

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

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lincoln, NE, Employer**

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**Docket No. 22-0989
Issued: January 13, 2023**

Appearances:

Paul H. Felsler, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 15, 2022 appellant, through counsel, filed a timely appeal from a December 17, 2021 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 an 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 December 17, 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 his burden of proof to expand the acceptance of his claim to include a vascular condition as causally related to the April 8, 2017 employment injury.

FACTUAL HISTORY

On April 14, 2017 appellant, then a 62-year-old temporary part-time city carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on April 8, 2017 he sustained an injury to his left ankle when he walked through a yard and stumbled on debris, while in the performance of duty. He stopped work that day. OWCP accepted the claim for sprain of unspecified ligament of left ankle and complex regional pain syndrome (CRPS) of left lower limb. On May 15, 2017 appellant underwent a left lower extremity femoral and popliteal artery balloon angioplasty. He returned to light-duty work on June 22, 2017 and worked until the employing establishment terminated his probationary employment on June 30, 2017. OWCP paid appellant wage-loss compensation on its supplemental rolls effective May 24, 2017 and on its periodic rolls effective December 10, 2017. On August 3, 2017 appellant underwent an OWCP-authorized procedure of left anterior talofibular ligament tear repair with augmentation and peroneal brevis tendon tear repair, which Dr. Kara Krejci, a Board-certified podiatrist, performed.

On April 16, 2018 Dr. Krejci requested approval for a repeat left ankle surgery.

OWCP referred appellant, together with the medical record and an April 25, 2018 statement of accepted facts (SOAF), to Dr. Peter M. Cimino, a Board-certified orthopedic surgeon, for a second opinion. The April 25, 2018 SOAF noted accepted conditions of left ankle strain and CRPS of the left lower limb.

A May 31, 2018 electromyogram and nerve conduction velocity (EMG/NCV) study of appellant's left peroneal motor and left tibial motor nerves found widespread membrane instability with increased insertional activity, focal neuropathies in the left distal leg/ankle affecting peroneal and tibial nerves, and evidence of a mild length-dependent sensory axonal polyneuropathy.

In a June 22, 2018 report, Dr. Cimino noted the history of the April 8, 2017 work injury, reviewed the April 25, 2018 SOAF and the medical record, and presented examination findings. In relevant part, he indicated that the balloon angioplasty procedure was performed to increase poor circulation that more than likely resulted from appellant's diabetic condition. This procedure was necessitated due to the painful condition and poor healing from the April 8, 2017 employment accident. Dr. Cimino opined that the repeat surgical procedure to the left ankle was too risky and unreliable, and he did not recommend it.

On April 29, 2019 appellant, through counsel, requested that appellant's claim be expanded to include the vascular condition and retroactively approve the May 15, 2017 angioplasty procedure.

On May 3, 2019 OWCP forwarded the case file to its district medical adviser (DMA) for review and a well-rationalized opinion on whether the requested balloon angioplasty was medically necessary and causally related to the accepted employment injury; and whether appellant had any additional conditions caused or aggravated by the April 8, 2017 accepted employment injury.

In a May 24, 2019 report, Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as the DMA, opined that the balloon angioplasty was not causally related to the accepted work-related conditions. He explained that appellant had bilateral narrowing of his vessels on ultrasound examination as well as documented diabetes, a condition known to be associated with vascular problems. Therefore, Dr. Fellars concluded that there was no indication that appellant's work event contributed in any way to his bilateral vascular condition and therefore the balloon angioplasty was not performed for a work-related condition. He also found no evidence of any additional injuries or conditions that were caused or aggravated by the April 8, 2017 work injury.

By decision dated May 29, 2019, OWCP denied the request to expand the case for inclusion of the vascular condition and the angioplasty procedure as not due to a condition causally related to the April 8, 2017 work injury.

On June 6, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on October 10, 2019.

By decision dated December 23, 2019, OWCP's hearing representative vacated OWCP's May 29, 2019 decision with regard to denial of authorization for the balloon angioplasty and remanded the case to OWCP for additional medical review and development as surgery was approved for additional medical conditions that were not accepted. It requested that the DMA, Dr. Fellars, provide a rationalized explanation of whether appellant had tendon/ligament injuries of the left ankle that were causally related to the April 8, 2017 employment injury and whether the authorized surgery was medically necessary due to the employment injury.

In a report dated January 30, 2020, Dr. Fellars, serving as the DMA, reviewed history of injury, the medical record and a new SOAF dated December 30, 2019. He opined that the balloon angioplasty was not causally related to the work injury and thus not medically necessary to the employment injury. Dr. Fellars explained that the degree of obstruction found on ultrasound of the bilateral lower extremities and vascular issues were most likely associated with appellant's diabetes and not the April 8, 2017 work injury as an injury to the left ankle would not cause decreased vascular flow in the right ankle. Furthermore, the injury mechanism of April 8, 2017 was not a mechanism for an injury to the artery. Dr. Fellars, however, opined that the only additional injury that occurred as a result of the work injury was the peroneus brevis split tear.

By decision dated February 24, 2020, OWCP expanded the acceptance of the claim to include left peroneal brevis split tear as causally related to the accepted employment injury. It also issued a February 26, 2020 SOAF which contained a list of all the accepted conditions including the peroneal brevis split tear and on February 26, 2020 referred the case file to the DMA for a vascular surgeon review. The DMA was requested to provide a rationalized explanation of whether the balloon angioplasty was medically necessary and causally related to the accepted work injury. He was also asked to list any additional conditions caused or aggravated by the April 8, 2017 work injury.

In an April 2, 2020 report, Dr. Harold Fenster, a Board-certified general surgery specialist serving as the DMA, reviewed the medical reports and the February 26, 2020 SOAF. He indicated that when appellant was evaluated by Dr. Krejci on May 15, 2017 she noted for the first time that appellant had decreased left ankle pulses and mottling of his left lower extremity skin. This precipitated a vascular workup that ultimately resulted in an arteriogram of the lower extremities

with angioplasty and stenting. Dr. Fenster indicated that it was not possible to prove that appellant's overt vascular problems were precipitated or related to the work injury as "no one can say for sure whether the deterioration of the vascular supply to the left lower extremity was directly caused by the work-related injury." Rather, appellant had significant bilateral lower extremity vascular insufficiency and his left ankle was not improving with conservative care. Dr. Fenster opined that it was medically necessary to perform the vascular workup prior to Dr. Krejci operating on the left ankle to assure the viability of the entire left lower extremity. He opined that the May 17, 2017 vascular procedure (the balloon angioplasty) that preceded the August 3, 2017 left ankle surgery was medically necessary to prevent a potential vascular disaster prior to performing the semi-elective left ankle procedure as appellant had significant vascular disease that needed to be addressed and treated before contemplating a semi-elective left ankle repair as he could have potentially lost a leg if the vascular issue was not addressed first.

By decision dated April 13, 2020, OWCP denied expansion of the claim to include the vascular condition and the angioplasty surgery as the medical evidence of record did not establish that the April 8, 2017 work injury caused or aggravated appellant's preexisting vascular conditions.

On April 22, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on August 3, 2020. New medical records were received, but did not address the issue at hand. By decision dated October 2, 2020, an OWCP hearing representative vacated in part and affirmed in part OWCP's April 13, 2020 decision. It retroactively approved the angioplasty procedure as necessary to allow treatment of the approved ankle injury, but affirmed the denial of expansion of the claim to include a vascular condition as the medical evidence of record was insufficient to establish that it was causally related to the April 8, 2017 employment injury.

On October 1, 2021 appellant, through counsel, requested reconsideration regarding the issue of appellant's vascular condition. Counsel presented several legal arguments that appellant's vascular complications and additional surgeries should be accepted as consequential to the accepted April 8, 2017 work injury.

By decision dated December 17, 2021, OWCP denied modification of the October 10, 2020 decision

LEGAL PRECEDENT

When 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.⁴

To establish causal relationship, the employee must submit rationalized medical opinion evidence.⁵ The opinion of the physician must be based on a complete factual and medical

⁴ *D.T.*, Docket No. 20-0234 (issued January 8, 2021); *see T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁵ *D.T.*, *id.*; *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.⁶ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁷

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.⁸

ANALYSIS

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

In his April 2, 2020 report, Dr. Fenster, the DMA, indicated that he reviewed the SOAF and the medical record and noted appellant's accepted conditions. He opined that the appellant's vascular condition was not related to the accepted April 8, 2017 work injury as it was not possible to prove that appellant's overt vascular problems were precipitated or related to the work injury as "no one can say for sure whether the deterioration of the vascular supply to the left lower extremity was directly caused by the work-related injury."

The Board finds that the April 2, 2020 report from DMA Dr. Fenster did not sufficiently address the underlying issue of whether appellant's preexisting vascular condition was causally related to the accepted April 8, 2017 employment injury. Dr. Fenster concluded that "no one can say for sure whether the deterioration of the vascular supply to the left lower extremity was directly caused by the work-related injury." The Board finds that his regarding causal relationship was vague, speculative, and equivocal and lacks sufficient medical rationale to resolve the issue in this case.⁹ As Dr. Fenster did not present a well-rationalized medical opinion explaining whether or not appellant's preexisting vascular condition/venous insufficiency was causally related to the accepted April 8, 2017 employment injury, the case is not in posture for decision.¹⁰

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹¹ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that

⁶ *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *T.K., id.; I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

⁹ *See N.W.*, Docket No. 21-0653 (issued September 30, 2021); *Deborah T. Lyon*, Docket No. 05-116 (issued December 9, 2005).

¹⁰ *See M.T.*, Docket No. 20-0321 (issued April 26, 2021); *M.G.*, Docket No. 19-1791 (issued August 13, 2020).

¹¹ *See M.T., id; N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

justice is done.¹² Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹³ Because Dr. Fenster, serving as OWCP's DMA, did not provide sufficient rationale regarding whether appellant's vascular condition is causally related to the April 8, 2017 employment injury, the case must be remanded to OWCP.

On remand, OWCP shall refer the case record, together with an updated SOAF, to the DMA, Dr. Fenster for a supplemental opinion. Following this and other such 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.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 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: January 13, 2023
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

¹² *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *see also Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹³ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).