United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 17-0926**
	)	**Issued: July 12, 2018**
DEPARTMENT OF STATE, BUREAU OF DIPLOMATIC SECURITY, Washington, DC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 March 23, 2017 appellant, through counsel, filed a timely appeal from a December 13, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[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] The record provided to the Board includes evidence received after OWCP issued its December 13, 2016 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has met his burden of proof to establish intermittent periods of disability commencing September 3, 2013 causally related to his November 16, 2011 employment injury.

FACTUAL HISTORY

On November 21, 2011 appellant, then a 35-year-old Diplomatic Security Special Agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury to his left wrist, left lower leg, and bilateral ankles when he was struck by a U.S. embassy vehicle on November 16, 2011 at Malacagnan Palace in Manila, Philippines while in the performance of his federal employment duties. He returned to the United States the next day and first received medical care on November 18, 2011.

The claim was administratively handled to allow for a limited amount of medical expenses, as it appeared to be a minor injury that resulted in minimal or no lost time from work. Once the medical bills exceeded $1,500.00, OWCP formally adjudicated the claim. On July 21, 2015 it accepted the claim for left bone bruise medial and lateral malleolus, resolved.

In July 1 and 8, 2015 letters, counsel requested that the acceptance of the claim be expanded to include impingement syndrome and intra-articular injury to the right ankle.

On September 29, 2015 OWCP received a claim for compensation (Form CA-7) for the periods September 3 to 13, 2013 and November 1, 2013 to August 24, 2014, and continuing.

Medical evidence from 2011 consisted of magnetic resonance imaging (MRI) scans of the bilateral ankles dated December 9, 2011. The right ankle MRI scan indicated moderate degenerative changes of the tibiotalar joint, mild degenerative changes of the posterior facet of the subtalar joint, and thickening of the anterior talofibular and calcaneofibular ligaments consistent with old sprain. The left ankle MRI scan showed bone bruise in the medial and lateral malleolus and the posterior aspect of the calcaneus with a possible subacute fracture of posterior process of talus, and an os trigone with degenerative changes. A complete tear of the anterior talofibular ligament and calcaneofibular ligaments was also noted.

In a January 13, 2012 report, Dr. John Cohen, a Board-certified orthopedic surgeon related that appellant was seen for bilateral leg pain or stiffness at both ankles, left worse than right. He noted that appellant was hit by a car as a pedestrian in Manila, Philippines on November 16, 2011. Dr. Cohen reported the results of the left ankle MRI scan and noted x-ray of the ankle was normal. He indicated that appellant may have posterior tendinitis of his left ankle.

In a February 6, 2013 report, Dr. Cohen noted that appellant had bilateral ankle pain as a result of his November 16, 2011 work injury. He reported that appellant was last seen in July 2012 and that his left ankle condition had resolved. Dr. Cohen noted that appellant had recurrent, intermittent right ankle pain which occurred while standing and walking. He advised that appellant may have impingement syndrome and intraarticular injury to the right ankle.

In a February 21, 2013 report, Dr. Evan Argintar, a Board-certified orthopedic surgeon, reported that appellant had chronic bilateral ankle pain, right greater than left, stemming from an accident in the Philippines about a year ago. He noted that appellant's medial joint tenderness correlated to his MRI scan, which showed a large osteochondral injury to the medial distal tibia articular surface. Dr. Argintar recommended a right ankle arthroscopy as appellant had failed conservative treatment. In March 8 and June 10, 2013 reports, he diagnosed an osteochondritis dissecans (OCD) distal talus and a subtalar cyst. Dr. Argintar discussed the injections which had been administered.

On September 2, 2013 appellant underwent a right ankle arthroscopy, micro fracture with open drilling of the medial malleolus. This procedure was not authorized by OWCP.

In a September 9, 2013 report, Dr. Argintar related that he had taken appellant off work the entire month of September 2013 to recover from his right ankle arthroscopy. In a September 16, 2013 report, he indicated that appellant was to remain nonweight bearing for two more weeks. On October 14, 2013 Dr. Argintar released appellant to weight bearing as tolerated.

OWCP received July 31, 2014 MRI scans of appellant's thoracic and lumbar sacral spine. These studies indicated no significant thoracic disc disease. Degenerative changes in the lumbar spine and a mild L5-S1 retrolisthesis with multilevel foraminal narrowing, most marked at L5-S1 with compromise of the bilateral existing L5 nerve root, were noted.

There are no treatment records on file from October 14, 2013 until May 26, 2015.

In a May 26, 2015 report, Dr. Zacharia Isaac, an internist and physiatrist, indicated that appellant had several lumbar spine conditions, including bilateral foraminal stenosis at L5-S1, which caused lumbar radiculopathy bilaterally. He also indicated that appellant had spinal stenosis, a degenerative condition, which could be exacerbated with abrupt movement or trauma. Dr. Isaac discussed appellant's job responsibilities and opined that appellant was no longer capable of performing the essential duties of a special agent.

On May 26, 2015 appellant also underwent a bilateral L5 lumbar selective nerve root block. A May 27, 2015 MRI scan of the lumbar spine showed similar findings to the July 31, 2014 report.

In an October 28, 2015 development letter, OWCP reviewed the evidence received in support of the claimed periods of disability from September 3, 2013. It indicated that the medical evidence submitted did not substantiate that the disability was caused by the accepted November 16, 2011 employment injury. OWCP requested that appellant submit a complete and comprehensive narrative report from his physician as to how he had a worsening of his accepted work-related condition during the period of compensation claimed. Appellant was afforded 30 days to submit the requested information.

In a November 17, 2015 report, Dr. Edmond J. Zaccaria, a family practitioner, noted that he was appellant's primary care physician. He indicated that he had read the initial accident report prepared by appellant regarding the November 16, 2011 employment injury, reviewed MRI scans and electromyogram (EMG) reports, reviewed medical records and reports from several physicians, and reviewed appellant's work requirements. Dr. Zaccaria noted that on November 16, 2011, appellant was on a protective detail in Manila, Philippines. He indicated that appellant was

standing with his back to the vehicle and that the front of the vehicle made contact with appellant at a low rate of speed, which caused him to bend backwards. The vehicle continued moving forward and appellant fell forward and under the vehicle, running over his right leg. Dr. Zaccaria noted that appellant returned to the United States the next day. He noted that during the 20-hour transit, appellant experienced pain and stiffness in his back and both legs. Dr. Zaccaria indicated that appellant was diagnosed with bilateral ankle sprain and lumbosacral spine sprain/strain. He noted appellant's course of conservative treatment and discussed MRI scan findings of December 9, 2011. Dr. Zaccaria indicated that appellant was given an orthopedic referral and continued to see a chiropractor for his back soreness and tightness.

Dr. Zaccaria discussed appellant's care under Dr. Cohen from January 12, 2012 through February 6, 2013. He noted that appellant's pain was constant and it made it difficult for him to do some of his work duties and that the pain worsened during travel. Dr. Zaccaria noted that appellant was placed on a "no running" restriction until further notice. He reported that the left ankle responded well to treatment, but the right ankle did not. Dr. Zaccaria discussed the results of the right ankle MRI scan and that appellant was under the care of Dr. Argintar for bilateral ankle sprain from February 19 through October 20, 2013. He discussed appellant's treatment, including injections and the September 2, 2013 right ankle arthroscopy. Dr. Zaccaria indicated that appellant had weight bearing restrictions as part of his recovery and was on a knee walker for six weeks. Appellant began physical therapy on October 7, 2013 and began full weight bearing on October 24, 2013.

Dr. Zaccaria reported that appellant's lumbosacral symptoms began again and his condition rapidly deteriorated once he started weight bearing on his right leg. He reported that on October 30, 2013 appellant was in transit to Washington, DC and began experiencing pain and paralysis. On October 31, 2013 appellant was taken to the George Washington University Hospital Emergency Room and was diagnosed with right lumbar radiculopathy. He was sent home and flew back to Boston, MA with medical assistance. On November 6, 2013 appellant was hospitalized at Framingham Union Hospital because he was unable to stand or sit. He was transferred to Massachusetts General Hospital on November 10, 2013 and on November 20, 2013, right L5-S1 nerve root impingement was diagnosed.

Dr. Zaccaria discussed appellant's care from Dr. Isaac since December 10, 2013. He noted that appellant required a walker for support while walking. An EMG conducted on August 20, 2015 revealed nerve damage to the nerves in question and one on the right calf. Dr. Zaccaria discussed the claimant's limitations and that he was a candidate for surgery.

Dr. Zaccaria opined that appellant's bilateral ankle sprain was causally related to the November 16, 2011 employment injury. He explained that the traumatic nature of the injury, complicated by subsequent exposure to extended periods of standing as required by appellant's job worsened and aggravated the injury. The osteochondritis dissecans (OCD) and subtalar cyst, which were not present in the December 9, 2011 MRI scan, were direct progressions of this injury.

Regarding the lumbosacral spine sprain/strain, Dr. Zaccaria also opined that the mechanism of injury and point of contact being the lumbar spine, established that the November 16, 2011 employment injury was the proximate cause of this injury. He explained that while the initial injury responded well to a regimen of conservative care, appellant's subsequent

exposure to extended periods of standing, and extensive seated travel time led to the worsening. Further, the extended use of a knee walker that maintained his leg suspended and bent at the same time, was the proximate cause of the L5-S1 nerve root impingement that has led to appellant's incapacitated state.

In an October 20, 2015 report, Dr. Isaac provided an impression of bilateral L5 radiculitis due to foraminal narrowing, history of work-related injury, physically demanding occupation, lumbar degenerative changes at L5-S1, facet arthropathy at L5-S1, balance issues with weakness in the leg and foot swelling, soft tissue tightness. In an October 20, 2015 progress note, he diagnosed bilateral L5 radiculitis.

A May 27, 2015 MRI scan of the lumbosacral spine was noted to be similar to the prior study of July 31, 2014.

By decision dated December 1, 2015, OWCP denied appellant's claim for compensation for the claimed periods of wage loss. It noted that appellant had not claimed a back injury on his CA-1 form and that the medical evidence of record did not establish a causal relationship between the lumbar spine sprain/strain diagnosis and the accepted November 16, 2011 employment injury. Appellant was advised that he could file a new injury claim if a new injury had occurred.

On December 9, 2015 counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 9, 2016. During the hearing and in a February 25, 2016 letter, counsel requested that the acceptance of the claim be expanded to include other medical conditions concerning the right ankle and back. The hearing representative advised counsel that the only issue to be decided from the hearing was appellant's entitlement to wage-loss compensation for the period claimed.

In an October 12, 2016 progress report, Dr. Isaac noted that appellant was last seen in December 2015 and was looking for work in a modified capacity as he could not work as a federal agent due to his standing and sitting intolerance, chronic back, and sciatic symptoms. He provided an impression of bilateral L5 radiculitis due to foraminal narrowing, history of work-related injury, physically demanding occupation, lumbar degenerative changes at L5-S1, facet arthropathy at L5-S1.

By decision dated December 13, 2016, an OWCP hearing representative affirmed OWCP's December 1, 2015 decision. She found that there was no medical evidence which supported appellant's claims for compensation for leave buy back or wage-loss compensation for the claimed periods causally related to the accepted November 16, 2011 employment injury. The hearing representative indicated that no action had been taken on counsel's July 1, 2015 and February 25, 2016 requests to expand the acceptance of the claim to include additional conditions, and that on return of the case record appellant should be provided due process regarding this issue. She further advised appellant that he could file a claim for an occupational disease (Form CA-2), if he believed that his current conditions were related to work activities associated with his occupation.

LEGAL PRECEDENT

Section 8102(a) of FECA[4] sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[5] This meaning, for brevity, is expressed as disability from work.[6]

For each period of disability claimed, the employee has the burden of proving that he or she was disabled from work as a result of the accepted employment injury.[7] Whether a particular injury caused an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by the preponderance of the reliable, probative, and substantial medical evidence.[8]

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. 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 he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[9]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability for intermittent periods commencing September 3, 2013.

While OWCP accepted that appellant sustained left bone bruise medial and lateral malleolus, resolved, on November 16, 2011, appellant bears the burden of proof to establish, through rationalized medical evidence, that he was disabled from work during the claimed time periods and that his disability was causally related to his accepted conditions.[10]

---

[4] 5 U.S.C. § 8102(a).

[5] 20 C.F.R. § 10.5(f). *See also William H. Kong,* 53 ECAB 394 (2002); *Donald Johnson,* 44 ECAB 540, 548 (1993); *John W. Normand,* 39 ECAB 1378 (1988); *Gene Collins,* 35 ECAB 544 (1984).

[6] *See Roberta L. Kaaumoana,* 54 ECAB 150 (2002).

[7] *See William A. Archer,* 55 ECAB 674 (2004).

[8] *See Fereidoon Kharabi,* 52 ECAB 291, 292 (2001).

[9] *Id.*

[10] *See supra* notes 7 and 8. *See also V.P.*, Docket No. 09-0337 (issued August 4, 2009).

For the period commencing September 3, 2013, the evidence reflects that appellant underwent a right ankle arthroscopic surgery on September 2, 2013, which OWCP did not authorize. The accepted condition was of the left ankle, not the right. Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition was causally related to the employment injury.[11]

While appellant claimed injury to both ankles on his CA-1 form, there is no examination records for treatment of record contemporaneous to the work injury. In his February 6, 2013 report, Dr. Cohen indicated that appellant had bilateral ankle pain as a result of the employment injury. However, it is not possible to establish the cause of a medical condition if the physician has not provided a diagnosis, but only notes pain.[12] The Board has consistently held that pain is a symptom and not a compensable medical diagnosis.[13] While Dr. Cohen ultimately opined that appellant may have impingement syndrome and intraarticular injury to the right ankle, he did not provide a rationalized opinion explaining whether and how those diagnoses were related to the November 16, 2011 employment injury. The Board has found that medical opinions unsupported by rationale are of little probative value.[14]

Medical notes from Dr. Argintar dated February 21 to October 14, 2013 fail to provide an opinion regarding the causality of the right ankle conditions. Reports lacking such an opinion are of diminished probative value.[15] In his February 21, 2013 report, Dr. Argintar reported that appellant had chronic bilateral ankle pain, right greater than left, stemming from the employment injury. While he indicated that appellant's clinical picture correlated to his MRI scan, which showed a large osteochondral injury to the medial distal tibia articular surface, Dr. Argintar did not provide any rationale supporting this conclusion or identify which MRI scan he was referring to when providing his opinion.[16] He provided no rationale as to why this condition was not seen on the December 9, 2011 right ankle MRI scan, which indicated moderate degenerative changes of the tibiotalar joint, mild degenerative changes of the posterior facet of the subtalar joint, and thickening of the anterior talofibular and calcaneofibular ligaments consistent with old sprain. Dr. Argintar's opinion is insufficiently rationalized and therefore his opinion is insufficient to support that appellant's right ankle condition arose from the accepted November 11, 2015 employment injury.[17] In a September 9, 2013 report, Dr. Argintar related that he had taken appellant off work for the entire month of September due to his right ankle surgery. As appellant's

[11] *G.M.*, Docket No. 15-1645 (issued December 7, 2015).

[12] *See A.C.*, Docket No. 16-1587 (issued December 27, 2016).

[13] *B.P.*, Docket No. 12-1345 (issued November 13, 2012); *C.F.*, Docket No. 08-1102 (issued October 2008).

[14] *M.P.*, Docket No. 14-1289 (issued September 26, 2014); *F.T.*, Docket No. 09-0919 (issued December 7, 2009); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[15] *See Mary E. Marshall*, 56 ECAB 420 (2005).

[16] *Supra* note 14.

[17] *See V.M.*, Docket No. 15-0601 (issued May 19, 2015).

right ankle condition was not an accepted, appellant has not established that he was disabled to the accepted employment injury.[18]

Dr. Zaccaria related in his November 17, 2015 report that appellant's right leg had been run over by the vehicle during the November 16, 2011 incident. However, there is no accident report or initial examination report which notes this mechanism of injury. While Dr. Zaccaria related that appellant had been placed on a "no running" restriction he did not explain whether this was related to appellant's accepted left ankle injury and whether it caused appellant to be disabled for work for any specific period of time. As previously noted, whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proven by the preponderance of the reliable, probative, and substantial medical evidence.[19]

The remaining evidence of record, which include multiple treatment notes from Dr. Isaac and diagnostic testing, are insufficient to establish appellant's burden of proof as none of these reports contain an opinion regarding a specific date of disability due to the accepted left ankle condition. Reports lacking such an opinion are of diminished probative value.[20]

In so far as the evidence pertains to conditions which have not been accepted by OWCP, but for which counsel has requested expansion of the acceptance of the claim, the Board notes that OWCP's hearing representative found in the December 13, 2016 decision that OWCP had not taken any action on counsel's request to expand the acceptance of the claim. As OWCP has not adjudicated this issue, the Board does not have jurisdiction. Issues in an interlocutory status are not before the Board.[21]

Appellant has not met his burden of proof because the medical opinion evidence in this case is insufficient to establish that he was disabled from work commencing September 3, 2013 causally related to the accepted condition which arose from the November 16, 2011 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 intermittent disability commencing September 3, 2013 causally related to his November 16, 2011 employment injury.

[18] *Supra* note 7.

[19] *Supra* note 8.

[20] *Id.*

[21] *See* 20 C.F.R. § 501.2(c)(2). *See also R.O.*, Docket No. 17-0894 (issued January 26, 2018).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 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