United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 19-1347**
	)	**Issued: December 5, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Duluth, GA, Employer	)	

Appearances:
Appellant, pro se
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 4, 2019 appellant filed a timely appeal from an April 25, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include a right tibial tendon condition, consequential to her employment-related

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the April 25, 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.*

right foot conditions; and (2) whether OWCP abused its discretion by denying authorization for right tibial tendon surgery.

FACTUAL HISTORY

On January 31, 2017 appellant, then a 51-year-old postal supervisor, filed an occupational disease claim (Form CA-2) alleging that she sustained plantar fasciitis as a result of her federal employment duties, including walking 8 to 12 miles daily on concrete floors, while in the performance of duty. She noted that she first became aware of her condition and realized it resulted from factors of her federal employment on May 12, 2015. On the reverse side of the claim form, the employing establishment indicated that appellant first reported the condition to her supervisor on January 31, 2017 and that she was performing her job duties. OWCP accepted the claim for plantar fascial fibromatosis. On June 14, 2017 appellant underwent surgery for plantar fasciitis and stopped work.

Appellant continued to receive medical treatment. A February 16, 2018 right ankle magnetic resonance imaging (MRI) scan report demonstrated tendinosis of the peroneus longus at the level of the malleolar tip and insertional plantar fasciitis, but no tear.

In a February 22, 2018 report, Dr. Phillip Walton, a Board-certified orthopedic surgeon, indicated that he examined appellant for her right posterior-tibial tendon tendinitis and plantar fasciitis. He related that an MRI scan revealed significant tendinitis and suspected intrasubstance tearing. Upon physical examination, Dr. Walton observed less tenderness to palpation along the plantar fasciitis. He diagnosed plantar fasciitis and right posterior-tibial tendon tendinitis. Dr. Walton explained that "given persistent symptoms and MRI [scan] findings, we recommend surgical intervention."

On May 1, 2018 Dr. Walton requested authorization for surgery to perform a revision of the lower right leg tendon and repair of right foot tendon. In a May 2, 2018 development letter, OWCP advised appellant that it was unable to authorize the requested procedure for right ankle surgery because the medical condition for which the surgical procedure was requested was not an accepted condition. It requested additional medical evidence to establish that the right posterior-tibial tendon tendinitis was consequential to her work-related condition and to support that the surgical procedure was medically necessary to treat her accepted right plantar fasciitis.

Appellant submitted medical reports dated November 15 to December 29, 2017, wherein Dr. Walton recounted her complaints of right heel pain, worse with walking. He indicated that appellant underwent plantar fasciitis surgery in June 2017 and that the pain had returned when she resumed work. Upon examination of appellant's right lower extremity, Dr. Walton observed tenderness to palpation over the posterior-tibial tendon and plantar fasciitis origin. He diagnosed foot pain, ankle pain, tibial posterior tendinitis, and plantar fasciitis. In a December 12, 2017 report, Dr. Walton indicated that appellant "does walk/stand for her job 7 [to] 10 hours per day per patient report, which does aggravate her pain."

In a May 2, 2018 report, Dr. Walton noted no improvement in appellant's constant pain and daily swelling. He reported findings of stable examination along the posterior-tibial tendon

and less tenderness to palpation along the plantar fasciitis. Dr. Walton diagnosed right posterior tibial tendon tendinitis and right foot plantar fasciitis.

In a June 30, 2018 addendum note, in response to the denial of his surgical request to treat her work-related plantar fasciitis, posterior tibial tendon dysfunction, and probable tear, Dr. Walton reported that appellant's current symptoms were a result of her original work-related injury on May 12, 2015. He noted that he believed that appellant's posterior tibialis portion of her injury was possibly underappreciated by appellant and by her treating podiatrist. Dr. Walton explained that from appellant's initial presentation in his office, she had exhibited symptoms consistent with both injuries. He opined that given the description of appellant's symptoms -- including weakness with push-off, hindfoot inversion and dynamic pronation of her foot with weight bearing -- he believed that these injuries were related to the May 12, 2015 injury. Dr. Walton further explained that given appellant's persistent weakness and biomechanical disturbances, even with rehabilitation and other conservative matters, surgery was medically necessary to address her posterior tibialis tendon insufficiency.

OWCP referred appellant's case to Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), in order to determine whether appellant developed right leg posterior-tibial tendinitis as a consequence of her accepted injury. In an August 21, 2018 report, he indicated that he had reviewed the evidence provided. Dr. Kuhn noted that he disagreed with Dr. Walton's opinion regarding causation and the need for the requested right posterior tibial tendinitis as it related to the May 12, 2015 employment injury. He indicated that although appellant had persistent symptoms in the plantar fascia since the industrial injury, there was lack of evidence of posterior tibial tendon symptoms. Dr. Kuhn concluded that there was insufficient evidence to establish that appellant developed any additional conditions, including right leg posterior tibial tendinitis, as a consequence of the accepted, work-related injury.

In a decision dated August 29, 2018, OWCP denied expansion of appellant's claim to include a consequential right posterior tibial tendinitis. It found that the lack of medical evidence and the August 21, 2018 DMA report established that appellant did not develop right leg posterior-tibial tendinitis as a consequence of her accepted injury.

By separate decision of even date, OWCP also denied authorization for surgery for revision of the right lower leg tendon and repair of the right foot tendon. It found that the medical evidence of record established that appellant did not have right posterior tibial tendinitis, and accordingly, that she did not need surgery.

On September 24, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on February 11, 2019. Appellant testified that, over time, her plantar fasciitis problem created a torn tendon in her foot, which did not heal after surgery.

Appellant subsequently submitted reports by Dr. Walton dated September 17, 2018 and February 11, 2019. Dr. Walton related that he treated appellant for tendinitis of right posterior tibial tendon and right plantar fasciitis. Appellant also submitted her response to OWCP's May 2, 2018 development letter.

OWCP also received treatment notes by Dr. Richard Aronoff, a podiatrist, dated July 15, 2015 to August 23, 2017 who examined appellant for complaints of continued right heel pain. He provided examination findings and diagnosed right plantar fasciitis.

By decision dated April 25, 2019, an OWCP hearing representative affirmed OWCP's August 29, 2018 decisions denying appellant's request to expand acceptance of her claim to include a posterior right tibial tendon tear condition as causally related to her right foot conditions and as such denying authorization for surgery.

LEGAL PRECEDENT -- ISSUE 1

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 is causally related to the employment injury.[3]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[4] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[5] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[6] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is insufficient to establish causal relationship.[7]

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant's own intentional misconduct.[8] Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury is compensable if it is the direct and natural result of a compensable primary injury.

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall

[3] *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[4] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[5] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[6] *Id.*

[7] *E.B.*, Docket No. 17-1497 (issued March 19, 2019); *V.W.*, 58 ECAB 428 (2007).

[8] *S.M., id.*; *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

make an examination.[9] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS -- ISSUE 1

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

OWCP accepted that appellant developed plantar fasciitis due to factors of her employment as a postal supervisor. In reports dated November 15 to December 29, 2017, Dr. Walton, appellant's treating physician, recounted appellant's complaints of right heel pain, worse with walking. Upon examination of appellant's right lower extremity, he observed tenderness to palpation over the posterior-tibial tendon and plantar fasciitis origin. Dr. Walton diagnosed foot pain, ankle pain, tibial posterior tendinitis, and plantar fasciitis. In a June 30, 2018 report, he explained that appellant exhibited symptoms consistent with both plantar fasciitis and posterior tibial tendon tendinitis since her first visit in his office. Dr. Walton opined that appellant's injuries were related to the May 12, 2015 injury. He further indicated that surgery was medically necessary to address her posterior tibialis tendon insufficiency.

By contrast, Dr. Kuhn, an OWCP DMA, indicated in his August 21, 2018 report that he disagreed with Dr. Walton's opinion regarding the causation and need for the requested right posterior tibial tendinitis. He reported that the medical evidence in the record did not establish that appellant developed any additional conditions, including right leg posterior tibial tendinitis, as a consequence of the accepted, work-related injury.

Both Dr. Walton and the DMA provided a description of appellant's employment injury and both provided rationale for their respective opinions based on their review of the medical evidence and physical findings. The Board, therefore, finds that a conflict in medical opinion exists regarding whether appellant sustained right posterior tibial tendinitis as a consequence of her work-related injury and, accordingly, whether right ankle surgery was medically necessary to treat her right posterior tibial tendinitis.[12]

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second-opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.[13] The Board will

[9] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[10] 20 C.F.R. § 10.321.

[11] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[12] *See A.T.*, Docket No. 19-0294 (issued May 29, 2019); *W.B.*, Docket No. 17-1994 (issued June 8, 2018).

[13] 5 U.S.C. § 8123(a); *see also G.K.*, Docket No. 16-1119 (issued March 16, 2018).

thus remand the case to OWCP for referral to an impartial medical examiner regarding whether appellant has met her burden of proof to establish that she sustained a right tibial tendon condition as a consequence to her employment-related right foot conditions and whether OWCP has abused its discretion by denying authorization for right tibial tendon surgery.[14] Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.[15]

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this opinion of the Board.

Issued: December 5, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[14] *See E.C.*, Docket No. 18-0780 (issued October 11, 2018); *P.S.*, Docket No. 17-0802 (issued August 18, 2017).

[15] Given the disposition of the first issue regarding the expansion of appellant's claim to include right posterior tibial tendon tendinitis, the second issue regarding authorization for surgery is moot.