

**United States Department of Labor
Employees' Compensation Appeals Board**

N.M., Appellant)	
)	
and)	Docket No. 18-1584
)	Issued: March 15, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Trenton, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 14, 2018 appellant, through counsel, filed a timely appeal from an April 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of disability commencing June 28, 2016, causally related to his accepted January 31, 2015

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.*

employment injury; and (2) whether OWCP has abused its discretion by denying authorization for right ankle surgery.

FACTUAL HISTORY

On January 31, 2015 appellant, then a 43-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on January 31, 2015 he sprained his right shoulder when he got thrown off a dock plate while in the performance of duty. He stopped work and returned to sedentary duty in May 2015.

Appellant was initially treated in the emergency room and diagnosed with ankle sprain, back pain, and shoulder pain.

After development of the claim, OWCP initially denied appellant's claim by decision dated April 1, 2015. Appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on March 15, 2016.

OWCP received a May 17, 2016 examination note by Dr. Robert C. Floros, a podiatrist and foot and ankle surgeon, who related that appellant had separation of the posterior process of his right talus with pain in the posterior aspect of his right talus and along the calcaneal fibular ligament. Dr. Floros diagnosed right ankle sprain and both posterior process talus fracture. He recommended surgery to remove the posterior process portion of the bone and repair ligaments as needed.

By decision dated May 31, 2016, an OWCP hearing representative found that the evidence of record was sufficient to substantiate that the January 31, 2015 employment incident occurred as alleged. She also determined that the medical evidence of record was sufficient to establish that appellant sustained a right ankle sprain as a result of the accepted employment incident. The hearing representative reversed the April 1, 2015 OWCP decision finding that OWCP accept appellant's claim for sprain of tibiofibular ligament of the right ankle.³ Appellant received wage-loss compensation for temporary total disability for the period March 18 to May 22, 2015.

In a July 12, 2016 Letter of Medical Necessity, Dr. Floros indicated that he was treating appellant for a work-related fracture to his right posterior talus with large posterior fragment. He related that appellant had undergone several months of conservative treatment and physical therapy, but had failed to progress even with reduced work hours, shoe wear, bracing, and casting. Dr. Floros reported that appellant had chosen to proceed with a right ankle procedure for an open resection of the bone fragments. He opined that the procedure was "necessary to help him reach a maximum medical improvement [MMI] and improve his present function." Dr. Floros submitted a request for authorization for partial removal of foot bone surgery and also provided a July 19, 2016 examination note.

³ The hearing representative further indicated that while appellant's podiatrist had diagnosed a fracture, she did not find that the medical evidence of record was sufficient to establish an ankle fracture.

By decision dated July 21, 2016, OWCP accepted appellant's claim for stress fracture of the right ankle.

On August 1, 2016 appellant filed a notice of recurrence (Form CA-2a) alleging that, on June 28, 2016, he sustained a recurrence of disability of his January 31, 2015 employment injury.⁴ He alleged that his ankle continued to worsen over time to a point where he could not work in a sedentary position beginning June 25, 2016. Appellant also described a February 3, 2016 incident when he fell down the stairs at his home after his right ankle gave out. On the reverse side of the claim form, the employing establishment confirmed that, following the original injury, appellant returned to work, but stopped work again on June 28, 2016.

OWCP received a June 28, 2016 work status form report by Dr. Floros. Dr. Floros indicated that appellant had been under his care and should be excused from work from June 28 to July 28, 2016. He related that appellant was awaiting surgery and could not return to work until cleared by the doctor. Dr. Floros also provided a prescription note dated June 28, 2019, which indicated "out of work." He also noted right ankle pain and under pain management.

On July 25 and August 26, 2016 OWCP authorized surgery for partial removal of right foot bone.

By decision dated September 9, 2016, OWCP modified the July 21, 2016 decision and explained that, pursuant to the May 31, 2016 hearing representative decision, further development of the claim was required to determine whether appellant's claim should be accepted for right ankle fracture. It noted that his claim had been accepted for sprain of the tibiofibular ligament of the right ankle.

By separate letter dated September 9, 2016, OWCP informed appellant that the August 26, 2016 medical authorization letter had been issued in error. It advised him that it was unable to authorize the procedure for right ankle surgery and requested additional evidence to support that the procedure was medically necessary to treat his January 31, 2015 employment injury.

OWCP received a statement from appellant detailing the dates he worked as an Uber driver and the amount of money he made. The period covered June 27 to September 19, 2016.

Dr. Floros provided a September 20, 2016 Letter of Medical Necessity, which was duplicative of his prior letter dated July 12, 2016. He reiterated that the procedure for open resection of the bone fragments of the right ankle was necessary to help appellant reach MMI and improve his present function.

On October 3, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant's right ankle fracture was causally

⁴ Appellant subsequently filed a claim for wage-loss compensation (Form CA-7) for total disability during the period June 28 through September 20, 2016.

related to his accepted employment injury and whether surgery for partial removal of right foot bone was necessary to treat appellant's employment injury.

In a November 4, 2016 report, Dr. Askin noted that he had reviewed the record, including the SOAF and medical reports. He accurately described the January 31, 2015 employment injury and noted that OWCP had accepted appellant's claim for strained tibiofibular ligament of the right ankle. Dr. Askin related appellant's complaints of right ankle and foot pain and right shoulder pain. Upon examination of appellant's bilateral ankles, he observed that appellant was able to circumduct his ankles and hindfeet to make an audible cracking sound. Range of motion demonstrated 10 degrees of dorsiflexion and 30 degrees of plantar flexion equally. Dr. Askin reported no edema or atrophic changes. Sensation was preserved to light touch and deep tendon reflexes at the ankles were symmetrical.

In response to OWCP's questions, Dr. Askin reported that appellant's clinical findings and diagnostic studies were consistent with a diagnosis of right ankle sprain causally related to the original January 31, 2015 employment injury. He indicated that appellant was also diagnosed with right ankle fracture, but reported that there was no "nexus between any supposed ankle fracture and the reported injury." Dr. Askin pointed out that x-ray examination and MRI scans taken in the immediate aftermath of the employment incident did not identify a fracture or dislocation or show an imperfection that warranted surgical intervention. He further opined that the proposed surgery for partial removal of the right foot bone was not directly related to appellant's employment injury. Dr. Askin concluded that there was no present clinical indication for a surgical procedure as related to the January 31, 2015 employment injury. He completed a work capacity evaluation form, which indicated that appellant had reached MMI and was capable of performing his usual job.

In a January 5, 2017 letter, counsel asserted that there was a conflict of medical evidence between Dr. Askin and Dr. Floros regarding whether right foot surgery was medically necessary to treat his January 31, 2015 employment injury. He requested that OWCP schedule a referee medical examination pursuant to 5 U.S.C. § 8123(a).

In a development letter dated January 17, 2017, OWCP informed appellant that, to establish his recurrence claim, he must show a worsening of his original injury without an intervening injury or new exposure such that he was no longer able to work. It requested that appellant respond to questions regarding the June 28, 2016 date of alleged recurrence and submit medical evidence, which established how he was unable to work during his claimed period as a result of his accepted injury. OWCP afforded appellant 30 days to provide the necessary information.

By decision dated January 18, 2017, OWCP denied authorization for right ankle surgery. On January 24, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative.

By decision dated February 22, 2017, OWCP denied appellant's claim for a recurrence of disability. It found that the medical evidence of record failed to establish that appellant's January 31, 2015 right ankle injury had worsened to the extent that he was disabled from work beginning June 28, 2016.

On February 28, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative.

On May 31, 2017 a hearing was held to address OWCP's January 18 and February 22, 2017 decisions.

Following the hearing, OWCP received comments from M.N., a human resource specialist for the employing establishment, on June 28, 2017. He related that after appellant's original injury, he returned to work in the ripped and torn section, which required him to sit at a table. M.N. alleged that it was not possible for appellant's employment to worsen his accepted ankle injury since he sat for the entire time and was not required to stand or walk at work.

In a handwritten statement dated August 17, 2017, appellant responded to the employing establishment's comments. He explained that he was unable to wear his brace while working at the employing establishment because they had a "no open toe" policy. Appellant reiterated that his ankle injury was not improving with physical therapy or by wearing a brace and that surgery was the only solution.

By decision dated August 15, 2017, an OWCP hearing representative affirmed OWCP's January 18 and February 22, 2017 decisions. He determined that the medical evidence of record failed to establish that appellant sustained a change or material worsening of his January 31, 2015 employment injury to the extent that he was not able to work in his sedentary job. The hearing representative also found that the weight of the medical evidence of record rested with the November 14, 2016 report of Dr. Askin who, as a second-opinion examiner, determined that appellant had not sustained a right ankle fracture as a result of the January 31, 2015 employment injury and that the proposed right foot bone surgery was not medically necessary to treat appellant's accepted January 31, 2015 right ankle sprain injury.

On October 30, 2017 appellant, through counsel, requested reconsideration. He resubmitted treatment notes and letters by Dr. Floros dated May 17 to July 19, 2016 and October 17, 2017.

Appellant also submitted treatment notes by Dr. Floros dated October 18, 2016 to January 10, 2017. Dr. Floros indicated that appellant still suffered from the fracture of the posterior aspect of the talus, experienced pain in the anterior talofibular ligament, calcaneal fibular ligament, and peroneal tendon area. He opined that appellant could not work.

OWCP received an October 6, 2016 examination report by Dr. Megan Lubin, a Board-certified podiatric surgeon and podiatric foot and ankle surgeon, who related that she had treated appellant for follow-up examination of right ankle pain after a January 31, 2016 work injury. Dr. Lubin conducted an examination and diagnosed nondisplaced fracture of the posterior process of the right talus, right lower leg pain, right ankle and foot post-traumatic osteoarthritis, and right ankle sprain. She recommended that appellant not work.

In treatment notes dated January 17 and November 7, 2017, Dr. Floros noted his disagreement with Dr. Askin's opinion that appellant had not sustained a right ankle fracture as a result of the January 31, 2015 employment injury. He recommended that appellant only work sedentary duty.

By decision dated April 10, 2018, OWCP denied modification of the August 15, 2017 decision. It found that the medical evidence of record was insufficient to establish that appellant's disability beginning June 28, 2016 resulted from a change or worsening of his January 31, 2016 employment injury. OWCP also determined that appellant had not submitted sufficient medical evidence to demonstrate how the proposed right ankle surgery was medically necessary to treat his accepted right ankle injury. It noted that the weight of the medical evidence rested with Dr. Askin and that a conflict of medical opinion had not been created because appellant's physicians had not provided sound medical rationale to support their conclusions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁶ For each period of disability claimed, an employee has the burden of proof to establish a causal relationship between his or her recurrence of disability and his or her accepted employment injury.⁷

OWCP's implementing regulations define a recurrence of disability as 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 injury or illness without an intervening injury or new exposure to the work environment.⁸ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force) or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.⁹

Whether a particular injury causes an employee to become disabled from work and the duration of that disability are medical issues that must be proven by a preponderance of reliable, probative, and substantial medical opinion evidence.¹⁰ Findings on examination and a physician's opinion, supported by medical rationale, are needed to show how the injury caused the employee's disability from his or her particular work.¹¹ For each period of disability claimed, the employee must establish that he or she was disabled from work as a result of the accepted employment injury. 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 claimed.

⁵ *Supra* note 2.

⁶ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁷ *Dominic M. Descaled*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

⁸ 20 C.F.R. § 10.5(x).

⁹ *Id.*

¹⁰ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

¹¹ *Dean E. Pierce*, 40 ECAB 1249 (1989).

To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing June 28, 2016, causally related to his accepted January 31, 2015 employment injury.

The medical evidence relevant to the claimed recurrence of disability included medical reports by Dr. Floros. In a June 28, 2016 work status form report, Dr. Floros indicated that appellant should be excused from work from June 28 to July 28, 2016. He related that appellant was awaiting surgery and as such could not return to work. Dr. Floros also completed a handwritten prescription note, which indicated “out of work.” He noted right ankle pain. In treatment notes dated October 18, 2016 to January 10, 2017, Dr. Floros also reported diagnoses of fracture of the posterior aspect of the talus, experienced pain in the anterior talofibular ligament, calcaneal fibular ligament, and peroneal tendon area. He continued to opine that appellant could not work.

The Board finds, however, that Dr. Floros did not provide a fully-rationalized explanation as to why appellant was suddenly unable to perform his sedentary position commencing June 28, 2016. Specifically, Dr. Floros did not provide objective findings to demonstrate how appellant’s accepted right ankle sprain condition had worsened to the point of total disability, but merely attributed appellant’s inability to work to subjective complaints of pain. When a physician’s statements regarding an employee’s ability to work consist only of repetition of the employee’s complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability.¹³ Likewise, in Dr. Lubin’s October 6, 2016 examination report, she also opined that appellant could not work, but did not provide objective findings or medical rationale explaining how appellant’s accepted right ankle sprain had changed or worsened to the extent that he was no longer able to work sedentary duty. These reports, therefore, failed to establish appellant’s inability to work beginning June 28, 2016.

Rationalized medical evidence is particularly necessary in this case since appellant described in his Form CA-2a that on February 3, 2016 he fell down the stairs at his home after his right ankle gave out and sustained additional injuries to his back, right shoulder, and right ankle.

For each period of disability claimed, an employee has the burden of proof to establish a causal relationship between his or her recurrence of disability and his or her accepted employment injury.¹⁴ Because appellant has not submitted sufficient medical evidence to establish that he was unable to work beginning June 28, 2016 due to a spontaneous change or worsening of his

¹² *Amelia S. Jefferson, supra* note 10.

¹³ *P.D.*, Docket No. 14-0744 (issued August 6, 2014); *G.T.*, 59 ECAB 447 (2008).

¹⁴ *Supra* note 10.

January 31, 2015 employment injury, the Board finds that appellant has not met his burden of proof in this case.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening in the amount of monthly compensation.¹⁵ While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.¹⁶

In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.¹⁷ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹⁸

To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹⁹ Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the surgery is for a condition causally related to the employment injury and that it is medically warranted.²⁰ Both of these criteria must be met in order for OWCP to authorize payment.²¹

¹⁵ 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

¹⁶ *See Debra S. King*, 44 ECAB 203, 209 (1992).

¹⁷ *D.C.*, 58 ECAB 629 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

¹⁸ *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁹ *Id.*; *see also Bertha L. Arnold*, 38 ECAB 282 (1986).

²⁰ *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

²¹ *See Cathy B. Millin*, 51 ECAB 331, 333 (2000).

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not abused its discretion by denying authorization for right ankle surgery.

In a November 4, 2016 report, Dr. Askin, an OWCP second-opinion examiner, reviewed appellant's medical records and a SOAF. He noted that examination of appellant's bilateral ankles showed no edema or atrophic changes, intact sensation, and symmetrical deep tendon reflexes. Dr. Askin reported that appellant's clinical findings and diagnostic studies were consistent with a diagnosis of right ankle sprain causally related to the original January 31, 2015 employment injury. He also indicated that the medical evidence did not support a nexus between a supposed right ankle fracture and the accepted employment injury. Dr. Askin concluded that there was no present clinical indication for a surgical procedure as related to the January 31, 2015 employment incident. The Board finds that he provided a well-rationalized opinion that the requested right ankle surgery was not medically warranted for the accepted right ankle sprain condition. Dr. Askin's opinion was based on a complete factual background, SOAF, and a review of the medical record, and physical examination findings. As such, his opinion represents the weight of the evidence.

In support of his request for authorization of surgery, appellant submitted several reports by Dr. Floros. In July 12 and September 20, 2016 letters, Dr. Floros indicated that he was treating appellant for a work-related fracture to his right posterior talus with large posterior fragment. He related that appellant's condition had failed to progress with conservative treatment and therapy and had elected to proceed with a right ankle surgical procedure for open resection of the bone fragments. Dr. Floros opined that the surgery was medically necessary to help appellant reach MMI. He also provided several examination notes dated May 17, 2016 to November 7, 2017. Dr. Floros diagnosed right ankle sprain and posterior process talus fracture. He continued to recommend right ankle surgery and that appellant remain off work.

The Board finds, however, that Dr. Floros did not provide medical rationale discussing how the right ankle surgery for removal of bone fragments was necessary to treat appellant's accepted right ankle sprain injury. On the contrary, Dr. Floros attributed the need for right ankle surgery to a right ankle fracture condition, which has not been accepted by OWCP. As noted above, to be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.²² As Dr. Floros did not relate that the proposed right ankle surgery was medically necessary to treat appellant's accepted right ankle sprain injury, his opinion is insufficient to establish causal relationship.

On appeal counsel alleges that a conflict of medical evidence existed between Dr. Askin and Dr. Floros regarding whether right foot surgery was medically necessary to treat appellant's January 31, 2015 employment injury and a referee medical examination was required pursuant to 5 U.S.C. § 8123(a). The Board finds, however, that Dr. Floros' reports lack the requisite medical rationale and are insufficient to create a conflict in medical opinion evidence. Dr. Floros has continued to attribute appellant's right ankle fracture to the accepted January 31, 2015 employment

²² *Supra* note 16.

incident despite negative results on diagnostic imaging appellant. He has not provided any medical rationale supporting how the proposed right ankle surgery was medically necessary to treat the accepted right ankle sprain injury.

The only limitation on OWCP's authority in approving or disapproving service under FECA is one of reasonableness.²³ In the instant case, OWCP obtained a well-rationalized report from Dr. Askin in which he opined that the requested surgery was not warranted for appellant's accepted January 31, 2015 employment injury. The remaining medical records of record were of diminished probative value as previously explained. OWCP, therefore, had sufficient evidence upon which it made its decision to deny surgery and did not abuse its discretion.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing June 28, 2016, causally related to his accepted January 31, 2015 employment injury. The Board also finds that OWCP did not abuse its discretion when it denied appellant authorization for right ankle surgery.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

²³ *Supra* note 17.