

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability, commencing February 28, 2019, causally related to her accepted December 31, 2013 employment injury.

FACTUAL HISTORY

On December 2, 2014 appellant, then a 52-year-old city carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on December 31, 2013 she developed frostbite on three fingers of her right hand due to exposure of sub-zero temperatures while in the performance of duty. She stopped work on January 2, 2014. On February 11, 2014 OWCP accepted appellant's claim for frostbite of the right hand and left foot. Appellant returned to part-time light-duty work in May 2014.

On August 26, 2014 appellant's attending physician, Dr. Al P. Baltrusaitis, an osteopath Board-certified in occupational medicine, provided permanent work restrictions of no cold exposure of less than 40 degrees. He noted that appellant would, therefore, not be able to deliver mail outside during the wintertime. On March 2, 2016 Dr. Baltrusaitis found that appellant could not perform outside work at all, including driving employing establishment vehicles, if the temperature was less than 40 degrees.

On March 8, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for the period February 13 through 22, 2016. By decision dated May 5, 2016, OWCP accepted that she sustained a recurrence of disability, commencing February 13, 2016, and authorized wage-loss compensation through June 24, 2016.

In a July 14, 2016 note, Dr. Baltrusaitis opined that appellant sustained a new injury on February 10, 2016 resulting in additional frostbite to her left fourth toe. On December 5, 2017 he repeated work restrictions of no outdoor work, including driving employing establishment vehicles, in temperatures below 40 degrees. Dr. Baltrusaitis reiterated that these restrictions were permanent.

On March 15 and 16, 2019 appellant filed a Form CA-7 claiming wage-loss compensation for the period March 1 through 15, 2019.

In notes dated December 4, 2018 through March 28, 2019, Dr. Baltrusaitis reviewed appellant's medical treatment and detailed her history of injury following the December 31, 2013 accepted employment injury. He noted that on the initial date of injury the temperature had dropped to 25 degrees below zero with a wind chill of 50 degrees below zero, which caused appellant's left toe problems. Over time, appellant began noticing more pain and discoloration with her left fourth toe as well as the formation of an ulcer and scab. On physical examination Dr. Baltrusaitis found discoloration and possible necrotic tissue on the left fourth toe extending to the edge of the nail. He concluded that appellant was temporarily totally disabled.

On follow up, appellant presented with swelling, peeling in her toe and an ulcer on the pad of the fourth toe. Dr. Baltrusaitis directed appellant to avoid the cold completely.

On March 28, 2019 Dr. Baltrusaitis noted that, while appellant's toe continued to heal, she still exhibited tenderness and was unable to bear weight. He diagnosed frostbite of the left foot

(subsequent encounter). Dr. Baltrusaitis noted that he had referred appellant for consultation with Dr. William Timm, a physician Board-certified in infectious disease, and related that Dr. Timm had documented that she had a nonhealing ulcer of the left fourth toe. He recounted that Dr. Timm suspected that appellant was at risk for the redevelopment of an ulceration related to a previous trauma from the frostbite injury. Dr. Baltrusaitis found that she was totally disabled from work for three weeks, during the period March 28 through April 18, 2019.

In an April 10, 2019 development letter, OWCP advised appellant of the deficiencies of her claim. It advised her the type of additional evidence necessary to establish her claim for compensation and afforded her 30 days to respond.

On April 19, 2019 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that on February 28, 2019 she again stopped work as a result of her December 31, 2013 employment injury. She noted her permanent restrictions of no work outside in temperatures below 40 degrees and asserted that she was exposed to weather of negative 25 degrees on January 28 and 29, 2019. On the reverse side of the claim form, appellant's supervisor contended that she had not exceeded her restrictions during work hours.

In an April 23, 2019 note, Dr. Baltrusaitis opined that appellant was totally disabled from work as she was unable to bear weight and needed to keep her foot elevated. He observed frostbite to the left fourth toe, with ulceration, and opined that appellant's disability was related to her work injury as she would always be a risk of redevelopment of an ulceration directly related to her previous trauma from frostbite. Dr. Baltrusaitis further opined, within a reasonable degree of medical certainty, that her current condition was directly and causally related to her accepted employment injury.

On May 9, 23 and August 18, 2019 Dr. Baltrusaitis continued to opine that appellant was totally disabled from work due to her left toe condition.

In a May 14, 2019 development letter, OWCP provided appellant with the definition of a recurrence of disability and requested additional factual and medical evidence to substantiate that her disability had occurred or increased due to a spontaneous change in the medical condition or due to the withdrawal of a light-duty assignment. It provided a questionnaire for her completion and afforded her 30 days to respond.

On June 7, 2019 OWCP received additional medical evidence, including evidence addressing unrelated medical conditions involving appellant's back and right lower extremity, as well as evidence dated February 11, 2014 through August 30, 2017 related to her previously accepted frostbite.

In a February 28, 2019 report, Dr. Timm noted his examination of appellant due to a nonhealing ulcer on her left fourth toe. He described her history of frostbite in December 2013. Dr. Timm noted that appellant's left fourth toe eventually healed, but continued to have some slight duskiness to the distal portion. He also reiterated her restriction of working only indoors if the temperature was below 40 degrees. Dr. Timm recounted that, in January 2019, appellant was walking to work during a period of subzero weather and noticed pain and purpling in the left fourth toe. Appellant developed peeling skin and ulceration. She continued to experience intermittent pain in the distal left fourth toe. On physical examination Dr. Timm found that the plantar aspect of the distal half of the left fourth toe had skin color changes and a partial thickness ulcer. He

diagnosed nonhealing ulcer left fourth toe with no evidence of secondary bacterial infection or cellulitis. Dr. Timm indicated that he suspected that appellant was at risk for redevelopment of an ulceration related to her previous trauma from the frostbite injury.

In an April 29, 2019 report, Dr. Jitendra K. Baruah, a Board-certified neurologist, examined appellant in part due to frostbite on her left toes and right hand. She diagnosed peripheral neuropathy with an unknown etiology.

On May 9, 2019 Dr. Baltrusaitis found that appellant's skin was intact on her left fourth toe. He found that appellant could bear weight on her left foot when flat, and put pressure on her fourth toe. Dr. Baltrusaitis released appellant to return to sedentary work with the same temperature restrictions. He repeated his April 23, 2019 findings and conclusions.

In a June 4, 2019 response to OWCP's development questionnaire, appellant asserted that during the week of January 28 through 31, 2019 the temperatures were 25 degrees below zero and the wind chill was negative 50 degrees. She alleged that any amount of time outside put her at risk of redeveloping frostbite due to her previous trauma. Appellant listed her work restrictions of performing work indoors only when temperatures fell below 40 degrees. She asserted that the ulceration of her left fourth toe worsened with every recurrence.

By decision dated June 27, 2019, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish that she was disabled from work, commencing February 28, 2019, due to a material change or worsening of her accepted work-related conditions. On July 3, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

During the hearing held on November 8, 2019, appellant testified that she stopped work in March 2019 and had not returned as the employing establishment was not providing work within her restrictions.

OWCP subsequently received additional medical evidence. In a November 22, 2019 report, Dr. Baltrusaitis noted examining appellant on February 28, 2019 due to her left fourth toe pain, discoloration, and an ulceration. He described her work restrictions beginning May 10, 2019.

On December 5, 2019 appellant sought treatment from Dr. Christopher Milkie, a podiatrist, for her left fourth toe. Dr. Milkie noted a history of frostbite in 2012 and found purplish discoloration of the distal one-half of the left fourth toe. He reported a lesion, but no ulceration. Dr. Milkie diagnosed frostbite left fourth toe. He found that appellant should not be working out in the cold at all.

By decision dated January 31, 2020, OWCP's hearing representative affirmed OWCP's June 27, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim.⁵ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁶ 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 probative and reliable medical opinion evidence.⁷ 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. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁸

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.⁹ 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.¹⁰

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and an inability to perform such limited-duty work. As part of this burden of proof, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹¹

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The rules that come

⁴ *Supra* note 2.

⁵ *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

⁶ *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson, id.*

⁷ *Amelia S. Jefferson, supra* note 5; *William A. Archer*, 55 ECAB 674 (2004).

⁸ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer, id.*; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ 20 C.F.R. § 10.5(x).

¹⁰ *Id.*

¹¹ *S.D.*, Docket No. 19-1245 (issued January 3, 2020); *L.S.*, Docket No. 18-1494 (issued April 12, 2019); *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Terry R. Hedman*, 38 ECAB 222 (1986).

into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether 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.¹²

ANALYSIS

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

In a February 28, 2019 report, Dr. Timm noted his examination of appellant due to a nonhealing ulcer on her left fourth toe. He described her history of frostbite in December 2013. Dr. Timm noted that appellant's left fourth toe eventually healed, but continued to have some slight duskiness to the distal portion. He also reiterated her restriction of working only indoors if the temperature was below 40 degrees. Dr. Timm recounted that in January 2019 appellant was walking to work during a period of subzero weather and noticed pain and purpling in the left fourth toe. Appellant developed peeling skin and ulceration. She continued to experience intermittent pain in the distal left fourth toe. On physical examination Dr. Timm found that the plantar aspect of the distal half of the left fourth toe had skin color changes and a partial thickness ulcer. He diagnosed nonhealing ulcer left fourth toe with no evidence of secondary bacterial infection or cellulitis. Dr. Timm indicated that he suspected that appellant was at risk for redevelopment of an ulceration related to her previous trauma from the frostbite injury. In an April 23, 2019 report, Dr. Baltrusaitis opined that appellant was totally disabled from work as she was unable to bear weight and needed to keep her foot elevated. He observed frostbite to the left fourth toe, with ulceration, and opined that appellant's disability was related to her work injury as she would always be a risk of redevelopment of an ulceration directly related to her previous trauma from frostbite. Dr. Baltrusaitis further opined, within a reasonable degree of medical certainty, that her current condition was directly and causally related to her accepted employment injury. While Dr. Timm's and Dr. Baltrusaitis' opinions are insufficiently rationalized to establish causal relationship, they are sufficient to require OWCP to further develop the medical evidence.¹³

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁴ OWCP has an obligation to see that justice is done.¹⁵

The case shall, therefore, be remanded to OWCP. On remand OWCP shall prepare a statement of accepted facts and refer the case to a specialist in the appropriate field of medicine, consistent with OWCP's procedures, to determine whether appellant sustained a recurrence of

¹² *V.K.*, Docket No. 19-0422 (issued July 20, 2020); *K.S.*, Docket No. 17-1583 (issued May 10, 2018); *Susanne W. Underwood* (*Randall L. Underwood*), 53 ECAB 139 (2001).

¹³ *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁴ *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769-71; *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

¹⁵ *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, *supra* note 13; *Gertrude E. Evans*, 26 ECAB 195 (1974).

disability and/or a consequential injury causally related to the accepted employment injury.¹⁶ If the referral physician negates causal relationship, he or she must explain with rationale how or why their opinion differs from that of Drs. Timm and Baltrusaitis. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on the issues of recurrence and consequential injury.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2020 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 12, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation of Medical Evidence*, Chapter 2.810.9.b(1) (June 2015).