United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 19-1132**
	)	**Issued: October 1, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, 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, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 24, 2019 appellant, through counsel, filed a timely appeal from a February 19, 2019 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.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's medical benefits, effective June 26, 2018, as she no longer had residuals due to her accepted

[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.*

conditions; and (2) whether appellant has met her burden of proof to establish continuing employment-related residuals on or after June 26, 2018 due to her accepted conditions.

FACTUAL HISTORY

On June 18, 2014 appellant, then a 41-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she fell off a porch while delivering mail in the performance of duty. She alleged injury to her right knee, right ankle, both hands, and right side of her chin. OWCP initially accepted the claim for contusions of multiple sites, right ankle sprain, and left wrist sprain. Acceptance of the claim was subsequently expanded to include the additional condition of right calcaneus fracture. Appellant worked in a full-time, limited-duty capacity until October 23, 2014, after which she worked part-time limited duty. She stopped work completely on May 12, 2015. OWCP paid appellant wage-loss compensation on the periodic rolls as of July 26, 2015. Appellant returned to limited-duty status on June 13, 2017. She subsequently filed claims for compensation (Form CA-7) for intermittent periods of wage loss. OWCP paid appellant compensation for those claimed periods on the supplemental rolls.

On October 31, 2017 OWCP requested that Dr. Mary Elizabeth Gilmer, a Board-certified orthopedic surgeon and appellant's attending physician, provide an update on appellant's work capacity and the status of her employment injury. It noted that the requested right ankle arthroscopy and repair of right ankle ligament and right leg tendon was approved on August 2, 2017 and requested a status update.[3]

Appellant continued to submit Form CA-7 claims for compensation for intermittent periods of wage loss.

In a November 21, 2017 report, Dr. Gilmer noted that appellant's left wrist examination revealed no deformity, atrophy, ecchymosis, swelling, or visible scars of the wrist. Palpation of the wrist revealed tenderness, with no effusion or crepitus and with normal range of motion, strength, sensation, and reflexes. Appellant had a positive Phalen's sign and positive Tinel's sign. For the right ankle examination, Dr. Gilmore noted diffuse swelling, mild tenderness of the anterior and lateral joint lines, pain with extreme range of motion, 4/5 strength in all muscles with normal sensation and ankle reflexes and positive anterior drawer, talar tilt, and varus stress tests. The right ankle x-ray revealed no acute changes. Dr. Gilmore diagnosed carpal tunnel syndrome of the left upper limb; strain of muscle tendon, right foot; sprain of other ligament right ankle; and other instability of right ankle. She continued to recommend arthroscopic surgery for the right ankle as appellant had chronic ankle instability on examination with positive drawer testing that was painful and not improving with conservative measures. Dr. Gilmore opined that appellant was unable to perform her job due to swelling and pain even while in a boot. Due to appellant's symptoms, she placed appellant on sedentary duty only with no standing/walking. On that same date, Dr. Gilmore completed a work capacity evaluation (Form OWCP-5c) and a duty status report (Form CA-17). She provided a sedentary work restriction, noting that appellant was unable to work extended periods of time due to an aggravation of anterior tibialis tendon. Dr. Gilmore also

[3] OWCP did not authorize right release of foot tendons and removal of right heel bone.

indicated that appellant most likely had left carpal tunnel syndrome due to performance of highly repetitive tasks.

OWCP also received duplicative copies of Dr. Gilmore's July 25, 2017 report and July 25, 2017 x-ray results previously of record. The July 25, 2017 x-ray findings revealed no acute changes in either the right ankle or left wrist. In her report, Dr. Gilmore indicated that appellant had ligamentous laxity of the right ankle and significant pain on drawer testing on examination. She advised that, while the magnetic resonance imaging (MRI) scan showed evidence of some remaining ligamentous tissue, it was insufficient to stabilize that the ankle and appellant was at risk for ongoing ankle injuries due to this ligamentous laxity. Dr. Gilmore recommended a lateral ligament reconstruction with personal exploration.

On February 15, 2018 OWCP notified appellant that she would be referred for a second opinion evaluation to determine the status of her accepted conditions, appropriate treatment, and extent of disability.

Dr. Gilmer continued to treat appellant for right foot pain, left upper limb carpal tunnel syndrome, left wrist pain, strain of muscle and tendon of long extensor muscle of toe at ankle and foot level on the right foot, sprain of other ligaments of the right ankle, pain in the right ankle and joints of the right foot, and other instability of the right ankle. She also continued to recommend right foot surgery due to chronic ankle instability with painful, positive drawer testing. Dr. Gilmer indicated that appellant was unable to perform her job due to swelling and pain. She placed appellant on sedentary duty with no standing/walking.

Appellant continued to file claims for wage-loss compensation.

In an April 10, 2018 report, Dr. Howard L. Fowler, a Board-certified orthopedic surgeon and second opinion physician, noted appellant's history of injury, reviewed the statement of accepted facts (SOAF), and the medical records. Appellant's physical examination of her right ankle revealed no swelling, normal range of motion, no evidence of instability either medially or laterally, and a negative anterior drawer and negative talar tilt. Dr. Fowler indicated that she had intact peroneal function, anterior tibial function, Achilles tendon function, and a neurologically intact right ankle. Other than appellant's pain complaints, he found that her right ankle was identical to the left ankle examination. Dr. Fowler noted that the x-ray of her right ankle and foot showed a chronic, ununited avulsion fracture at the distal prominence of the calcaneus, and that previous MRI scans revealed intact ligaments, intact tendons, and the ununited avulsion fracture. With respect the left wrist and hand, he noted diffuse tenderness on palpation with no swelling, a mildly positive Phalen's sign, but negative Tinel's sign. Dr. Fowler indicated that the x-ray testing of the left wrist and hand showed no bony abnormality. He concluded that, other than the possibility of left hand carpal tunnel syndrome, the accepted employment conditions of contusion of multiple sites, right ankle sprain, left wrist sprain, and fracture of calcaneus had resolved. Dr. Fowler opined that appellant had no remaining residuals from her employment-related conditions as carpal tunnel syndrome did not appear in the SOAF. He further opined that she had reached maximum medical improvement (MMI) and no permanent restrictions were necessary as she was capable of performing the physical requirements of her date-of-injury position. Dr. Fowler completed a work capacity evaluation indicating the same.

In a letter dated May 8, 2018, OWCP proposed to terminate appellant's medical benefits as the evidence of record established that she no longer had residuals causally related to the June 18, 2014 employment injury. It determined that the weight of the medical evidence rested with Dr. Fowler, the second opinion physician. OWCP afforded appellant 30 days to respond if she disagreed with the proposed termination.

Appellant subsequently filed additional wage-loss compensation claims contending that no work was available within her restrictions from April 16, 2018 onwards.

OWCP also received medical reports from Dr. Gilmer dated March 13, April 12, May 22, and June 4, 2018. In her March 13, April 12, and June 4, 2018 reports, Dr. Gilmer provided examination findings and continued to assess right foot strain of muscle and tendon of long extensor muscle of toe at ankle and foot level, and sprain of other ligament of right ankle. She noted a treatment plan of ankle surgery and a course of physical therapy. In her May 22, 2018 report, Dr. Gilmer emphasized that appellant could not return to work without restrictions. She indicated that appellant could only do light-duty work, within the restrictions indicated by the March 25, 2018 functional capacity evaluation (FCE). Dr. Gilmer continued to diagnose strain of muscle and tendon of long extensor muscle of toe at ankle and foot level, right foot; sprain of other ligaments of right ankle, pain in right ankle and joints of right foot, left carpal tunnel syndrome, and left wrist pain. She advised that right ankle surgery had been recommended to help appellant's pain, but OWCP had denied such surgery. Dr. Gilmer opined, in her June 4, 2018 report, that appellant's carpal tunnel syndrome was not related to the employment injury, but was due to repetitive tasks. She advised appellant to file an occupational disease claim for that condition.[4]

By decision dated June 25, 2018, OWCP finalized the termination of appellant's medical benefits, effective June 26, 2018. It found that the weight of the medical evidence rested with Dr. Fowler, OWCP's second opinion examiner, who concluded that she had no residuals due to her accepted employment conditions.

OWCP continued to receive additional wage-loss compensation claims from appellant and reports from Dr. Gilmer.

In an April 12, 2018 report, which OWCP received July 6, 2018, Dr. Gilmer indicated that appellant presented on November 8, 2016 with lateral ligamentous instability consistent with her employment-related injury. She indicated that, while the MRI scan done after her evaluation revealed an intact anterior talofibular ligament, this would not prevent appellant's ankle from subluxing and cause instability and ankle pain due to abnormal movements in the ankle. Dr. Gilmer indicated that conservative measures had failed, as had all attempts to get the recommended lateral ligament reconstruction approved. She opined that, since surgery was not an option, appellant's FCE work restrictions could not be changed without surgical repair.

[4] The Board notes that appellant filed an occupational disease claim to which OWCP assigned OWCP File No. xxxxxx294. It accepted the claim for left upper limb carpal tunnel syndrome. OWCP has not administratively combined OWCP File No. xxxxxx294 with the present claim.

On November 20, 2018 appellant requested reconsideration and submitted additional medical evidence.

In an August 14, 2018 report, Dr. N. Christopher Khatri, a Board-certified internist, noted the history of injury and appellant's medical course. Examination findings of right ankle revealed mild swelling and limited dorsiflexion. An April 10, 2018 x-ray revealed chronic fracture of calcaneus. Dr. Khatri diagnosed a sprain of other ligament of right ankle and strain of muscle and tendon of long extensor muscle of toe at ankle and foot level, right foot. He indicated that appellant had a chronic, ununited avulsion fracture of the calcaneus, which was identified on April 10, 2018 and was the same fracture from the employment injury. Dr. Khatri explained that an avulsion fracture occurred when a tendon or ligament that is attached to the bone pulls a piece of the fractured bone off. He indicated that radiographic evidence supported that appellant's employment injury had not healed and, because of the fracture not healing, other anatomical structures of the right foot were at risk for becoming damaged. Dr. Khatri noted that Dr. Gilmer had diagnosed strain of the tendon of the ankle in November 2016 and April 2018 and recommended surgical intervention to alleviate appellant's right foot pain due to the strained tendon and ligament. He indicated that the damage to her surrounding tendons and ligaments was caused by the unhealed fracture and required surgical intervention as conservative treatment had failed and she was at risk for long-term complications. Dr. Khatri requested that the condition of right calcaneus fracture be reinstated and the claim expanded to include sprain of right ankle and strain of muscle and tendon of long extensor muscle of toe at ankle and foot level.

In a December 20, 2018 letter, OWCP requested that Dr. Fowler clarify his opinion and conclusions regarding appellant's employment-related right calcaneus fracture. It requested the date and a copy of appellant's x-ray which showed the chronic, ununited avulsion fracture. OWCP also indicated if it was a newly obtained x-ray, whether it changed Dr. Fowler's opinion that the employment-related fracture of the right calcaneus had resolved.

OWCP received a March 22, 2018 FCE report and reports from Dr. Gilmer dated March 15, April 12, May 22, and June 4 and 20, 2018. In her reports, Dr. Gilmer continued to provide impressions of right foot pain, strain of muscle and tendon of long extensor muscle of toe at ankle and foot level, right foot, sprain of other ligaments of right ankle, pain in right ankle and joints of right foot, left carpal tunnel syndrome, and pain in left wrist. She disagreed with the second opinion physician's assessment and indicated that FCE performed prior to his examination delineated her limitations. Dr. Gilmer reiterated that appellant displayed symptoms of ankle instability and synovitis after an ankle sprain, a common finding. She also continued to recommend ligament reconstruction surgery.

In a February 5, 2019 report, Dr. Fowler indicated that an April 10, 2018[5] x-ray report was obtained as part of his examination. He forwarded a copy of an April 10, 2014 x-ray report of the right foot and ankle, which showed a very small ununited, chronic avulsion at the very distal tip of the calcaneus right foot, and similar findings on a right foot MRI scan dated October 22, 2014. Dr. Fowler indicated that this x-ray had not changed his opinion that the employment-related fracture of the right calcaneus had resolved. He explained that this was a very small avulsion type

[5] The April 10, 2018 date of the x-ray appears to be a typographical error as Dr. Fowler submitted an April 10, 2014 x-ray.

fracture which was present on MRI scan dated October 22, 2014, approximately 4 and ½ years ago. Any symptoms that may have resulted from this possible avulsion would have resolved long-ago. The fact that the small chronic avulsion was ununited also had not changed Dr. Fowler's opinion as those symptoms should have resolved long-ago.

By decision dated February 19, 2019, OWCP denied modification of its termination decision based on Dr. Fowler's February 5, 2019 report, which concluded that the employment-related fracture of the right calcaneus would have resolved long-ago.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[6] After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[7] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[9] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[10]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[11]

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's medical benefits effective June 26, 2018.

The evidence of record establishes that there remains a conflict between Dr. Fowler, the second opinion physician, and Dr. Gilmer appellant's treating physician, as to whether appellant

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[6] *M.M.,* Docket No. 17-1264 (issued December 3, 2018); *S.F.,* 59 ECAB 642 (2008); *Kelly Y. Simpson,* 57 ECAB 197 (2005); *Paul L. Stewart,* 54 ECAB 824 (2003).

[7] *See R.R.*, Docket No. 19-0173 (issued May 2, 2019); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

[8] *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

[9] *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

[10] *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

[11] 5 U.S.C. § 8123(a). *B.S.*, Docket No. 19-0711 (issued October 17, 2019); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016) (where the Board held that OWCP improperly terminated the claimant's wage-loss compensation and medical benefits as there was an unresolved conflict of medical opinion between her treating physician and a second opinion specialist).

had residuals from her accepted conditions as of June 26, 2018. In his April 10, 2018 report, Dr. Fowler noted reviewing the SOAF. He found, based on his examination, that there were no objective findings to support ongoing residuals from appellant's employment-related conditions. Dr. Fowler determined that she had reached MMI and could return to her date-of-injury position with no restrictions. Regarding appellant's right ankle, he noted that her physical examination revealed no swelling, normal range of motion, and no evidence of instability either medially or laterally. Dr. Fowler concluded that she had a neurologically intact right ankle. He also noted that both x-ray and MRI scan testing had revealed an ununited avulsion fracture at the distal prominence of the right calcaneus.

Appellant's treating physician, Dr. Gilmer, however, submitted numerous reports through June 4, 2018 wherein she noted that she continued to treat appellant for right ankle ligament strain and recommended surgical correction as conservative treatment had failed. She explained that appellant had ligamentous laxity of the right ankle due to loss of ligamentous tissue, which was insufficient to stabilize the ankle. Dr. Gilmer also explained that appellant could only perform light-duty work. The two physicians thus disagreed as to whether appellant's accepted right ankle strain had resolved.[12] The Board finds that an unresolved conflict of medical evidence remains between the opinions of Dr. Fowler and Dr. Gilmer as to whether appellant had residuals from the accepted conditions.

As a conflict remains in the medical opinion evidence prior to June 26, 2018 as to whether appellant's accepted conditions had resolved, the Board finds that OWCP has not met its burden of proof to terminate her medical benefits.[13]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's medical benefits effective June 26, 2018.[14]

[12] *Id.*

[13] On return of the case record OWCP should consider administratively combining OWCP File No. xxxxxx294 with the present claim.

[14] In light of the disposition of this case, issue number 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 1, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board