United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 19-0691**
	)	**Issued: August 23, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Elk Grove Village, IL, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 11, 2019 appellant, through counsel, filed a timely appeal from a December 28, 2018 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 this case.[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] Appellant submitted additional evidence following the December 28, 2018 decision. However, "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 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 commencing May 11, 2017 due to her accepted December 3, 2014 employment injury.

FACTUAL HISTORY

On November 3, 2014 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 3, 2014 she sustained right hand, knee, and ankle injuries due to a fall which occurred while she was in the performance of duty. She stopped work on November 4, 2014. OWCP accepted appellant's claim for right ankle sprain, abrasion or friction burn of right hand without infection, and abrasion or friction burn of right leg (except the foot) with infection. On January 28, 2016 appellant underwent OWCP-authorized right ankle surgery, including lateral ankle stabilization with repair of the right anterior talofibular ligament. She stopped work due to the surgery and, in November 2016, she returned to regular-duty work for the employing establishment on a full-time basis.[4]

On January 31, 2017 appellant advised OWCP by telephone that the employing establishment removed her from work on January 27, 2017 and placed her on emergency leave without pay (LWOP) status pending termination from employment. She filed claims for compensation (Form CA-7) for wage loss beginning January 27, 2017 due to her December 3, 2014 employment injury. By decision dated March 22, 2017, OWCP denied appellant's claims for wage-loss compensation beginning January 27, 2017, noting that the evidence of record was insufficient to establish that she was off work due to the December 3, 2014 employment injury.[5]

On April 19, 2017 OWCP advised appellant that it was referring her for an impartial medical examination regarding her ongoing medical conditions and disability due to her December 3, 2014 employment injury.

Appellant subsequently submitted an April 11, 2017 report from Dr. Syed Hussain, a Board-certified internist, who indicated that appellant presented on that date with complaints of right ankle and left heel pain. Dr. Hussain diagnosed plantar fascial fibromatosis and prescribed compounding cream. The findings of an April 11, 2017 venous duplex scan of the right lower extremity showed no evidence of deep vein thrombosis.

In April 2018, appellant returned to full-time work in a limited-duty capacity which required her to lift up to 50 pounds and which did not require squatting all the way down. She stopped work on May 11, 2017.

On May 12, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of disability on May 11, 2017 due to her December 3, 2014 employment injury. She asserted that she had disability due to muscle spasms which first occurred in 2016 with physical therapy and noted that she had experienced three more muscle spasm episodes since that time.

[4] OWCP paid appellant appropriate compensation for disability related to the surgery.

[5] The Board notes that appellant's claim for wage-loss compensation between January and March 2017 is not currently before the Board.

Appellant subsequently submitted documents from her May 11, 2017 visit to an emergency room for complaints of right calf spasms. She was seen by Dr. Arnold Bennett, a Board-certified radiologist, who diagnosed right calf muscle spasms and indicated that a May 11, 2017 venous duplex scan of the right lower extremity showed normal Doppler flow.[6] On May 15, 2017 Dr. Hussain diagnosed plantar fascial fibromatosis and injury of nerves at the right foot/ankle level. He recommended that appellant avoid any activity which aggravated her ankles. In a May 15, 2017 note, Dr. Hussain indicated that appellant was still suffering from lower extremity pain and recommended that she limit her standing.[7]

A report of June 15, 2017 electromyogram and nerve conduction velocity (EMG/NCV) studies of appellant's right lower extremity contained an impression of normal study with no evidence of an acute or chronic lumbar radiculopathy, generalized large fiber neuropathy, lumbosacral plexopathy, or entrapment neuropathy/myopathy. In a June 19, 2017 report, Dr. Rajeev Garapati, a Board-certified orthopedic surgeon, advised that he was not sure about the exact etiology of appellant's right calf pain or why she would have had atrophy of her right calf after the January 28, 2016 surgery.

Appellant then attended a rescheduled impartial medical examination with Dr. Kenneth Sanders, a Board-certified orthopedic surgeon. In a January 31, 2018 report, Dr. Sanders reported the findings of his physical examination, noting that appellant had no atrophy, swelling, or tenderness upon palpation of her right calf. He diagnosed status postoperative lateral reconstruction of the lateral ligaments of the right ankle. Dr. Sanders opined that appellant had no disabling residuals of her December 3, 2014 employment injury and could perform her regular work duties.

In a March 2, 2018 report, Dr. Garapati diagnosed status post right ankle ligamentous reconstruction with peroneal tendon transfer to the fibula, neuritis in right lower extremity, and right calf pain and atrophy in right lower extremity.[8] In an April 2, 2018 report, he diagnosed right ankle ligamentous reconstruction with peroneal tendon transfer, right ankle stiffness, right calf atrophy, and right lower extremity neuritis. Dr. Garapati indicated that he was giving appellant restrictions of lifting no more than 50 pounds and avoiding deep squatting positions.

By decision dated May 14, 2018, OWCP denied appellant's recurrence claim, noting that the medical evidence of record did not establish a recurrence of disability on or after May 11, 2017 due to the December 3, 2014 employment injury.[9]

[6] Dr. Bennett also noted that May 11, 2017 x-rays of appellant's right ankle showed no metallic hardware in the projection of the right ankle, and intact ankle mortise. He indicated that a defect within the distal fibula might reflect the prior location of a screw.

[7] By decision dated June 12, 2017, OWCP suspended appellant's benefits in the present claim for failing to cooperate with the scheduled impartial medical examination. On June 20, 2017 appellant, through counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review. By decision dated January 29, 2018, OWCP's hearing representative affirmed the June 12, 2017 decision.

[8] In a March 2, 2018 duty status report (Form CA-17), Dr. Garapati indicated that appellant was limited to lifting no more than 50 pounds.

[9] OWCP later expanded the accepted conditions to include a rupture of the right tibiofibular ligament.

Appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on October 17, 2018, she testified that she filed the recurrence claim because of muscle spasms in her right calf. Appellant asserted that she was being worked outside her limitations. She claimed that she developed atrophy in her right calf due to the January 28, 2016 surgery. Appellant indicated that she was currently off work due to a disciplinary issue.

By decision dated December 28, 2018, OWCP's hearing representative affirmed the May 14, 2018 decision.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.[10] This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.[11]

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.[12]

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[13] Where no such rationale is present, the medical evidence is of diminished probative value.[14]

[10] 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[11] *Id.*

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[13] *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

[14] *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability on or after May 11, 2017 due to her accepted December 3, 2014 employment injury.

Appellant submitted documents from her May 11, 2017 visit to an emergency room for complaints of right calf spasms, as well as several follow-up reports regarding these complaints. On May 11, 2017 Dr. Bennett diagnosed right calf muscle spasms and indicated that a May 11, 2017 venous duplex scan of the right lower extremity showed normal Doppler flow. He also noted that May 11, 2017 x-rays of appellant's right ankle showed no metallic hardware in the projection of the right ankle, and intact ankle mortise. Dr. Bennett indicated that a defect within the distal fibula might reflect the prior location of a screw. On May 15, 2017 Dr. Hussain diagnosed plantar fascial fibromatosis and injury of nerves at right foot/ankle level. He recommended that appellant avoid any activity that aggravated her ankles and indicated that appellant was still suffering from lower extremity pain and recommended that she limit her standing. In an April 2, 2018 report, Dr. Garapati diagnosed right ankle ligamentous reconstruction with peroneal tendon transfer, right ankle stiffness, right calf atrophy, and right lower extremity neuritis. He indicated that he was giving appellant permanent restrictions of lifting no more than 50 pounds and avoiding deep squatting positions.

The Board notes that Drs. Bennett, Hussain, and Garapati did not provide an opinion that the observed symptoms/conditions or recommended restrictions were related to appellant's December 3, 2014 employment injury or the OWCP-authorized January 28, 2016 right ankle surgery undertaken to treat the injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's disability/condition is of no probative value on the issue of causal relationship.[15] These reports submitted by appellant do not provide an opinion on causal relationship between the accepted December 3, 2014 employment injury and any period of disability. As such, they are of no probative value.[16]

Appellant has not shown that her employment-related condition worsened to the extent that she could no longer work on or after May 11, 2017.[17] As the record does not contain a rationalized opinion on causal relationship, the Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing May 11, 2017 due to her accepted December 3, 2014 employment injury.

[15] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[16] *Id.* Moreover, Dr. Sanders, an OWCP referral physician, indicated in a January 31, 2018 report that appellant had no disabling residuals of her December 3, 2014 employment injury and could perform her regular work duties. Although OWCP referred to Dr. Sanders as an impartial medical specialist, he actually served as an OWCP referral physician because there was no conflict in the medical evidence at the time of the referral. *See R.H.*, Docket No. 17-1477 (issued March 14, 2018) (finding that, due to the lack of a conflict in the medical evidence at the time of the referral to the putative impartial medical specialist, the physician actually served as an OWCP referral physician rather than an impartial medical specialist).

[17] *See supra* note 9. Appellant asserted that she had to perform duties outside her limited-duty restrictions, but she did not submit any evidence in support of this claim. *See supra* note 10.

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 commencing May 11, 2017 due to her accepted December 3, 2014 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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