United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 22-0995**
	)	**Issued: October 11, 2023**
U.S. POSTAL SERVICE, NORTHPOINTE POST OFFICE, Spokane, WA, Employer	)	

Appearances:
Andrew Douglas, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 16, 2022 appellant, through counsel, filed a timely appeal from a February 1, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 February 1, 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 his burden of proof to establish a left lower extremity condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On August 31, 2020 appellant, then a 45-year-old sales and services/distribution associate, filed an occupational disease claim (Form CA-2) alleging that he developed left ankle pain due to factors of his federal employment. He indicated that the pain began after his ankle popped at work and worsened over the proceeding months requiring him to seek a doctor's care. Appellant noted that he first became aware of his condition on January 12, 2020, and realized its relationship to his federal employment on July 15, 2020. He did not stop work.

In a July 15, 2020 medical report, Dr. Brian Padrta, a Board-certified orthopedic surgeon, noted that appellant related complaints of progressively worsening left lateral foot pain for the past year, which he indicated was "somewhat activity related." He performed a physical examination of the left foot, which revealed a definite mild varus with a cavus midfoot, tenderness along the peroneal tendons distal to the fibula, hypertrophy of the peroneal tubercle, mild tightness of the gastrocnemius, and mild clawing of the lesser toes in the forefoot. Dr. Padrta reviewed x-rays, which revealed increased calcaneal pinch with no other bony abnormalities in the hindfoot. He diagnosed possible peroneus longus tendon tear, acquired cavus deformity, and pain in the left foot and recommended a magnetic resonance imaging (MRI) scan.

In an August 3, 2020 follow-up report, Dr. Padrta recommended surgery, including peroneal tendon repair and calcaneal osteotomy. He noted that appellant had significant chronic varus of the hindfoot.

In an August 7, 2020 statement, appellant related that, in November 2019, he was pushing flats and heard a pop in his left ankle, followed by a small amount of pain. He did not initially believe he was injured, but over the next several months his ankle was "acting up" and felt bruised, so he eventually sought medical care.

In an August 28, 2020 statement, P.V., an employing establishment supervisor, indicated that none of appellant's supervisors at or around November 2019 recalled him reporting an injury to his ankle.

In a September 24, 2020 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an October 5, 2020 response to OWCP's questionnaire, appellant indicated that in November 2019 he moved a flat cart to the flats and injured his left ankle. He related that he sought medical care in January 2020 and that his work duties included turning, twisting, and pushing heavy items and carts. Appellant indicated that his activities outside of work included family dinners, fishing, hunting, and going to the movies.

OWCP also received a form report signed by Dr. Craig R. Barrow, a Board-certified orthopedic surgeon.

By decision dated November 5, 2020, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted employment factors.

On November 20, 2020 appellant requested reconsideration of OWCP's November 5, 2020 decision. In support of his request, he submitted an undated medical status profile, which was printed on November 5, 2020 and contained diagnoses of cavovarus deformity of foot, peroneal tendon tear, and repetitive motion injury.

By decision dated December 2, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), finding that his request for reconsideration neither raised substantial legal questions, nor included new or relevant evidence.

On November 4, 2021 appellant, through counsel, again requested reconsideration.

In support thereof, appellant submitted a July 23, 2020 MRI scan of the left ankle revealed a longitudinal split tear of the peroneus brevis tendon and tendinopathy and tenosynovitis of the peroneus longus tendon distally with some reactive changes in the cuboid bone.

In a September 28, 2020 medical report, Dr. Barrow noted that appellant related complaints of left foot and ankle pain, which he attributed to an injury at work two years prior and followed by ongoing repetitive motion work activities. He performed a physical examination of the left lower extremity, which revealed pain and reduced strength with eversion, moderate swelling over the foot and ankle, significant swelling and pain on palpation over the peroneal tendons, significant cavovarus malalignment, a peekaboo heel sign, and a limp favoring the left side. Dr. Barrow reviewed the MRI scan, which revealed the peroneal tendon tear and "old" x-rays, which revealed evidence of a cavovarus malalignment of the left foot and fracture of the base of the fifth metatarsal. He diagnosed cavovarus deformity of the left foot, tear of the left peroneal tendon, and a repetitive motion injury. Dr. Barrow opined that appellant's cavovarus malalignment was preexisting, but that his "repetitive motion at his work certainly contributed to his peroneal tendon tears and pain that he is having at this time and aggravated his cavovarus deformity." He recommended surgery, including left foot cavovarus reconstruction.

In an October 29, 2020 medical report, Dr. Barrow noted that he performed surgery on appellant's left foot and ankle on October 21, 2020, including left foot cavovarus reconstruction surgery with repair of the peroneal tendon tear and osteotomies of the first metatarsal and calcaneus. Follow-up notes dated November 5, 2020 through April 1, 2021 by Dr. Barrow, Brad J. Bachmeier, a physician assistant, and Donna Henry, a nurse practitioner, documented appellant's postoperative care.

A report of x-rays of the left foot dated April 1, 2021 revealed well-healed calcaneal and first metatarsal osteotomies with improvement of alignment of previous cavovarus deformity.

In a follow-up report dated July 29, 2021, Dr. Barrow noted that appellant related ongoing complaints of pain, swelling, and stiffness in the left foot and that he had been unable to run, jog,

or play basketball. He corrected his September 28, 2020 medical note to reflect that appellant injured his left foot at work in November 2019 when he was pushing flats and heard a pop. Dr. Barrow noted that he continued to turn, twist, and push heavy carts and flats of mail at work thereafter, and noticed a feeling of a bruise by his left ankle. He indicated that the injury was caused by repetitive motions due to his work and that the cavovarus foot deformity predisposed appellant to injury to the peroneal tendon because the malalignment caused him to walk on the outside of his foot. Dr. Barrow further explained that twisting, moving, pushing, and pulling at work placed increased strain and pressure on the tendons. He opined that "the pop in November 2019 was a tear of the peroneal tendon and this continued to get worse as he performed his job duties."

By decision dated February 1, 2022, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,[5] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[6] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[8] The medical evidence required to establish causal relationship between a claimed specific condition and employment factors is rationalized medical opinion evidence.[9] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of

[4] *Supra* note 2.

[5] *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *See T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

the relationship between the diagnosed condition and specific employment factors identified by the employee.[10]

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.[11]

ANALYSIS

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

In his July 29, 2021 report, Dr. Barrow discussed appellant's medical history, reviewed diagnostic reports, and provided findings on physical examination of his left lower extremity. He discussed the mechanism of injury for this occupational disease claim.[12] Dr. Barrow explained that appellant's underlying cavovarus malalignment made him more likely to sustain a peroneal tendon injury. He further explained that the repetitive duties of twisting, moving, pushing, and pulling at work placed increased strain and pressure on the tendons, which eventually led to the peroneal tendon tear. Dr. Barrow opined that "the pop in November 2019 was a tear of the peroneal tendon and this continued to get worse as he performed his job duties."

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility for the development of the evidence.[13] OWCP has an obligation to see that justice is done.[14]

While Dr. Barrow's opinion is not fully rationalized, it is sufficient to require further development of the medical evidence.[15] On remand, OWCP shall refer appellant to a specialist in the appropriate field of medicine, along with the case record and a statement of accepted facts, for an examination and a rationalized medical opinion as to whether the accepted factors of federal employment either caused or aggravated his diagnosed conditions.[16] If the second opinion physician disagrees with the opinion of Dr. Barrow, he or she must provide a fully-rationalized

[10] *T.L., supra* note 8; *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams, supra* note 8.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (May 2023). *See R.D.*, Docket No. 18-1551 (issued March 1, 2019).

[12] *See S.B.*, Docket No. 20-1458 (issued March 5, 2021); *L.H.*, Docket No. 17-0947 (issued March 8, 2018).

[13] *See id.*; *see also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy Hammons*, 51 ECAB 219, 223 (1999).

[14] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

[15] *Id., see also J.H., supra* note 6; *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[16] Federal (FECA) Procedure Manual, *supra* note 11; *C.C.*, Docket No. 19-1631 (issued February 12, 2020).

explanation as to why the accepted employment factors were insufficient to have caused or aggravated appellant's diagnosed conditions.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 1, 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: October 11, 2023
Washington, DC

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

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

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