

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

C.C., Appellant	)	
	)	
and	)	<b>Docket No. 19-1948</b>
	)	<b>Issued: January 8, 2021</b>
U.S. POSTAL SERVICE, RADIO CITY	)	
STATION POST OFFICE, New York, NY,	)	
Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Thomas S. Harkins, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

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

**JURISDICTION**

On September 23, 2019 appellant, through counsel, filed a timely appeal from June 3 and September 5, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the September 5, 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.*

## **ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions as causally related to her accepted October 30, 2017 employment injury; (2) whether she has met her burden of proof to establish total disability for the period beginning July 7, 2018 causally related to her accepted October 30, 2017 employment injury; (3) whether OWCP abused its discretion by denying authorization for left knee surgery; and (4) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 6, 2019, as she no longer had residuals or disability causally related to the accepted October 30, 2017 employment injury.

## **FACTUAL HISTORY**

On November 1, 2017 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 30, 2017 she was struck by a vehicle and fractured her left foot while in the performance of duty. OWCP initially denied appellant's claim, but on March 27, 2018 accepted the claim for closed fracture of first and third metatarsal bones of the left foot. It paid her wage-loss compensation on the supplemental rolls for the period from December 15, 2017 to July 6, 2018.

Appellant was treated by Dr. Howard I. Baum, a Board-certified orthopedist, on March 6, 2018 in follow up for a left foot fracture that occurred on October 30, 2017, when she was struck by a motor vehicle at work. In reports dated April 3 and May 1, 2018, Dr. Baum noted initially treating appellant on November 7, 2017, for a left foot fracture, neck, low back, shoulder, and bilateral knee pain after a pedestrian motor vehicle accident on October 30, 2017. He noted that a December 1, 2017 magnetic resonance imaging (MRI) scan of the lumbar spine revealed: herniated discs at L3-4, L4, L4-5; a broad-based annular tear; and a bulging disc at L5-S1. Similarly, Dr. Baum discussed a cervical spine MRI scan, completed on even date, which revealed a bulging disc at C3-4; herniations at C3-4, C4-5; and central disc herniations at C5-6. MRI scans of the both knees dated November 30, 2017, revealed a partial anterior cruciate ligament (ACL) tear in the right knee and hemi-bundle ACL tear in the left knee. Dr. Baum diagnosed cervical, lumbar, and bilateral knee derangement. He noted that the mechanism of injury was a pedestrian motor vehicle accident that caused flexion, extension, rotational, and torsional loads over a short time, which was a precipitating cause of the herniated discs and ACL tears. Dr. Baum opined that appellant was a candidate for knee arthroscopy. In an undated attending physician's report (Form CA-20), he diagnosed first and third metatarsal fracture of the left foot and responded "Yes" with regard to whether he believed the condition was caused or aggravated by an employment activity. Dr. Baum noted that appellant was partially disabled from October 30, 2017 to June 5, 2018.

OWCP advised appellant in a May 29, 2018 letter that the evidence submitted was insufficient to establish that she sustained additional conditions causally related to the October 30, 2017 employment injury. It requested that she submit additional medical evidence to establish that any additional diagnosed conditions she was claiming were causally related to the accepted employment injury.

In a June 5, 2018 Form CA-20, Dr. Baum diagnosed left foot, cervical spine, lumbar spine, and bilateral knee injuries and checked the box marked "Yes" indicating that the conditions were

caused or aggravated by an employment activity. He noted total disability for the period October 30, 2017 to July 31, 2018. On June 7, 2018 Dr. Baum requested authorization to perform left knee arthroscopy.

On June 12, 2018 OWCP notified appellant that her request for authorization of the left knee arthroscopic surgery was not approved. It indicated that the evidence was insufficient to authorize the proposed surgery because the requested treatment did not appear to be medically necessary for and causally related to her accepted conditions of closed fracture of first and third metatarsal bones of the left foot.

By decision dated July 2, 2018, OWCP denied expansion of the acceptance of appellant's claim to include the additional conditions of cervical and lumbar derangement; bilateral knee, shoulder, and foot derangement; cervical herniated disc; cervical radiculopathy; lumbar herniated disc; bilateral shoulder impingement; and bilateral knee tears.

Appellant continued to submit reports from Dr. Baum. OWCP received a June 5, 2018 report from Dr. Baum who treated appellant post work-related injury on October 30, 2017, and reported appellant's complaints of pain in the neck, low back, shoulders, and knees. Findings on examination of the lumbar and cervical spine revealed positive Spurling and straight leg testing. Examination of her shoulders revealed positive Hawkins, O'Brien's, and Neers test, and pain with flexion and extension of the knees. Dr. Baum diagnosed cervical spine, lumbar spine, bilateral knee, and shoulder derangement. He recommended a left knee arthroscopy. In a July 3, 2018 Form CA-20 report, Dr. Baum diagnosed left foot, cervical spine, lumbar spine, and bilateral knee derangement and responded "Yes" with regard to whether he believed the conditions were caused or aggravated by an employment activity. He noted that appellant was partially disabled from work for the period October 30, 2017 to August 17, 2018.

On July 24, 2018 appellant filed a wage-loss compensation claim (Form CA-7) for disability for the period July 7 to 20, 2018.

In a development letter dated August 3, 2018, OWCP explained that the evidence submitted was insufficient to support the claim for wage-loss compensation. It advised appellant of the type of medical evidence necessary to establish her claim and afforded her 30 days to submit the necessary evidence.

In reports dated July 3 and 24, 2018, Dr. Baum reported that appellant presented to his office within one week of a motor vehicle accident complaining of pain in the neck, low back, knees, shoulders, and foot consistent with a pedestrian motor vehicle accident which caused her to fall to the ground where she sustained twisting, torsional, and direct impact injuries. He indicated that appellant had a foot fracture from either a crush injury or a rotational injury. Dr. Baum diagnosed cervical, lumbar, bilateral knee, and bilateral shoulder derangement. In an August 14, 2018 Form CA-20 report, he diagnosed left foot, cervical spine, lumbar spine, and bilateral knee derangement and responded "Yes" with regard to whether he believed the condition was caused or aggravated by an employment activity. Dr. Baum noted that appellant was partially disabled from work for the period from October 30, 2017 to September 11, 2018.

Appellant filed additional wage-loss compensation claims (Form CA-7) for the period July 21 to August 31, 2018.

On August 13, 2018 appellant requested reconsideration of the July 2, 2018 decision denying expansion of her claim.

By decision dated September 11, 2018, OWCP denied modification of the July 2, 2018 decision.

OWCP received an August 14, 2018 report from Dr. Baum, who continued to diagnose left foot, cervical spine, lumbar spine, and bilateral knee derangement and opined that appellant remained totally disabled from work.

By decision dated September 20, 2018, OWCP denied appellant's wage-loss compensation claims for the period beginning July 7, 2018.

By decision dated September 25, 2018, OWCP denied appellant's request for authorization for surgical treatment for her left knee.

Appellant continued to submit evidence. Form CA-20 reports from Dr. Baum, dated September 17 to November 13, 2018, diagnosed left foot, cervical spine, lumbar spine, and bilateral knee derangement and responded "Yes" with regard to whether he believed the condition was caused or aggravated by an employment activity and noted appellant was partial disabled from October 30, 2017 to September 11, 2018. In reports dated September 18 to December 11, 2018, Dr. Baum noted that he had treated appellant following a left foot fracture with complaints of pain and instability of the knee, spasm of the neck and back, and right shoulder pain. On December 11, 2018 he diagnosed meniscal tear and lumbar derangement. Dr. Baum again noted the necessity for arthroscopic surgery of the knees and advised that appellant remained disabled from work.

On December 21, 2018 OWCP referred appellant, the case file, a statement of accepted facts (SOAF), and a series of questions to Dr. Andrew Farber, an osteopath Board-certified in orthopedic surgery, for a second opinion examination and opinion on appellant's employment-related conditions and disability. It requested that Dr. Farber determine whether the acceptance of her claim should be expanded to include other diagnoses, whether appellant continued to suffer from residuals of her work-related injury, the need for surgery or further treatment, and whether she was capable of returning to gainful employment.

In a January 3, 2019 medical report, Dr. Farber described appellant's October 30, 2017 employment injury, noting that she was struck by a motor vehicle at work. He discussed appellant's medical history, reviewed diagnostic reports, and provided findings on physical examination. Dr. Farber diagnosed closed fracture of the first and third metatarsal bones of the left foot. He opined that these conditions had resolved. Dr. Farber further opined that there were no other conditions caused by the work injury. Findings on examination revealed appellant walked without assistive device or antalgic gait, no swelling or deformity of the left foot and ankle, strength was intact, no gross instability, and no focal neurovascular deficit was noted. Dr. Farber noted her subjective complaints corresponded with the objective findings. He reviewed the MRI report of the foot dated November 30, 2017, and x-ray of the foot dated December 18, 2017. Dr. Farber opined that based on his physical examination and review of the medical records she had reached maximum medical improvement (MMI) and needed no further treatment or surgery. He opined that appellant was able to return to her date-of-injury job as a letter carrier without restrictions.

On January 15, 2019 Dr. Baum treated appellant's status post left foot fracture with complaints of pain and instability of the knee, neck, back, and right shoulder pain. He recommended knee arthroscopy and opined that appellant was totally disabled.

On February 6, 2019 OWCP issued a notice proposing to terminate appellant's entitlement to wage-loss compensation and medical benefits as she no longer had disability or residuals causally related to her accepted employment injury. It allowed appellant 30 days to respond to the proposal.

In response, on March 4, 2019, appellant, through counsel, disagreed with the notice of proposed termination. Counsel asserted that there was a conflict of opinion between appellant's physician, Dr. Baum, and OWCP's referral physician, Dr. Farber regarding whether appellant had residuals of her accepted conditions. In support of her request, appellant submitted a February 12, 2019 report from Dr. Baum, who opined that the proximity of her complaints to the time of the injury was consistent with the neck, back, knees, and shoulders conditions being post-traumatically induced and causally related to the motor vehicle accident of October 30, 2017. Other reports from Dr. Baum dated January 29 and February 12 to May 7, 2019, reiterated his findings that appellant was status post left foot fracture with complaints of pain and instability of the knee, neck, back, and shoulder pain. Dr. Baum continued to recommend knee arthroscopy and opined that appellant was totally disabled.

On March 5, 2019 appellant, through counsel, requested reconsideration of OWCP's decisions dated September 11, 20, and 25, 2018.

By decision dated June 3, 2019, OWCP denied modification of the decisions dated September 11, 20, and 25, 2018.

In a letter dated June 6, 2019, OWCP advised appellant that a conflict in medical opinion evidence existed between Dr. Baum, appellant's treating physician, and Dr. Farber, OWCP's second opinion examiner, regarding her diagnosis and whether she had continuing disability from work as a result of the accepted employment injury.

OWCP referred appellant to Dr. Alan Crystal, a Board-certified orthopedist, to resolve the conflict in medical opinion between Dr. Baum and Dr. Farber. It prepared a SOAF dated March 19, 2019 noting in part that on October 30, 2017 appellant was struck by a vehicle while crossing the street and was knocked back about eight feet and fell down on the ground in a sitting position. In a June 26, 2019 report, Dr. Crystal noted his review of the SOAF, as well as the medical evidence of record. On examination he noted unremarkable findings for range of motion in appellant's ankles, knees, hips, cervical, thoracic and lumbar spine, and normal muscle strength. Dr. Crystal noted several instances of "exaggeratory" behavior during the physical examination. He opined that the acceptance of the claim should not be expanded to include other conditions, as the accident only caused a fracture of the first and third metatarsals of the left foot. Dr. Crystal advised that the examination did not elicit objective findings in regard to her left foot and concluded that it healed without any disability as she is neither swollen nor tender, and has a normal gait. He found that appellant's left foot did not have objective findings that would contraindicate a return to full duty. Dr. Crystal opined that she was not disabled due to the accepted October 30, 2017 employment injury, and required no further treatment. In addressing appellant's requested conditions for expansion of knee, back, and neck pain, he advised that none of these

areas were documented in the emergency room as being injured. Upon review of his reports, Dr. Baum noted multiple other conditions causally related to the accident were based on appellant falling. He noted, however, that the emergency room notes did not indicate that appellant had fallen. Dr. Crystal further noted the derangement diagnosis by Dr. Baum was not causally related to the motor vehicle accident of October 30, 2017, but rather the findings on all the MRI scans were age-related degenerative changes. He concluded that appellant had reached MMI and was capable of working full-time regular duty.

Appellant submitted reports from Dr. Baum, dated June 4 to July 9, 2019, who continued to diagnosis cervical and lumbar spine internal derangement, bilateral knee derangement, and status post left foot fracture. Dr. Baum reiterated appellant's need for left knee arthroscopy and opined that she remained totally disabled.

By decision dated September 5, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective September 6, 2019 finding that the special weight of the evidence was represented by Dr. Crystal.

### **LEGAL PRECEDENT -- ISSUE 1**

When 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.<sup>4</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>5</sup> A physician's opinion on whether there is a causal relationship between the diagnosed condition and the accepted employment injury must be based on a complete factual and medical background.<sup>6</sup> 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).<sup>7</sup>

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.<sup>8</sup> Thus, a subsequent

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<sup>4</sup> See *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>5</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>6</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> See *S.M.*, Docket No. 19-0397 (issued August 7, 2019); *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* 10-1 (2006).

injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural consequence of a compensable primary injury.<sup>9</sup>

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>10</sup> For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>11</sup> Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.<sup>12</sup>

### ANALYSIS -- ISSUE 1

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

OWCP accepted that appellant sustained a closed fracture of the first and third metatarsal bones of the left foot. It found that a conflict in medical opinion evidence existed between Dr. Baum, appellant's treating physician, and Dr. Farber, OWCP's second opinion examiner, regarding her diagnosis and whether she had continuing disability from work as a result of the accepted employment injury. OWCP referred her, together with a SOAF, to Dr. Crystal for an impartial medical examination. The SOAF provided to Dr. Crystal specifically noted that the appellant was struck by a vehicle crossing the street and was knocked back eight feet and fell down on the ground in a sitting position.

In a report dated June 26, 2019, Dr. Crystal, in addressing appellant's requested conditions for expansion of knee, back, and neck, advised that none of these areas were documented in the emergency room as being injured. Upon review of Dr. Baum's reports, he noted multiple other conditions causally related to the employment incident. Dr. Crystal noted, however, that the emergency room notes did not indicate that appellant had fallen and therefore he did not accept the fall as factual. He concluded that appellant's claim should not be expanded to include the knee, back, and neck and that she was capable of working full-time regular duty.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF. OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>13</sup> As Dr. Crystal did not use the SOAF as the framework in forming his opinion, his opinion is of

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<sup>9</sup> *A.T.*, Docket No. 18-1717 (issued May 10, 2019); *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139 (2001).

<sup>10</sup> 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>11</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>12</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>13</sup> *Id.*; *see also N.W.*, Docket No. 16-1890 (issued June 5, 2017).

diminished probative value.<sup>14</sup> He opined that Dr. Baum noted appellant fell, but the emergency room notes did not support a fall. As discussed, however, Dr. Crystal did not acknowledge that appellant fell down after being struck by a vehicle as stated within the SOAF. He failed to rely upon a complete and accurate SOAF, and thus his opinion is of diminished probative value and is not entitled to the special weight typically afforded to an impartial medical examiner.<sup>15</sup>

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence.<sup>16</sup> Once OWCP undertook development of the evidence by referring appellant to a referee physician, it had the duty to secure an appropriate report addressing the relevant issues.<sup>17</sup> As Dr. Crystal did not base his report on an accurate factual history, the case will be remanded to OWCP for further development of the medical evidence.

On remand OWCP should prepare an updated SOAF and should obtain a supplemental opinion from Dr. Crystal or a new referee physician who accepts all of the facts of the SOAF in responding to OWCP's questions. After such further development as necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.<sup>18</sup>

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<sup>14</sup> *Id.*; see also *Y.D.*, Docket No. 17-0461 (issued July 11, 2017).

<sup>15</sup> See *S.T.*, Docket No. 18-1144 (issued August 9, 2019) (medical opinions based on an incomplete or inaccurate history are of limited probative value).

<sup>16</sup> See *D.M.*, Docket No. 19-1181 (issued December 2, 2019).

<sup>17</sup> *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Richard F. Williams*, 55 ECAB 343 (2004).

<sup>18</sup> The Board finds that it is unnecessary to address issue two, three, and four in view of the Board's disposition of the first issue.



**ORDER**

**IT IS HEREBY ORDERED THAT** the September 5 and June 3, 2019 decisions of the Office of Workers' Compensation Programs are reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 8, 2021  
Washington, DC

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

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

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