dated March 18, 2019, an OWCP hearing representative affirmed the September 10, 2018 decision with modification. He affirmed OWCP's finding that the medical evidence of record failed to establish that appellant was disabled from working her light-duty assignment on June 2, 4, 5, 11, 16, 18, and 20, 2018 due to her October 12, 2017 employment injury. The hearing representative also modified OWCP's decision and determined that appellant was entitled to wage-loss compensation for four hours on June 4, 2018 because the medical evidence of record showed that she received medical treatment from Dr. DeFrino on that date.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>9</sup> has the burden of proof to establish 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>10</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>11</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 reliable, probative, and substantial medical evidence.<sup>12</sup> Findings on examination are generally needed to

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and flexor digitorum longus tendon transfer. OWCP commenced payment of wage-loss compensation for total disability beginning August 1, 2018.

<sup>9</sup> *Supra* note 2.

<sup>10</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>11</sup> See *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *id.*

<sup>12</sup> *J.A.*, Docket No. 18-1304 (issued May 1, 2019); *William A. Archer*, 55 ECAB 674 (2004).

support a physician's opinion that an employee is disabled for work.<sup>13</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>14</sup>

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 light duty can be performed, the employee has the burden to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.<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 an employee to self-certify his or her disability and entitlement to compensation.<sup>17</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability on June 2, 4, 5, 11, 16, 18, and 20, 2018 causally related to the accepted October 12, 2017 employment injury.

In a May 24, 2018 report, Dr. DeFrino noted that he examined appellant for complaints of left ankle pain. He provided examination findings and recommended that appellant undergo left ankle arthroscopic surgery. Dr. DeFrino completed a work status note, which indicated a primary diagnoses of PTTD and talar OCD. He indicated that appellant could work sedentary duty. In a June 4, 2018 work status note, Dr. DeFrino related that appellant's activity was limited to walking and standing occasionally. In a June 14, 2018 report, Dr. DeFrino explained that appellant was on sedentary duty, but was complaining of continued pain and discomfort because she had to do a little bit of walking while she worked. He recommended that appellant continue working sedentary duty with limited walking and standing.

The Board finds that Dr. DeFrino's reports did not establish that appellant was disabled on the claimed dates in June 2018. Rather, the reports provide appellant with work restrictions of sedentary duty with limited walking and standing and do not establish a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements resulting from the accepted employment injury. Dr. DeFrino did not indicate that appellant was disabled from work on June 2, 4, 5, 11, 16, 18, and 20, 2018 due to her October 12,

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<sup>13</sup> *B.W.*, Docket No. 19-0049 (issued April 25, 2019); *Dean E. Pierce*, 40 ECAB 1249 (1989).

<sup>14</sup> *C.B.*, Docket No. 18-0633 (issued November 16, 2018).

<sup>15</sup> *M.S.*, Docket No. 19-0609 (issued September 23, 2019); *S.H.*, Docket No. 18-1398 (issued March 12, 2019); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>16</sup> *J.S.*, Docket No. 16-1014 (issued October 27, 2014); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>17</sup> *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, *supra* note 12; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

2017 employment injury.<sup>18</sup> These reports, therefore, are insufficient to establish appellant's claim for wage-loss compensation on June 2, 4, 5, 11, 16, 18, and 20, 2018. Dr. DeFrino's remaining medical reports dated July 26, 2018 to January 5, 2019 are insufficient to establish entitlement to wage-loss compensation as they post-date the claimed period of total disability.

The Board therefore finds that appellant has not met her burden of proof to establish her claim.

On appeal counsel contends that the decision was contrary to fact and law. However, as found above the medical evidence submitted is insufficient to establish that appellant was disabled from working her modified-duty position on June 2, 4, 5, 11, 16, 18, and 20, 2018 as a result of her October 12, 2017 employment injury. Appellant, therefore, has not met her burden of proof in this case.

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 her burden of proof to establish a recurrence of total disability on June 2, 4, 5, 11, 16, 18, and 20, 2018 causally related to the accepted October 12, 2017 employment injury.

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<sup>18</sup> See *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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