

³ The Board notes that, following the May 1, 2023 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 disability from work for the period December 6, 2020 through October 9, 2021 causally related to his accepted January 25, 2019 employment injury.

FACTUAL HISTORY

On February 6, 2019 appellant, then a 44-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on January 25, 2019 when sprinting to respond to an alarm, he heard a pop and experienced pain in his left leg, injuring his Achilles tendon while in the performance of duty.⁴ He stopped work on January 25, 2019. OWCP accepted the claim for strain of the left Achilles tendon. Appellant returned to light-duty work on September 10, 2019 performing sitting, simple grasping, and fine manipulation for eight hours each, lifting up to 25 pounds, standing and walking for one hour each, reaching over the shoulder for two hours, driving a vehicle for one hour, but was prohibited from climbing, kneeling, twisting, pushing or pulling.

In a July 10, 2020 report, appellant's attending physician, Dr. Robert N. Pica, a podiatrist, diagnosed contracture of the gastrocnemius and compensatory tarsal tunnel syndrome as sequela from the accepted left Achilles tendon injury. He advised that appellant could perform light duty. Dr. Pica prescribed a foot and ankle orthosis for minimal ambulation and nonweight-bearing usage for 8 to 12 weeks. On July 14, 2020 the employing establishment offered appellant a light-duty position within the same restrictions as his September 10, 2019 job offer.

Dr. Karanvir Prakash, a Board-certified orthopedic surgeon, examined appellant on November 3, 2020, described his January 25, 2019 employment injury, diagnosed left Achilles tendinitis, and gastrocnemius contracture. He recommended that appellant continue with unspecified limited-duty work as he could not run. Dr. Prakash also recommended surgery consisting of gastrocnemius release, Achilles tendon debridement, and tarsal tunnel release.

The employing establishment reported that appellant stopped work on December 6, 2020 due to a nonemployment-related right hip surgery.

On December 15, 2020 Dr. Prakash examined appellant due to left ankle pain and noted that he was using crutches. He diagnosed Achilles tendinitis left leg with gastrocnemius contracture. Dr. Prakash also found tenderness in the tarsal tunnel and a positive Tinel's sign. He requested left ankle magnetic resonance imaging (MRI) scan. Dr. Prakash noted that appellant had recently undergone a nonwork-related procedure of hardware removal in the right hip and was scheduled to undergo a right total hip replacement surgery.

In a March 31, 2021 note, Dr. Prakash related that appellant had recently undergone a right hip replacement. He diagnosed left Achilles tendinitis, tarsal tunnel syndrome left ankle, forefoot varus with midfoot sag and dorsal bunion, and knee pain with possible exacerbation of arthritis. Dr. Prakash again recommended a left ankle MRI scan and found that appellant could continue his

⁴ Appellant subsequently filed a separate occupational disease claim (Form CA-2) alleging that as a result of his accepted January 25, 2019 employment injury his preexisting hip condition was aggravated resulting in capital femoral epiphysis and in the need for full hip replacement surgery under OWCP File No. xxxxxx905. OWCP denied this claim by decision dated October 19, 2021. It has administratively combined that claim with the current claim, OWCP File No. xxxxxx356, with the latter serving as the master file.

unspecified limited activity schedule. He also examined him on April 21, 2021 and diagnosed patellar tendinitis of the left knee finding that he could continue his unspecified limited activity schedule.

On May 11, 2021 Dr. Prakash diagnosed left Achilles tendinitis, peroneal tendinitis, and retrocalcaneal bursitis of the left foot based on MRI scan. He completed a duty status report (Form CA-17) of even date and found that appellant should remain on light duty sitting for eight hours a day, standing and walking for one hour each. Dr. Prakash restricted all other activities.

In a May 27, 2021 memorandum, the employing establishment determined that Dr. Prakash's restrictions were insufficient to form the basis for a light-duty job and requested clarification. On June 22, 2021 it further related that it was not allowing appellant to return to work.

On June 23, 2021 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. James J. Schwartz, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 24 2021 report, Dr. Schwartz reviewed the SOAF, described the January 25, 2019 employment injury, and provided findings on physical examination. He found a contracture of the gastrocnemius/solus complex and tarsal tunnel syndrome possibly as the result of the contracted Achilles tendon. Dr. Schwartz opined that appellant's work-related conditions had not resolved and advised that his ongoing work restrictions were appropriate. He related that additional medical recovery should be expected following successful surgery. Dr. Schwartz completed a work capacity evaluation (Form OWCP-5c) and indicated that appellant could perform sedentary and light level work with restrictions on standing and walking of less than one hour each and pushing, pulling, and lifting up to 20 pounds for three hours each.

In August 3 and September 3, 2021 notes, Dr. Prakash diagnosed left Achilles tendinosis with retrocalcaneal bursitis, forefoot driven hindfoot varus with dorsal bunion, right foot, tarsal tunnel syndrome left ankle. He found that appellant's Achilles strain had progressed to significant problems with his foot and ankle and with difficult weight bearing as a direct consequence of the accepted employment injury. Dr. Prakash recommended surgery. He also completed a Form OWCP-5c on September 7, 2021 and agreed with Dr. Schwartz' restrictions that appellant could perform sedentary and light levels work walking and standing less than one hour each.

On August 20, 2021 the employing establishment offered appellant a light-duty position within the work restrictions established by Dr. Schwartz. He did not respond.

On October 17, 2021 appellant filed a series of claims for compensation (Form CA-7) for the period January 25, 2019 through October 9, 2021.⁵ OWCP paid wage-loss compensation on the supplemental rolls from March 12 through September 9, 2019. Appellant used leave from December 7 through 26, 2020 and worked from December 27, 2020 through January 2, 2021. He again used paid leave on January 4, 2021 and began using leave without pay on January 5, 2021.

In an October 25, 2021 development letter, OWCP informed appellant of the deficiencies in his claim and requested that he submit medical evidence to support his reported disability during the claimed period causally related to the accepted January 25, 2019 employment injury. It afforded him 30 days to respond.

⁵ Appellant received continuation of pay from February 2 through March 11, 2019.

Dr. Prakash provided reports dated October 18 and 20, 2021 diagnosing Achilles tendinosis with retrocalcaneal bursitis, left ankle, forefoot driven hindfoot varus with dorsal bunion, right foot, and tarsal tunnel syndrome, left ankle. He found that appellant had a combination of injuries and an upgraded diagnoses because of failure of conservative management. Dr. Prakash opined that the accepted Achilles strain had progressed to significant problems with the foot and ankle including difficulty bearing weight. He opined that these conditions were a direct consequence of the accepted January 25, 2019 employment injury. Dr. Prakash recommended surgeries including gastrocnemius release, tarsal tunnel release, first tarsometatarsal joint arthrodesis, and Achilles tendoscopy with retrocalcaneal bursectomy. He suggested that the surgeries be performed in stages and related that appellant was likely to be out of work for six to nine months for the surgeries.

In a November 8, 2021 report, Dr. Prakash described the January 25, 2019 employment injury of Achilles tendinitis required the use of a walking boot for approximately nine months. He reviewed diagnostic studies which revealed an Achilles tendon tear as a result of the accepted employment injury. Dr. Prakash related that appellant had a preexisting right hip slipped capital femoral epiphysis with a prior surgery. He opined that altered gait biomechanics resulting from the use of a walking boot aggravated this preexisting condition and required further right hip surgery. Dr. Prakash also opined that the same altered biomechanics resulted in tarsal tunnel syndrome of the left foot. He concluded that these conditions were impacted by the January 25, 2019 employment injury and requested that the acceptance of appellant's claim be expanded to include the additional conditions of Achilles tendon tear of the left ankle, tarsal tunnel syndrome of the left foot, aggravation of right hip slipped epiphysis, bilateral primary osteoarthritis of the hips, total right hip replacement, and subchondral sclerosis.

On November 24, 2021 Dr. Prakash opined that appellant had failed conservative management resulting in his upgrading appellant's diagnoses to include Achilles tendinosis with retrocalcaneal bursitis, left ankle, forefoot driven hindfoot varus with dorsal bunion, right foot, dorsal bunion, right, and tarsal tunnel syndrome, left ankle. He found that he was unable to perform his regular work as a direct consequence of his accepted employment injuries. Dr. Prakash again recommended a series of surgeries. He completed a Form OWCP-5c of even date listing restrictions of walking and standing less than one hour and sedentary strength level work. Dr. Prakash completed duplicative forms on January 5 and February 16, 2022.

On March 16, 2022 OWCP expanded its acceptance of the claim to include Achilles tendinitis, left leg, and tarsal tunnel syndrome, left leg.

By decision dated March 22, 2022, OWCP denied appellant's claims for disability from work for the period December 6, 2020 through October 9, 2021. It found that the medical evidence of record was insufficient to establish disability. On March 30, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated May 27, 2022, OWCP's hearing representative vacated the March 22, 2022 OWCP decision and remanded the case for development of the evidence to identify the periods of claimed wage loss *versus* the dates appellant received payment, "in the form of leave and [appellant's] return to work," the availability of the offered position, and whether the position was available for him following his use of leave to recover from his hip surgeries for the period January 5 through August 20, 2021.

On March 30 and May 11, 2022 Dr. Prakash completed OWCP-5c forms and indicated that appellant could perform sedentary strength level work with less than one hour each of walking and standing. He completed narrative notes repeating his previous diagnoses of Achilles tendinitis with retrocalcaneal bursitis, left ankle, forefoot driven hindfoot varus with dorsal bunion, right foot, dorsal bunion, right, and tarsal tunnel syndrome, left ankle with the addition of chronic pain of both knees. Dr. Prakash opined that the way that appellant was walking with altered gait mechanics was causing undue strain to his knees and hips and exacerbating his symptoms. He found that appellant's altered gait probably led to his need for a total hip replacement.

In a June 22, 2022 report, Dr. Prakash described the January 25, 2019 employment injury and appellant's medical history including nine months in a walking boot. He indicated that appellant was capable of light-duty work during this period. Dr. Prakash attributed the additional condition of Achilles tendon tear to the accepted January 25, 2019 employment injury. He noted appellant's preexisting right hip slipped capital femoral epiphysis and opined that the accepted employment injury coupled with altered gait biomechanics and prolonged immobilization due to prolonged use of a walking boot aggravated this condition resulting in the need for total hip replacements in December 2020 and January 2021. Dr. Prakash further recommended surgeries to repair the gastrocnemius, tarsal tunnel, and dorsal bunion and forefoot varus. He found that appellant could not walk or stand for prolonged periods of time exceeding more than two hours to avoid further damage to his foot, ankle, knee, and hip. Dr. Prakash concluded that appellant should not work prior to his recommended surgeries.

On August 3, 2022 the employing establishment indicated that appellant stopped work on January 25, 2019, returned to light-duty work on September 10, 2019 and stopped work on December 4, 2020 due to his nonemployment-related hip surgery. It reported that he was not allowed to return to work from December 4, 2020 through August 19, 2021 when it provided a light-duty job offer which appellant refused.

In an e-mail dated September 27, 2022, the employing establishment indicated that the light-duty job offer was never withdrawn and that if appellant had not undergone hip surgery on December 4, 2020 he would have been allowed to continue in the light-duty work assignment.

By decision dated September 29, 2022, OWCP denied appellant's claim for disability from work for the period December 6 2020 through October 9, 2021. It found that the medical evidence of record was insufficient to establish disability.

On October 3, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The oral hearing took place on February 14, 2023.

The employing establishment resubmitted appellant's September 9, 2019 and July 14, 2020 light-duty job offers.

On December 20, 2022 Dr. Prakash repeated his diagnoses of Achilles tendinitis of the left lower extremity, chronic pain of both knees, retrocalcaneal bursitis of the left heel, acquired left hindfoot varus, tarsal tunnel syndrome, left, and left foot bunion. He continued to opine that appellant's symptoms were progressing to appellant's knees and hips due to appellant's altered gait as a result of the failure of conservative treatment for his accepted employment injuries and the failure to approve requested surgeries. Dr. Prakash concluded that the additional conditions were a direct consequence of the accepted employment injury. He also completed an OWCP-5c

form diagnosing Achilles tendinitis and indicated that appellant could perform sedentary strength level work with less than one hour each of walking and standing.⁶

In April 5, 2023 form reports, Dr. Prakash diagnosed Achilles injury and found that appellant could stand and walk for less than one hour a day each, should not perform self-defense moves, run, climb stairs, or lift. He indicated that appellant's condition would improve following surgery.

On January 24, 2023 the employing establishment offered appellant a light-duty work assignment walking and standing less than one hour each.

By decision dated May 1, 2023, OWCP's hearing representative affirmed OWCP's September 29, 2022 decision. She found that appellant had not submitted sufficient rationalized medical evidence to support that the claimed period of disability was causally related to the accepted work injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ 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.⁸

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁹ Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹⁰ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹¹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical stand point, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.¹²

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

⁶ On April 13, 2023 appellant, through counsel, requested that OWCP expand the acceptance of his claim to include the additional conditions. OWCP has not issued a final decision on this issue and the Board will not consider it for the first time on appeal. 20 C.F.R. § 501.2(c)(2).

⁷ *Supra* note 2.

⁸ *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁰ *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

¹¹ *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹² *See A.R.*, Docket No. 20-0583 (issued May 21, 2021); *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹³

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant was evaluated by OWCP's second opinion physician, Dr. Schwartz, on July 24, 2021. Dr. Schwartz found additional conditions due to the January 25, 2019 employment injury of contracture of the gastrocnemius/solus complex and tarsal tunnel syndrome. OWCP accepted these conditions based on his opinion. Dr. Schwartz also provided additional work restrictions beyond those of the July 14, 2020 limited-duty position including performing sedentary and light work levels while standing and walking less than one hour each, and limiting pushing, pulling and lifting to 20 pounds for three hours each rather than 25 pounds with no time restriction. As his report was based on a proper factual history and provided findings and medical reasoning supporting his conclusions, this report establishes that appellant's work restrictions had changed between his December 2020 work stoppage and the July 24, 2021 examination such that the July 14, 2020 light-duty position was no longer within his work capacity.¹⁴

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁵ While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁶ Accordingly, once OWCP starts to procure medical opinion, it must do a complete job in securing from its referral physician an opinion which adequately addresses the relevant issues.¹⁷

Thus, the Board will remand the case for OWCP to obtain a rationalized supplemental opinion from Dr. Schwartz regarding when appellant could no longer perform the duties of the July 14, 2020 limited-duty position causally related to his accepted January 25, 2019 employment injuries. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹³ See *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *William A. Archer*, 55 ECAB 674 (2004).

¹⁴ See *M.H.*, Docket No. 22-1178 (issued April 25, 2023); *V.A.*, Docket No. 21-1023 (issued March 6, 2023).

¹⁵ See *R.H.*, Docket No. 22-1379 (issued May 19, 2023); *C.F.*, Docket No. 20-1572 (issued November 10, 2021); *Vanessa Young*, 56 ECAB 575 (2004).

¹⁶ *Id.*

¹⁷ *M.T.*, Docket No. 21-0819 (issued March 2, 2023); *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: November 27, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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