

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

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<b>D.O., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0315</b>
	)	<b>Issued: June 29, 2022</b>
<b>DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, Brookhaven, NY,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On December 28, 2021 appellant, through counsel, filed a timely appeal from a December 10, 2021 merit decision 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 December 10, 2021 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.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions regarding her right foot as a consequence of the accepted July 16, 2018 employment injury.

## **FACTUAL HISTORY**

On July 19, 2018 appellant, then a 48-year-old tax examiner, filed a traumatic injury claim (Form CA-1) alleging that on July 16, 2018 she sustained injuries to her right ankle, left knee and neck when her ankle rolled as she stepped off the curb and she fell in the performance of duty. She stopped work on July 17, 2018. On October 3, 2018 OWCP accepted the claim for right ankle sprain and left knee abrasion. Appellant received wage-loss compensation on the supplemental rolls from August 31 to October 29, 2018.

In his initial report of July 23, 2018, Dr. John J. Yu, a Board-certified orthopedic surgeon, noted the history of appellant's July 16, 2018 employment injury as an inward twisting of her right ankle. In that report and in a subsequent report dated August 6, 2018, he noted appellant's physical examination findings and diagnosed sprain of the right anterior talofibular ligament.

In an October 29, 2018 report, Dr. Yu diagnosed sprain of the right ankle deltoid ligament and sprain of the anterior talofibular ligament of the right ankle. A magnetic resonance imaging (MRI) study of the right ankle was recommended.

Appellant underwent an MRI scan of the right ankle on December 14, 2018. The report noted a history of a July 16, 2018 twisting injury with pain and history of old fracture. The diagnostic impression was that of a low-grade partial tear of anterior talofibular ligament and anterior tibiofibular ligament; tibiotalar joint effusion with stable 7 x 5 millimeter (mm) osteochondral defect of lateral talar dome; peroneus brevis tendinopathy with 8 mm incomplete longitudinal split at the tibia; and posterior tibial tendinopathy with tenosynovitis of flexor tendons.

In a December 19, 2018 report, Dr. Yu noted appellant's examination findings and his review of the right ankle MRI scan. He provided an assessment of right peroneal tendon tear, sprain of right anterior talofibular ligament, and osteochondral defect of right talus. A right ankle arthroscopy was recommended as appellant had failed conservative management. On January 14, 2019 Dr. Yu provided a surgical request for the diagnosis of right sprain of anterior talofibular ligament.

On September 15 and December 8, 2020 and February 12, 2021, appellant, through counsel, requested that her claim be expanded to include consequential conditions of right peroneal tendon tear, sprain of right anterior talofibular ligament, and osteochondral defect of right talus.

In a development letter dated May 4, 2021, OWCP informed appellant that the evidence was insufficient to warrant expansion of the acceptance of her claim to include possible consequential conditions of peroneal tendon tear, right; sprain of anterior talofibular ligament, right; and osteochondral defect of talus, right as Dr. Yu, including in his December 19, 2018 report, had failed to provide sufficient medical rationale explaining how those conditions are due to the

July 16, 2018 accepted incident. It advised her of the necessary factual and medical evidence needed to establish a consequential claim and afforded her 30 days to provide this information.

OWCP continued to receive medical evidence. In a May 17, 2021 report, Dr. Yu provided examination findings and reviewed x-rays findings, which he related showed no fractures, subluxations or dislocations. He diagnosed right ankle instability and tear of peroneal tendon of right foot. Dr. Yu indicated that appellant's work-related injury in 2018 may lead to a chronic ankle instability, peroneal tendon tear and possible osteochondral defect. He concluded that appellant could continue to work light duty and he requested an updated right ankle MRI scan.

A May 18, 2021 MRI scan of appellant's right ankle noted diffuse thickened lateral ligament, deep fibers of the deltoid ligament with healed partial tear; minimal ill-defined fluid dorsal and lateral to the tarsal sinus with no tear of the tarsal sinus ligaments; stable osteochondral defect of the lateral talar dome; posterior tibial tendinopathy with low-grade interstitial tearing at the insertion; and peroneus brevis tendinopathy at the inframalleolar segment with no discrete split.

In a May 24, 2021 report, Dr. Yu noted appellant's examination findings and his review of the updated May 18, 2021 MRI scan report. He diagnosed right ankle instability, posterior tibial tendinitis of right lower extremity, and peroneal tendinitis of right lower extremity. Surgical correction was recommended.

By decision dated June 21, 2021, OWCP denied expansion of the acceptance of appellant's claim to include consequential conditions of right peroneal tendon tear, sprain of right anterior talofibular ligament, and osteochondral defect of right talus. It noted that it had not received any additional evidence in response to its May 4, 2021 development letter.

On June 25, 2021 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The telephonic hearing was held on November 2, 2021. No additional evidence was received into the record.

By decision dated December 10, 2021, an OWCP hearing representative affirmed OWCP's June 21, 2021 decision. The hearing representative summarily concluded that, "a careful and thorough review of the medical evidence fails to reflect any medical evidence in which a physician has displayed knowledge of the accepted employment trauma of July 16, 2018, and indicated such condition, and/or the peroneal tendon tear, right and osteochondral defect of talus, right, to be causally related thereto, and supplied medical rationale for the opinion rendered."

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA,<sup>4</sup> that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the

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<sup>4</sup> *K.R.*, Docket No. 20-0995 (issued January 29, 2021); *A.W.*, Docket No. 19-0327 (issued July 19, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

employment injury.<sup>5</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>6</sup>

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.<sup>7</sup> The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.<sup>8</sup>

A claimant bears the burden of proof to establish a claim for a consequential injury.<sup>9</sup> As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the accepted employment injury.<sup>10</sup>

### ANALYSIS

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

OWCP summarily denied appellant's claim for a consequential injury without complying with the review requirements of FECA and its implementing regulations.<sup>11</sup> Section 8124(a) of FECA provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation.<sup>12</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons. As well, OWCP's procedures provide that the reasoning behind OWCP's decision should be clear enough

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<sup>5</sup> *J.B.*, Docket No. 20-1566 (issued August 31, 2021); *see J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *See L.M.*, Docket No. 18-1514 (issued July 18, 2019); *K.D.*, Docket No. 17-1894 (issued August 6, 2018); *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004).

<sup>8</sup> *See L.M.*, Docket No. 21-0644 (issued March 15, 2022); *K.D., id.*; *see also S.S.*, 59 ECAB 315 (2008).

<sup>9</sup> *L.M., id.*; *C.H.*, Docket No. 20-0228 (issued October 7, 2020); *P.P.*, Docket No. 19-1359 (issued April 30, 2020).

<sup>10</sup> *See T.S.*, Docket No. 20-0968 (issued August 17, 2021); *K.W.*, Docket No. 18-0991 (issued December 11, 2018); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

<sup>11</sup> *See Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607(b).

<sup>12</sup> 5 U.S.C. § 8124(a).

for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>13</sup>

In the December 10, 2021 hearing decision, OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision.<sup>14</sup> Rather, it summarily denied appellant's claim, without identifying the specific medical evidence reviewed or sufficiently explaining why the medical evidence of record was insufficient to establish causal relationship between the claimed consequential conditions and the accepted employment injury. OWCP's failure to provide factual findings and explain the basis for its conclusion precludes the Board's review of the decision.<sup>15</sup>

The Board will, therefore, set aside OWCP's December 10, 2021 decision and remand the case for a *de novo* decision, pursuant to the standards set forth in 5 U.S.C. § 8124(a) and 20 C.F.R. § 10.126.

### CONCLUSION

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

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

<sup>14</sup> 20 C.F.R. § 10.126; *D.W.*, Docket No. 18-0483 (issued March 7, 2019).

<sup>15</sup> *See Order Remanding Case*, Docket No. 19-1533 (issued April 30, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 28, 2021 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: June 29, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

A handwritten signature in black ink, appearing to read "J. D. McGinley". The signature is written in a cursive, flowing style with a large initial "J" and "M".

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