

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

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S.M., Appellant )	
)	
and )	<b>Docket No. 21-0848</b>
)	<b>Issued: October 7, 2022</b>
DEPARTMENT OF TRANSPORTATION, )	
FEDERAL AVIATION ADMINISTRATION, )	
Washington, DC, Employer )	
_____ )	

*Appearances:*  
Russell T. Uliase, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. McGINLEY, Alternate Judge

**JURISDICTION**

On May 18, 2021 appellant, through counsel, filed a timely appeal from a November 19, 2020 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 November 19, 2020 decision, appellant submitted additional evidence to OWCP. 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 expand the acceptance of her claim to include an additional right lower extremity condition as causally related to the accepted June 13, 2013 employment injury.

## FACTUAL HISTORY

On June 13, 2013 appellant, then a 47-year-old computer specialist, filed a traumatic injury claim (Form CA-1) alleging that on June 13, 2013 she sustained injury when she was working at home and slipped on a wet step and fell while in the performance of duty. She did not stop work. OWCP assigned OWCP File No. xxxxxx013 and initially accepted her claim for contusions of the lower back and pelvis; permanent aggravation of disc herniation at L4-5; and permanent aggravation of lumbar spondylosis and radiculopathy at L5-S1. On May 20, 2015 it expanded acceptance of appellant's claim to include left buttocks contusion (resolved).

On November 18, 2016 Dr. Barrett Woods, a Board-certified orthopedic surgeon, performed OWCP-authorized lumbar laminectomy at L4-5 with instrumented fusion at L5-S1. He provided post-surgery medical care and appellant also received medical treatment for her multiple conditions from Dr. Richard A. Domsky, a Board-certified emergency medicine physician, and Dr. Joshua Armstrong, an osteopath and Board-certified physiatrist.

On August 21, 2018 appellant underwent surgical repair of right tibial fracture. The surgery was not authorized by OWCP.

On September 7, 2018 appellant filed a Form CA-1 alleging that on August 20, 2018 she sustained injury in the form of fracture of her right tibia and fibula. OWCP assigned OWCP File No. xxxxxx203. By decision dated December 4, 2018, issued under OWCP File No. xxxxxx203, OWCP denied appellant's claim for an August 20, 2018 traumatic injury, finding that she had not met her burden of proof to establish that she sustained an injury in the performance of duty on August 20, 2018. It administratively combined OWCP File No. xxxxxx203 and OWCP File No. xxxxxx013, designating the latter as the master file.

On February 28, 2019 OWCP referred appellant, along with the case record and a statement of accepted facts (SOAF), for a second opinion examination and evaluation with Dr. Noubar Didizian, a Board-certified orthopedic surgeon. It requested that he provide an opinion regarding whether appellant continued to have disability or residuals related to the accepted June 13, 2013 employment injury. OWCP also requested that Dr. Didizian indicate whether appellant's current lower extremity condition was related to the accepted June 13, 2013 employment injury.

In a report dated March 20, 2019, Dr. Didizian discussed appellant's factual and medical history and detailed the findings of his physical examination. He provided an extensive summary of the medical reports of attending physicians who treated her multiple medical conditions. Dr. Didizian opined that the June 13, 2013 employment injury caused an exacerbation of appellant's preexisting degenerative back condition, which resulted in appellant developing a foot drop condition. He noted:

“[T]he neurosurgeon as well as Dr. Woods make a good case that the preexisting condition was aggravated/exacerbated by the incident of June 13, 2013, resulting

in foot drop and a herniated disc. Obviously, the aggravation stayed with the patient, since conservative therapy, including epidurals, did not resolve her problem, eventually necessitating surgery by Dr. Woods on November 18, 2016.”

Dr. Didizian also indicated that the subsequent August 20, 2018 right tibia plateau fracture with compartment syndrome “had nothing to do with the present illness of June 13, 2013.” He opined that the August 20, 2018 injury was a separate incident for which appellant underwent multiple surgeries and stayed out of work for an extended period. Dr. Didizian indicated that, due to the June 13, 2013 employment injury, appellant had restricted range of motion of the lumbar spine and problems with “post-surgical mobility” and that she also had disability related to the June 13, 2013 employment injury. In another portion of the report, he indicated, “[Appellant] is able to perform her regular duties.”

On April 3, 2019 OWCP requested that Dr. Didizian produce a supplemental report, which clarified his March 20, 2019 report. In an April 25, 2019 report, Dr. Didizian provided a summary of appellant’s medical treatment since suffering an employment injury on June 13, 2013. He noted that the chronology of events indicated that, even though appellant had prior back problems, she was functioning well on full duty, and the June 13, 2013 incident materially increased her symptomatology and necessitated surgical intervention. Dr. Didizian indicated that his definition of permanent aggravation involved the permanent worsening of the underlying condition due to employment factors. He noted, “I think it satisfies the criteria that will satisfy the [Department of Labor].” Dr. Didizian advised that consistent neurologic deficits in the toe and ankle extensors on the left constituted a pathology that needed to be addressed since the condition had not improved after “the present illness” that was addressed by the surgery. He indicated that appellant had material findings on physical examination and radiologic studies at the time of her surgery. Dr. Didizian noted, “[i]t is also my medical opinion that the fact the patient did well postoperatively certainly points in the direction that it was as stated by the incident of June 13, 2013, and it was not a placebo effect.”

On July 14, 2019 Dr. Woods requested, on appellant’s behalf, expansion of the acceptance of her claim to include fracture of the right tibial plateau causally related to the accepted June 13, 2013 employment injury. He indicated that appellant had lumbar radiculopathy due to the June 13, 2013 injury and opined that, despite some improvement with radicular pain after the November 18, 2016 surgery, the “persistent functional limitation resulted in her having another fall, which was traumatic resulting in a severe tibial plateau fracture that required [several] more operations on her leg.” Dr. Woods noted that appellant had persistent and permanent weakness in her left leg when he last saw her on June 17, 2019. He concluded that appellant’s August 20, 2018 fall and consequential right leg fracture were due to the nerve damage related to the accepted June 13, 2013 employment injury.

By decision dated January 27, 2020, OWCP denied appellant’s claim, finding that she had not met her burden of proof to establish expansion of the acceptance of her claim to include an additional right lower extremity condition as causally related to the accepted June 13, 2013 employment injury. On February 3, 2020 appellant, through counsel, requested a hearing before a representative of OWCP’s Branch of Hearings and Review. Prior to the hearing, OWCP’s hearing representative issued an April 21, 2020 decision vacating the January 27, 2020 decision and remanding the case to OWCP for further development of the evidence. The hearing representative directed OWCP to obtain a supplemental report from Dr. Didizian.

On remand OWCP requested that Dr. Didizian produce a supplemental report, which clarified his prior reports dated March 20 and April 25, 2019. In particular, it requested that he provide further explanation of whether he believed that appellant's right tibia/fibula fracture was "consequentially connected" to the accepted June 13, 2013 employment injury.

In a supplemental June 18, 2020 report, Dr. Didizian advised that, in his April 25, 2019 report, he had indicated that the August 20, 2018 injury had nothing to do with the "work injury." He noted that, to support this statement, he reviewed numerous reports, which supported that appellant did not have weakness in the lower extremities neurologically, including a February 8, 2017 report in which Dr. Armstrong indicated that the manual muscle strength was 5/5 in appellant's bilateral hip flexors, hip extensors, knee flexors, knee extensors, and ankle dorsiflexors. Dr. Didizian noted that, in a March 6, 2017 report, Dr. Woods indicated that appellant had symmetric lower extremity strength and reflexes and, in a June 26, 2017 report, he noted that she had no focal deficits neurologically. Dr. Didizian also indicated that Dr. Armstrong noted in a September 28, 2017 report that appellant complained of left groin and anterior thigh symptoms and the neurological examination showed motor strength 5/5 in the hip flexors, hip extensors, knee flexors, knee extensor, and ankle dorsiflexors. In a March 8, 2018 report, Dr. Armstrong also indicated that manual muscle testing was 5/5 at L5-S1 and diagnosed acute bilateral low back pain without sciatica. Dr. Didizian noted, "[t]he fact was for the last one year prior to the incident of August 20, 2018, her neurologic examination was intact and her motor strength was 5/5." He further noted that it was his opinion that "tibial and fibular fractures on the right side has [sic] nothing to do with the original injury which was related to the lower back and the back surgery."

By decision dated June 23, 2020, OWCP's denied appellant's claim, finding that she had not met her burden of proof to establish expansion of acceptance of the claim to include an additional right lower extremity condition causally related to the accepted June 13, 2013 employment injury.

Appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated November 19, 2020, OWCP's hearing representative affirmed the June 23, 2020 decision.

### **LEGAL PRECEDENT**

The claimant bears the burden of proof to establish a claim for a consequential injury.<sup>4</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 specific employment factors or employment injury.<sup>5</sup> Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>6</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or

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<sup>4</sup> *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *A.H.*, Docket No. 18-1632 (issued June 1, 2020); *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

<sup>5</sup> *K.W.*, Docket No. 18-0991 (issued December 11, 2018).

<sup>6</sup> *G.R.*, Docket No. 18-0735 (issued November 15, 2018).

condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</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 the claimant's own conduct.<sup>10</sup>

### ANALYSIS

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

The Board has held that, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>11</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>12</sup> Once OWCP starts to procure medical opinion, it must do a complete job in securing from its referral physician an opinion which adequately addresses the relevant issues.<sup>13</sup>

The Board notes that reports of Dr. Didizian, the OWCP referral physician, are in need of clarification with respect to the question of whether appellant has met the burden of proof to expand acceptance of appellant's claim to include an additional right lower extremity condition as causally related to the accepted June 13, 2013 employment injury. In his initial report dated March 20, 2018, Dr. Didizian opined that the June 13, 2013 employment injury caused an exacerbation of appellant's preexisting degenerative back condition, which resulted in appellant developing a foot drop condition. He noted:

“[T]he neurosurgeon as well as Dr. Woods make a good case that the preexisting condition was aggravated/exacerbated by the incident of June 13, 2013, resulting in foot drop and a herniated disc. Obviously, the aggravation stayed with the patient, since conservative therapy, including epidurals, did not resolve her problem, eventually necessitating surgery by Dr. Woods on November 18, 2016.”

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

<sup>8</sup> *K.S.*, Docket No. 17-1583 (issued May 10, 2018).

<sup>9</sup> *Id.*

<sup>10</sup> *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004).

<sup>11</sup> *See D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

<sup>12</sup> *See A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

<sup>13</sup> *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *Mae Z Hackett*, 34 ECAB 1421, 1426 (1983).

These statements raise the question of whether the accepted June 13, 2013 employment injury contributed to the occurrence of appellant's August 20, 2018 fall at home, which resulted in a fracture of the right tibial plateau. In the March 20, 2019 report, Dr. Didizian also indicated, without elaboration, that the subsequent August 20, 2018 right tibia plateau fracture "had nothing to do with the present illness of June 13, 2013." However, he did not explain how this statement comported with his other statements in the same report that appellant continued to have limitations and disability related to the June 13, 2013 employment injury.

Dr. Didizian produced supplemental April 25, 2019 and June 18, 2020 reports at the request of OWCP. In his June 18, 2020 report, he opined that the August 20, 2018 fall was not related to the June 13, 2013 employment injury because appellant generally exhibited 5/5 strength in her lower extremities in the year prior to the August 20, 2018 fall. In these reports, however, Dr. Didizian did not address his earlier statements about appellant having a foot drop condition related to the accepted June 13, 2013 employment injury. In addition, he indicated in his supplemental April 25, 2019 report that consistent neurologic deficits in the toe and ankle extensors on the left constituted a pathology that needed to be addressed since the condition had not improved after "the present illness" that was addressed by the surgery. Dr. Didizian did not clearly identify the cause of this condition. He did not address whether the condition had resolved and his opinion on appellant's consequential injury claim requires further clarification.

Therefore, the Board finds that the case must be remanded for clarification to determine whether to expand acceptance of appellant's claim to include an additional right lower extremity condition as causally related to the accepted June 13, 2013 employment injury. OWCP shall submit the case record and a detailed SOAF to a new second opinion physician for the purpose of obtaining a rationalized medical opinion on the issue.<sup>14</sup> After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>14</sup> *J.H.*, Docket No. 19-1476 (issued March 23, 2021); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Talmadge Miller*, 47 ECAB 673 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 19, 2020 merit 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: October 7, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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