United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 21-1260**
	)	**Issued: September 9, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Duluth, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 18, 2021 appellant filed a timely appeal from an April 30, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include a right tibial tendon condition causally related to the accepted factors of her

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the April 30, 2021 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*.

federal employment; and (2) whether OWCP has abused its discretion by denying appellant's request for authorization for right tibial tendon surgery.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 31, 2017 appellant, then a 51-year-old postal supervisor, filed an occupational disease claim (Form CA-2) alleging that she developed plantar fasciitis due to factors of her federal employment, including walking 8 to 12 miles six days per week on concrete floors. On June 14, 2017 she underwent surgery for plantar fasciitis and stopped work. OWCP paid appellant wage-loss compensation on the supplemental rolls from June 15 through July 28, 2017.

By decision dated January 4, 2018, OWCP accepted the claim for plantar fascial fibromatosis.

Appellant continued to receive medical treatment. In a February 22, 2018 report, Dr. Phillip Walton, a Board-certified orthopedic surgeon, noted that a right ankle magnetic resonance imaging (MRI) scan revealed significant tendinitis and suspected intrasubstance tearing.[4] On physical examination he observed less tenderness to palpation along the plantar fascia. Dr. Walton diagnosed plantar fasciitis and right posterior-tibial tendon (PTT) tendinitis.

On May 1, 2018 Dr. Walton requested authorization for surgery to perform a revision of the lower right leg tendon and repair of right foot tendon.

In an August 21, 2018 report, Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), indicated that the medical evidence of record was insufficient to substantiate appellant's alleged PTT symptoms and need for the requested surgery. He further noted that MRI scans of record failed to support objective findings consistent with PTT tendinitis.

By decision dated August 29, 2018, OWCP denied expansion of the acceptance of appellant's claim to include right PTT tendinitis based on the DMA's opinion in his August 21, 2018 report. By separate decision of even date, it also denied authorization for revision of the right lower leg and repair of the right foot tendon, finding that the medical evidence of record did not establish that she had right PTT tendinitis.

On September 18, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated April 25, 2019, OWCP's hearing representative affirmed OWCP's August 29, 2018 decisions.

[3] Docket No. 19-1347 (issued December 5, 2019).

[4] A February 16, 2018 right ankle MRI scan showed tendinosis of the peroneus longus at the level of the malleolar tip and insertional plantar fasciitis, but no tear.

Appellant appealed to the Board. By decision dated December 5, 2019, the Board set aside OWCP's April 25, 2019 decision, finding that a conflict in the medical opinion evidence existed between Dr. Walton, appellant's treating physician, and Dr. Kuhn, the DMA, regarding whether she sustained right PTT tendinitis as a consequence of her work-related injury and, accordingly, whether right ankle surgery was medically necessary to treat her right PTT tendinitis. Consequently, the Board remanded the case to OWCP for referral to an impartial medical examiner (IME) in order to resolve the conflict in medical evidence, pursuant to 5 U.S.C. § 8123(a).

On remand OWCP referred appellant, the medical record along with a statement of accepted facts (SOAF) and a series of question to Dr. Jayendrakumar Shah, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether appellant sustained right PTT tendinitis as a consequence of her work-related injury and, accordingly, whether right ankle surgery was medically necessary to treat her right PTT.

In a March 17, 2020 report, Dr. Shah recounted appellant's history of work-related right foot pain that started on May 12, 2015 and noted that her claim was accepted for plantar fascial fibromatosis. He indicated that she previously underwent right foot surgery on June 15, 2017 and June 11, 2019. Dr. Shah noted that appellant complained of right foot pain that developed as a result of walking 10 to 12 miles daily at the employing establishment. On physical examination he reported mild tenderness and small ulceration on the medial side of the right foot. Neurological examination demonstrated full strength in the foot flexors and extensors with symmetric sensation to light touch. Dr. Shah assessed plantar fascial fibromatosis.

In response to OWCP's questions, Dr. Shah indicated that there were no current objective findings of medical conditions connected to appellant's accepted employment injury. He opined that none of the conditions connected to PTT, flexor digitorum tendon, and possible osteomyelitis were causally related to her accepted plantar fasciitis injury. Dr. Shah opined that appellant had fully recovered from her accepted plantar fascial fibromatosis injury and that she had no residuals of her accepted employment-related condition. He reported that he disagreed with Dr. Walton's request to expand the acceptance of her claim to include a right tibial tendon injury and concluded that no additional surgery or treatment was necessary. Dr. Shah completed a work capacity evaluation (Form OWCP-5c) dated April 15, 2020, indicating that appellant was capable of performing her usual job without restrictions.

On March 27, 2020 appellant underwent a right ankle MRI scan, which demonstrated internal fixation screw in the medial navicular, likely to repair the PTT, likely torn flexor digitorum longus tendon, and small tibiotalar and subtalar joint effusion.

By *de novo* decision dated May 29, 2020, OWCP denied expansion of the acceptance of appellant's claim to include a right leg tibial posterior tendinitis injury as causally related to her accepted right foot injury and denied authorization for right lower extremity surgery. It found that the special weight of the medical evidence rested with the March 17, 2020 report of Dr. Shah, the IME.

On June 29, 2020 appellant requested reconsideration.

In reports dated May 4 through July 27, 2020, Dr. Walton indicated that appellant was seen for follow up of her right foot status post flexor digitorum longus (FDL) tendon transfer and endoscopic gastrocnemius recession. On physical examination of her right lower extremity he reported no signs of infection and a mostly healed wound. Dr. Walton assessed status post right FDL transfer and endoscopic gastrocnemius recession and posterior tibial tendon tendinitis.

In a June 19, 2020 statement, appellant noted her disagreement with Dr. Shah's opinion. She indicated that Dr. Walton had diagnosed her with right TPP tendinitis in November 2017 and agreed that walking 10 to 12 miles daily had contributed to her persistent right foot pain. Appellant further noted that in Dr. Walton's review of the February 2018 right ankle MRI scan he suspected instar-substance tearing.

By decision dated September 17, 2020, OWCP denied modification of the May 29, 2020 decision.

On October 22, 2020 appellant requested reconsideration.

In a September 30, 2020 report, Dr. Walton indicated that appellant was seen for follow up after right ankle surgery on September 8, 2020. He reported healed incisions and no signs of infection on physical examination. Dr. Walton assessed status post right FDL transfer and endoscopic gastrocnemius recession and status post removal of hardware. He opined that the significant amount of standing for appellant's job directly contributed to her work-related foot conditions and was associated with PTT and plantar fasciitis symptoms.

By decision dated January 20, 2021, OWCP denied modification of the September 17, 2020 decision.

On March 9, 2021 appellant requested reconsideration. She asserted that her right foot was still very painful and requested that OWCP expand the acceptance of her claim to include PTT tendinitis. Appellant indicated that, after her plantar fasciitis diagnosis, she continued to work on hard concrete floors and walk 8 to 12 miles per day.

Appellant submitted operative reports. A June 25, 2020 operative report noted that she underwent right foot irrigation and debridement and removal of orthopedic hardware by Dr. Walton. A September 8, 2020 operative report indicated that appellant underwent a revision of right FDL transfer by Dr. Walton.

In reports dated November 19, 2020 through March 29, 2021, Dr. Walton continued to record appellant's improvement after right ankle surgery in September 2020. He provided examination findings and assessed status post right FDL transfer and endoscopic gastrocnemius recession.

By decision dated April 30, 2021, OWCP denied modification of the January 20, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

Where 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.[5]

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.[6] A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[7] Additionally, the opinion of the physician 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 the specific employment factor(s) identified by the claimant.[8]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.[9] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10] When a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS -- ISSUE 1

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

In the prior appeal, the Board remanded the case to OWCP to obtain a report from an IME in order to resolve the conflict in medical opinion evidence regarding whether appellant sustained

[5] *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[6] *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[7] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[8] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[10] 20 C.F.R. § 10.321.

[11] *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

right PTT tendinitis and, accordingly, whether right ankle surgery was medically necessary to treat her right PTT.

As noted, when a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12] In his March 17, 2020 report, Dr. Shah noted his disagreement with Dr. Walton's request to expand the acceptance of appellant's claim to include a right tibial tendon injury. He opined that appellant's PTT, flexor digitorum tendon, and possible osteomyelitis were not related to her accepted plantar fasciitis injury. Dr. Shah, however, did not discuss whether appellant developed PTT due to the accepted factors of her federal employment, including walking 8 to 12 miles six days per week on concrete floors. As Dr. Shah did not opine on whether appellant's diagnosed PTT was causally related to her employment, his opinion requires clarification.[13] In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification and/or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[14]

For the above-described reasons, the opinion of Dr. Shah requires clarification. Therefore, in order to address the unresolved conflict in the medical opinion evidence, the Board will remand this case to OWCP for a supplemental opinion regarding whether appellant sustained a right tibial tendon condition, causally related to the accepted factors of her federal employment. If Dr. Shah is unable to clarify his opinion or if his requested supplemental report is insufficiently rationalized, OWCP must submit the case record and a detailed SOAF to a new IME for the purpose of obtaining a rationalized medical opinion on the issue.[15] Following this and any other such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.[16]

[12] *Id*.

[13] *S.M.*, Docket No. 20-1527 (issued March 29, 2022); *A.G.*, Docket No. 21-0315 (issued December 29, 2021).

[14] *T.C.*, Docket No. 20-1170 (Issued January 29, 2021); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

[15] *T.C.*, *id*. *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071 (1979).

[16] Given the disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 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: September 9, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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