

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

T.B., Appellant)	
)	
and)	Docket No. 22-1304
)	Issued: April 21, 2023
DEPARTMENT OF DEFENSE, DEFENSE)	
LOGISTICS AGENCY, Barstow, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 12, 2022 appellant, through counsel, filed a timely appeal from an August 5, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the August 5, 2022 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 a recurrence of disability commencing September 13, 2021 causally related to the accepted January 3, 2017 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ 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 4, 2017 appellant, then a 43-year-old materials handler/forklift operator, filed a traumatic injury claim (Form CA-1) alleging that on January 3, 2017 she bruised her forehead, left leg, and right ankle when she lost her footing while stepping off a pallet and fell while in the performance of duty. She stopped work on the date of injury. OWCP accepted appellant's claim for strain of muscle, fascia, and tendon at neck level, sprains of unspecified ligaments of the right and left ankles. It subsequently accepted a left foot calcaneal spur and other acquired deformities of the left foot. Appellant underwent an OWCP-authorized right foot surgery on September 27, 2017. On October 14, 2020 she underwent a left heel spur removal and gastrocnemius equinus left ankle resection. OWCP paid appellant wage-loss compensation intermittently on its supplemental rolls and on its periodic rolls until April 4, 2019, and then again from January 9, 2020 until May 16, 2021.

In a September 2, 2021 work status note, Dr. Brad Katzman, a podiatrist, placed appellant off all work through September 30, 2021 due to "swelling on foot." He noted waiting on test results. Dr. Katzman extended appellant's disability status in a September 30, 2021 work status note indicating "waiting on nerve test."

On October 4, 2021 appellant filed a claim for compensation (Form CA-7) claiming disability from work for the period September 13 through 24, 2021.

In an October 6, 2021 development letter, OWCP noted that it appeared that appellant was claiming disability due to a material change/worsening of her accepted work-related conditions and that the evidence was insufficient to establish her condition had materially changed such that she was no longer able to perform the duties of her position when she stopped work on September 13, 2021. It advised her of the type of medical evidence needed. OWCP afforded appellant 30 days to submit the necessary evidence.

On January 18, 2022 Dr. Katzman extended appellant's total disability status. In an accompanying note, he indicated "waiting for [(magnetic resonance imaging)] MRI and nerve study."

⁴ Docket No. 21-0480 (issued January 10, 2022). By decision dated January 10, 2022, the Board affirmed OWCP's December 10, 2020 decision that appellant had not met her burden of proof to establish a recurrence of disability for the period April 22, 2019 through October 13, 2020 causally related to her accepted January 3, 2017 employment injury.

By decision dated February 25, 2022, OWCP denied appellant's claim for a recurrence of disability commencing September 13, 2021. It found that she had not submitted sufficient medical evidence from a physician to establish her claim for disability compensation based on a worsening of her accepted condition such that she could no longer perform her work duties at the time she stopped work on September 13, 2021.

On March 7, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received a March 3, 2022 left ankle MRI scan which provided an impression of interval achilles tendon repair with diffuse tendon thickening and abnormal signal intensity at the tendon insertion, compatible with tendinosis/postsurgical changed with improvement of bursitis, a healed remote fracture of the distal tibia and fibula, and irregularity and scarring of the anterior talofibular ligament with a small ossicle compatible with prior injury.

A telephonic hearing was held on June 1, 2022.

In a May 3, 2022 report, Dr. Katzman reported that appellant was seen for left heel spur, left ankle equinus contracture, left ankle sprain, and idiopathic peripheral neuropathy. Appellant was referred to a neurologist for a nerve conduction velocity (NCV) study. Dr. Katzman opined that she was unable to complete a full work schedule as she was awaiting NCV study approval. He held appellant off work until July 2, 2022. An attached April 19, 2022 work slip excused appellant from work from April 9 through May 31, 2022 pending authorization for NCV study, x-rays, and computerized tomography scan.

May 24, 2022 electrodiagnostic studies of the lower extremities were received. The results of the tests were within normal limits.

In a June 6, 2022 report, Dr. Yury Furman, a neurologist, noted that the May 24, 2022 NCV and electromyography study was normal with no evidence of tibial nerve compression in the tarsal tunnel. He also noted that appellant was employed as a material handler, but was not currently working. Dr. Furman summarized her examination findings. He diagnosed left ankle pain, history of left ankle surgery, and clinical evidence of left tarsal tunnel syndrome without electrophysiological evidence for tibial nerve lesion. Dr. Furman recommended conservative care.

On June 27, 2022 appellant, through counsel, requested that the acceptance of his claim be expanded to include left tarsal tunnel syndrome, noting Dr. Furman's report.

OWCP received Dr. Katzman's January 18, 2022 office note, which noted a normal vascular and neurological examination with sutures in place and with no sign of infection at the surgical site noted. Mild edema was noted as well as slight hypertrophy of the posterior left heel. He opined that appellant was totally disabled.

In a June 20, 2022 disability note, Dr. Katzman indicated that appellant could return to light-duty work on June 27, 2022 with restrictions.

In a June 29, 2022 letter, OWCP advised appellant that it was in the process of scheduling a second opinion examination to determine the nature of her condition, the extent of disability and appropriate treatment recommendations. Of record was a statement of accepted facts and a series

of questions to the second opinion examiner to assess claim expansion of left tarsal tunnel condition, residuals of the January 3, 2017 employment injury, and appellant's current work capacity.

On June 30, 2022 OWCP received Dr. Furman's May 23, 2022 report. Dr. Furman diagnosed left ankle pain, history of left ankle surgery and noted that appellant would have electrodiagnostic studies performed on May 24, 2022 to rule out tarsal tunnel syndrome on the left.

On July 14, 2022 the employing establishment offered, and appellant accepted, a temporary modified-duty work assignment.

In an August 1, 2022 report, Dr. Katzman noted that appellant's physical examination and work tolerances were unchanged. He opined that she could work a full-time sedentary position with no steel toe shoes and limited standing and walking.

By decision dated August 5, 2022, an OWCP hearing representative affirmed OWCP's February 25, 2022 decision finding that the medical evidence of record was insufficient to support appellant's inability to work after September 13, 2021 due to a change in her accepted conditions.

LEGAL PRECEDENT

A recurrence of disability means 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 compensable injury or illness and without an intervening injury or new exposure in the work environment.⁵

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁶

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment

⁵ 20 C.F.R. § 10.5(x); *D.B.*, Docket No. 21-0503 (issued August 24, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁶ Federal (FECA) Procedure Manual, Part 2 --Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

injury, and supports that conclusion with medical reasoning.⁷ Where no such rationale is present, the medical evidence is of diminished probative value.⁸

ANALYSIS

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

Appellant filed a Form CA-7 claiming disability for the period commencing September 13, 2021. On June 29, 2022 OWCP advised her that she would be scheduled for a second opinion examination to determine the nature of her condition, the extent of disability and appropriate treatment recommendations. The purpose of the referral to a second opinion examination was to assess whether acceptance of the claim should be expanded to include left tarsal tunnel condition, residuals of the January 3, 2017 injury, and appellant's current work capacity. However, prior to receiving the second opinion examiner's report, OWCP denied her recurrence of disability claim for the period commencing September 13, 2021 causally related to the accepted January 3, 2017 employment injury.

It is well established that, proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁹ Once OWCP undertook development of the evidence by referring appellant's file to an OWCP second opinion examiner regarding the extent of her disability, it had an obligation to do a complete job and obtain a fully-rationalized opinion regarding the issue in this case.¹⁰ The second opinion report is relevant to the issue of appellant's work capacity. The case shall, therefore, be remanded for OWCP to consider the reports of its second opinion examiner prior to issuing a decision on appellant's wage-loss compensation claim. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on her wage-loss compensation claim.

CONCLUSION

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

⁷ *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

⁸ *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

⁹ *See T.S.*, Docket No. 22-0977 (issued October 31, 2022); *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁰ *See* 5 U.S.C. § 8101(19); *T.S.*, *id.*; *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2022 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: April 21, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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