



## **ISSUE**

The issue is whether appellant met his burden of proof to establish a recurrence of disability commencing August 18, 2014 causally related to his accepted April 15, 2005 employment injury.

On appeal, counsel alleges that appellant has established a worsening of his accepted condition, resulting in a recurrence of total disability.

## **FACTUAL HISTORY**

On April 15, 2005 appellant, a 50-year-old letter carrier, filed a traumatic injury (Form CA-1) alleging that he sustained an injury to his right foot when a motor vehicle ran over it. OWCP accepted the claim for contusion of the right foot and traumatic arthritis of the right first metatarsophalangeal joint. Appellant underwent authorized fusion of the right first metatarsophalangeal joint on September 20, 2005. He received compensation benefits on the supplemental rolls from September 20 through November 13, 2005.

Appellant returned to full duty as a letter carrier on February 20, 2006. He underwent surgery for hardware removal on October 10, 2006; he returned to full duty thereafter on November 14, 2006. Appellant stopped work again in 2008 for intermittent periods and began receiving compensation benefits on the periodic rolls as of June 7, 2009.

In a June 17, 2013 report, Dr. Edward L. Chairman, a specialist in podiatric surgery, advised that appellant was returning to work with restrictions after a five-year hiatus. He noted his history of a right foot injury and fusion of the first metatarsophalangeal joint in 2005. Dr. Chairman advised that appellant continued to have right foot pain and discomfort and noted that one of the screws used in fixation began to loosen, which led to it being surgically removed; after this procedure appellant's right foot condition improved. He noted that appellant reported total rigidity and fusion of the first metatarsophalangeal joint. Dr. Chairman related that appellant had been working at home in a computer-type business and was able to work by sitting at his computer with his right foot elevated on a stool to counteract gravity; he advised that when appellant's foot was not elevated it swelled up and caused significant pain and discomfort. He opined that appellant could return to work at a sedentary position if he was able to sit at his desk most of the time and keep his foot elevated.

On March 12, 2014 appellant accepted a part-time position as a modified clerk, sales solution team member, with varying hours. The job was tailored to the physical restrictions outlined by Dr. Chairman. The duties of the job involved: contacting customers by telephones, light data entry, answering the telephone, and administrative assistance duties in the back room. The physical requirements of the job were as follows: sitting in an office chair with a back support, with occasional standing, simple grasping to use computer mouse with right upper extremity, pushing/pulling for intermittent use of computer mouse with right hand, intermittent use of the right hand for keyboard data entry, and speaking on the telephone. Appellant continued to receive compensation benefits on the supplemental rolls for partial disability, for four hours of wage loss per day.

In a June 23, 2014 report, Dr. Miteswar Purewal, Board-certified in orthopedic surgery, advised that appellant related that his right foot pain had increased since his last visit. He diagnosed traumatic ankle arthropathy and chronic regional pain syndrome of the right lower extremity, with neuropathic pain. Dr. Purewal reported that appellant was struggling with increased pain, as he had returned to part-time work. He related that the employing establishment had not provided appellant with an adjustable desk that would allow him to elevate his leg.

In order to determine appellant's current condition, and whether he had continued disability causally related to his April 15, 2005 employment injury, OWCP referred him to Dr. Raoul Biniarishvili, Board-certified in psychiatry and neurology, for a second opinion examination. In a report dated June 23, 2014, Dr. Biniarishvili related that appellant had sustained trauma in 2005 when a car ran over his foot. He opined that appellant had traumatic arthropathy and chronic pain syndrome related to his injuries. Dr. Biniarishvili opined that appellant's conditions were connected to the work injury by direct cause. He noted that appellant complained of moderately severe pain in the right foot; the pain in his right foot was more severe in the big toe and at the bottom of the right foot. Dr. Biniarishvili asserted that appellant's pain was associated with frequent exacerbations and limited his everyday activities. He related that appellant was unable to walk long distances and experienced difficulty walking and carrying weight. Dr. Biniarishvili opined that appellant could not perform full-duty work. He opined, however, that appellant was able to work four to six hours a day in a sedentary position. Dr. Biniarishvili concluded that appellant had reached maximum medical improvement, although he could benefit from repeated courses of physical therapy, medical treatment, and possible sympathetic blocks. He advised that appellant's prognosis for gaining full function in his right foot was guarded.

In an August 18, 2014 report, Dr. Purewal advised that appellant continued to experience right lower extremity pain and that his average pain level was an 8 on a scale of 1 to 10. He diagnosed traumatic ankle arthropathy and chronic regional pain syndrome of the right lower extremity and suggested cutting appellant's work hours to Mondays, Wednesdays, and Fridays to see if his swelling would improve. Dr. Purewal advised that appellant's swelling and discomfort had increased since he began working part time and opined that the employing establishment had not provided him with any accommodation in terms of ergonomics. He reported that appellant continued his three-day work schedule.

Appellant filed a Form CA-7 dated August 20, 2014, in which he claimed compensation for wage loss from August 9 to 23, 2014. In a time analysis form (Form CA 7a) dated August 26, 2014, he noted that he had worked four hours a day from August 11 through 15, 2014, and on August 20, 2014. Appellant related that he had used four hours of leave on August 18, 2014 for a physician's appointment and two hours of annual leave on August 22, 2014. He requested eight hours of wage-loss compensation for August 19 and 21, 2014.

On September 10, 2014 appellant filed another Form CA-7 claim for compensation for the period August 23 through September 5, 2014. He continued to submit Forms CA-7, every two weeks, alleging wage loss.

By letter dated September 10, 2014, OWCP advised appellant that it required additional factual and medical evidence, including a comprehensive medical report, to support his claim for reimbursement for eight hours of leave without pay on August 19 and 21, 2014. It noted that Dr. Binaurishvili opined in his June 23, 2014 report that appellant was capable of working at least four hours per day. OWCP found that his opinion represented the weight of the medical evidence. It asked appellant to either indicate why he did not work on August 19 and 21, 2014 or have his attending physician submit an updated report indicating his work capacity on these days.

On March 10, 2015 appellant filed a Form CA-2a claim for a recurrence of disability, alleging that his increased disability from work; *i.e.*, his reduced work hours, as of August 18, 2014 was caused or aggravated by his accepted April 15, 2005 employment injury. He reported on the form that his treating physician reduced his work hours due to a worsening of his condition. The employing establishment indicated on the form that it had made accommodations or adjustments in appellant's regular duties due to his injury-related limitations. It further asserted that he had returned to work on March 12, 2014 at four hours per day, five days per week. Appellant had claimed that his injuries were worsened and that his days were decreased to three per week; management indicated that his current schedule was four hours per day, four days per week.

By letter dated May 18, 2015, OWCP advised appellant that it required additional factual and medical evidence, including a comprehensive medical report, to support his claim that his alleged recurrence of disability as of August 18, 2014 was causally related to his accepted right foot conditions. It informed appellant that the evidence it had received was insufficient to establish his claim for recurrence of disability because, although Dr. Purewal advised that appellant was experiencing increased swelling and discomfort and suggested reducing his work schedule to three days per week, he did not indicate how his work-related conditions had materially worsened or how the suggested reduction in work hours was related to the accepted right foot conditions. Appellant was afforded 30 days to submit this additional evidence. No additional response was received within that time frame.

By decision dated June 29, 2015, OWCP denied appellant's claim, finding that he failed to establish a recurrence of disability commencing August 18, 2014, causally related to his April 15, 2005 employment injury.<sup>3</sup> It determined that medical evidence submitted in support of the recurrence claim did not establish that he had a return or increase of disability due to a change or worsening of his accepted, work-related conditions. OWCP noted that Dr. Binaurishvili found in his June 23, 2014 report that appellant could work four to six hours per day performing a desk job. It further noted that Dr. Purewal's August 18, 2014 report asserted that the swelling and discomfort in appellant's right foot had increased since he began working part time, that management had provided no accommodation for his physical restrictions, and that he had suggested cutting his work hours to Monday, Wednesday, and Friday. OWCP found, however, that Dr. Purewal's report did not specifically indicate how the worsening of appellant's accepted conditions caused his inability to work at least four hours per

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<sup>3</sup> OWCP listed traumatic right ankle arthropathy and reflex sympathetic dystrophy of the right lower limb as accepted conditions. There is no documentation in the record that these conditions were ever accepted by OWCP as causally related to the April 15, 2005 employment injury.

day in the modified sales solution team member job. OWCP therefore concluded that the weight of medical evidence continued to support that appellant was capable of working in this sedentary position up to four hours per day. It further noted that he had been paid up to four hours per day leave without pay since returning to work on March 14, 2014.

By letter dated July 6, 2015, appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on September 14, 2015.

In a report dated July 14, 2015, Dr. Purewal advised that he began treating appellant on October 2, 2008 for his right lower extremity condition which began in 2005. He noted that appellant suffered a work-related injury when a car ran over his foot. Dr. Purewal noted that appellant had returned to work in a modified employment position in an office setting. He related that appellant reported increased swelling and pain in his lower extremity when he worked five consecutive days. Dr. Purewal noted that he suggested modification of appellant's work schedule to determine if this would improve his pain. He opined that the reduction in work hours would reduce the swelling and pain as the affected limb would not be in the dependent position.

In an August 24, 2015 report, Dr. Purewal noted that appellant's pain had remained the same since his last visit; he rated the pain as an 8 on a scale of 1 to 10. He reiterated his diagnoses of traumatic ankle arthropathy, chronic regional pain syndrome of the right lower extremity, and neuropathic pain. Dr. Purewal agreed with Dr. Biniaurishvili that appellant would benefit from physical therapy.

At the hearing, appellant testified that when he first returned to work in March 2014 his job involved sitting at a desk making telephone calls, calling different companies trying to generate business for the employing establishment. He related that he had a chair with two armrests on the side; he noted that Dr. Purewal had also recommended that he have a footrest to keep his foot elevated at all times. Appellant asserted that when he returned to work the employing establishment provided him with a makeshift stool, which did not have sufficient elevation for his foot. He learned of a stool which would satisfy his needs and provided management with a picture of the stool, but has not been able to obtain this stool to this day, as management allegedly told him that they would order it, but he would have to pay for it with his own credit card. Appellant asserted that because he did not get the stool he began to experience constant pain, numbness, and discomfort in his legs, at the bottom of his right foot, right ankle, and right leg all the way up to his hip.

Appellant advised that when he returned to work he was working approximately five days a week, but he eventually realized that this was too much. He related that, because of the pain, numbness, and swelling in his right foot and right leg he returned to Dr. Purewal, who reduced his work schedule to three days per week: Monday, Wednesday, and Friday, for four hours per day, in August 2014. Dr. Purewal prescribed medications and administered epidural injections every three months; he also recommended that appellant take a 15-minute break every hour to relieve the pain, numbness, and discomfort in his back and his legs. Appellant reported that these measures helped relieve some of the pain and discomfort, as did putting two chairs together and placing his right leg on the chairs. He also experienced improvement in his right foot condition by taking more days off, when he could elevate his leg more and undergo physical

therapy. Appellant recently switched to a four-day per week work week; he noted that his schedule had since varied, most recently going from 12 hours per week (four hours per day three days a week) to 16 (adding a fourth workday of four hours). He noted that he was receiving compensation for 20 hours per week in lost wages from OWCP.

Counsel argued that Dr. Purewal's June 23, 2014 report supported a worsening of appellant's condition. He stated that appellant's right foot condition worsened because he was initially working 20 hours a week, five days a week, 4 hours per day until August 2014, when Dr. Purewal recommended reducing appellant's workdays to three per week. Counsel reported that appellant underwent electromyogram testing on July 2, 2014 which showed persistent nerve damage in his right lower extremity including poly peroneal neuropathy on the right leg, which required right lower extremity epidural injections. He asserted that Dr. Purewal reported increased swelling and discomfort in the right foot in his August 2014 report and alleged that management did not provide suitable accommodation for appellant's right foot condition by failing to provide an appropriate stool for his right foot, consistent with Dr. Purewal's recommendations; appellant further noted that Dr. Purewal reduced his workdays to Monday, Wednesday, and Friday to alleviate the swelling in the right leg and foot. Counsel noted that Dr. Purewal opined in his June 5, 2015 report that appellant's condition had improved after this modification in his work schedule; Dr. Purewal therefore argued that the schedule was part of the problem and that appellant needed to have a day off in between workdays to recover. Based on this evidence, counsel argued, the record established that appellant sustained an overall worsening of his condition and a recurrence of his work-related right foot condition as of August 18, 2014.

By decision dated October 27, 2015, OWCP's hearing representative affirmed the July 29, 2015 decision.

### **LEGAL PRECEDENT**

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 of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of disability. As part of this burden, 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>4</sup>

The Board will not require OWCP to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>5</sup>

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<sup>4</sup> *Terry Hedman*, 38 ECAB 222 (1986).

<sup>5</sup> *See W.T.*, Docket No. 13-1026 (issued September 10, 2013).

## ANALYSIS

Appellant has been in receipt of wage-loss compensation for partial disability. He worked a five-day, four-hour a day schedule in the modified job for five consecutive months, from March to August 2014, and received compensation for 20 hours per week in lost wages from OWCP.

The record does not contain any medical opinion evidence showing a change in the nature and extent of appellant's injury-related condition resulting in total disability as of August 18, 2014. Indeed, appellant has failed to submit any medical opinion containing a rationalized, probative report, which establishes increased disability as of August 18, 2014 causally related to his accepted contusion of the right foot and traumatic arthritis of the right first metatarsophalangeal joint conditions. For this reason, he has not discharged his burden of proof to establish his claim a recurrence of disability as a result of his accepted employment conditions.

On appeal, counsel argues that he has provided sufficient factual and medical evidence to establish an overall worsening of his work-related condition beginning August 18, 2014. He notes that appellant testified at the hearing that, after his return to work, he was working five days a week, but found that schedule was too much for his right foot and ankle therefore Dr. Purewal reduced appellant's workdays to three per week. Counsel further contends that Dr. Purewal's reports establish that appellant was experiencing a worsening of the his work-related right foot condition in the form of increased swelling and pain in the right foot and ankle; he notes that Dr. Purewal opined that the prolonged position of the lower extremity in a dependent position required by appellant's new work position led to increased swelling as the normal autonomic control was compromised; this necessitated the reduction in work hours. The Board does not accept counsel's contentions.

Dr. Chairman advised in his June 17, 2013 report that appellant could return to work in a sedentary position where he was able to sit for most of the day and prop his foot up on a stool, fighting gravity. He reported that when appellant was able to keep his foot elevated on a stool while sitting at a desk, he did not experience swelling, symptoms, or pain in his right foot. On March 12, 2014 appellant accepted a part-time position as a modified clerk, a sales solution team member, based on the restrictions outlined by Dr. Chairman.

Dr. Biniaurishvili opined in his June 23, 2014 report that appellant could work four to six hours a day performing a desk job.

In his June 23, 2014 report, Dr. Purewal related that appellant was struggling with increased right foot pain since he returned to part-time work. He related that management had failed to provide appellant with an adjustable desk that would permit him to elevate his leg. In his August 18, 2014 report, Dr. Purewal noted that appellant continued to experience right lower extremity pain and that his average pain level was an 8 on a scale of 1 to 10. He advised that appellant's swelling and discomfort had increased since he began working part time and opined that the employing establishment had not provided him with any accommodation in terms of ergonomics. Dr. Purewal diagnosed traumatic ankle arthropathy and chronic regional pain

syndrome of the right lower extremity and recommended that appellant reduce his workdays to Mondays, Wednesdays, and Fridays to see if this would decrease his swelling.

The reports from Dr. Purewal provided a diagnosis of appellant's current condition and indicated generally that he complained of disabling pain in June and August 2014, but did not constitute probative, rationalized medical evidence sufficient to establish that appellant's alleged increased disability as of August 18, 2014 was causally related to his accepted right foot conditions. He opined in his August 18, 2014 report that appellant had increased swelling, pain, and discomfort in his right foot and that he therefore needed to cut back on his workdays. Dr. Purewal, however, did not provide a probative, rationalized medical opinion, which addressed or explained whether appellant sustained a recurrence of disability due to his accepted contusion of the right foot and traumatic arthritis of the right first metatarsophalangeal joint conditions on August 18, 2014. He made no objective findings regarding whether appellant sustained a recurrence of disability as of August 18, 2014.<sup>6</sup> Dr. Purewal did not describe how appellant's accepted contusion of the right foot and traumatic arthritis of the right first metatarsophalangeal joint conditions would have been competent to cause the claimed recurrence of disability as of August 18, 2014. Thus, his reports do not constitute probative, rationalized evidence demonstrating that a change occurred in the nature and extent of the injury-related conditions sufficient to warrant increased disability for the period claimed.

Further, appellant did not submit sufficient evidence indicating that there was a change in the nature and extent of his limited-duty assignment. He asserted at the hearing that when he returned to work in March 2014 his job involved sitting at a desk making telephone calls, calling different companies trying to generate business for the employing establishment. Appellant and counsel alleged that management did not provide suitable accommodation for his right foot condition by failing to provide an appropriate stool for his right foot, consistent with Dr. Chairman's recommendations; the makeshift stool management gave appellant did not have sufficient elevation for his foot and he had not been able to obtain the stool which provided these needs. He asserted that because he did not get the stool he began to experience constant pain, numbness, and discomfort in his legs, hips, and at the bottom of his right foot, right ankle, and right leg all the way up to his hip and that was the worst. Appellant stated that he was working about five days a week at the modified job, but eventually came to believe that he needed to reduce his weekly workdays. Dr. Purewal recommended reducing appellant work schedule to three days per week; Monday, Wednesday, and Friday, for four hours per day, in August 2014 and that appellant take a 15-minute break every hour to relieve the pain, numbness, and discomfort in his back and his legs. Appellant reported that these measures helped reduce some of the pain and discomfort, as did putting two chairs together and placing his right leg between the chairs; the additional days off also helped because he could elevate his leg more, get more rest for his right foot and undergo physical therapy. He subsequently switched to a four day per week workweek.

While appellant asserted that his workdays were decreased because his right foot conditions had worsened due to management's failure to accommodate his work restrictions, he

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<sup>6</sup> *William C. Thomas*, 45 ECAB 591 (1994).

has failed to support these allegations with any documentary evidence.<sup>7</sup> The employing establishment provided him with the modified job as a sales solution team member a job tailored to meet Dr. Purewal's work restrictions. It indicated on the May 10, 2015 Form CA-2a that it had made accommodations and adjustments in appellant's regular duties due to his injury-related limitations. Appellant asserted that his conditions worsened as a result of management's failure to make the requisite accommodations and adjustments for his work-related conditions. The record shows, however, that he was able to work a five-day, four-hour per day schedule at the modified job for five consecutive months, from March to August 2014, without interruption. Further, as noted above, appellant was receiving compensation for 20 hours per week in lost wages from OWCP.

Accordingly, OWCP properly denied compensation for a recurrence of appellant's work-related accepted right foot and traumatic arthritis of the right first metatarsophalangeal joint conditions as of August 18, 2014. The Board will affirm the October 27, 2015 decision of OWCP's hearing representative.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's 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 a recurrence of disability commencing August 18, 2014 causally related to his accepted April 15, 2005 employment injury.

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<sup>7</sup> The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. See generally *Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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