

² The Board notes that, following the July 11, 2023 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.*

related to her accepted employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 26, 2021 appellant, then a 60-year-old consumer safety inspector, filed a traumatic injury claim (Form CA-1) alleging that on November 18, 2021 she had stepped off the inspection stand and twisted her right ankle/foot while in the performance of duty. She stopped work on November 19, 2021 and returned to work in a full-time full-duty capacity on January 15, 2022. On June 3, 2022 OWCP accepted the claim for sprain of other ligament of right ankle.

On August 5 and 22, 2022 appellant filed claims for compensation (Form CA-7) for disability from work during the periods August 1 through 5, 2022 and August 8 through 19, 2022, respectively.

Reports and work restrictions dated July 27 and August 10 and 18, 2022 signed by Dr. Aaron Green, a Board-certified orthopedic foot and ankle surgeon, were received. In his reports, he noted appellant's pain complaints regarding her right ankle from her November 17, 2021 work injury. In reports dated July 27 and August 10 and 18, 2022, Dr. Green reported physical examination of her right ankle, noting that she could weight bear with some discomfort. Good range of motion was reported, but range of motion against resistance with dorsiflexion, plantar flexion, eversion, and inversion resulted in pain response at the lateral malleolus. There was also some lateral soft tissue reproducible tenderness to palpitation. Dr. Green diagnosed strain of tendon of foot and ankle. Effective July 27, 2022, he placed appellant on light duty with no climbing or foot controls. Dr. Green opined that she could walk alternating with sitting with standing and must wear an ace wrap on right ankle at work. On August 16, 2022 he released appellant to full-duty work without restrictions beginning August 22, 2022.

On August 12, 2022 OWCP sent an email to the employing establishment noting that appellant's physician had placed appellant back on work restrictions. It asked the employing establishment to confirm whether any work was available for appellant. The employing establishment responded that there were no accommodations available for her restrictions.

On August 17, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF), and the medical record, to Dr. Willie E. Thompson, an orthopedic surgeon, for a second opinion physician regarding the status of her accepted condition.

In a September 12, 2022 report, Dr. Thompson, noted that examination of appellant's right foot and ankle revealed some tenderness over the anterior talofibular ligament to the right ankle, pain increased with force inversion at the ankle, and mild puffiness consistent with mild residual edema over the lateral ankle. He stated that appellant's right ankle was stable, with normal range of motion, and strength graded at 5/5. Dr. Thompson opined that, although there was a mild residual sprain of the anterior talofibular ligament of the right ankle, it was not incapacitating and would not interfere with her ability to return to work in a full-duty capacity. He concluded that appellant's minor residuals would resolve with continued, normal activity and possible use of a

lace-up ankle brace as a palliative measure. Dr. Thompson did not address her work capacity from August 1 through 19, 2022.

In a development letter dated September 15, 2022, OWCP informed appellant of the deficiencies of her recurrence claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a September 19, 2022 response to the development questionnaire, appellant contended that her ankle never stopped hurting and that the pain and swelling continued when she returned to work.

By decision dated October 17, 2022, OWCP denied appellant's recurrence claim, finding that the evidence of record did not substantiate that her accepted employment-related condition worsened to the point that she required work restrictions as of August 1, 2022.

On November 1, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held telephonically on April 12, 2023. January 4, 2022 email evidence from the employing establishment indicated that it was unable to accommodate appellant's light-duty work restrictions. It specifically noted that her work assignment required her to frequently and repeatedly pickup, carry and turnover 12.5-pound chicken carcasses, walk across uneven, slippery, wet and frozen floors, and climb stairs and ladders.

By decision dated May 24, 2023, an OWCP hearing representative affirmed the October 17, 2022 decision, finding that appellant had failed to provide sufficient medical evidence to establish a recurrence of intermittent disability for the period August 1 through 19, 2022 causally related to the accepted November 18, 2021 employment injury.

On June 12, 2023 appellant requested reconsideration. She argued that Dr. Green had restricted her to light-duty work as her ankle was swollen and she needed to rest her ankle, but the employing establishment could not offer her light duty. Appellant explained that, because her ankle never healed properly, he had placed her on light duty and she was off work from August 1 through 18, 2022.

By decision dated July 11, 2023, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

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.³ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because

³ 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁴

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.⁵

ANALYSIS -- ISSUE 1

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

In his July 27, 2022 report, Dr. Green reported appellant's physical examination findings relating to the right ankle. He diagnosed strain of tendon of foot and ankle. Effective July 27, 2022, Dr. Green placed appellant on light duty with no climbing or foot controls. He opined that she could walk alternating with sitting with standing and must wear an ace wrap on right ankle at work. These restrictions continued through August 19, 2022. The employing establishment verified that it could not accommodate appellant's light duty-work restrictions. It also related that her work assignment would require that she frequently walk across wet and slippery floors, and climb stairs and ladders. Appellant contends that she suffered a recurrence of disability from work for the period August 1 through 19, 2022 causally related to her accepted employment injury as the employing establishment could not accommodate her light-duty restrictions. OWCP's procedures provide that, to be eligible for compensation, the medical evidence should support that the claimant is disabled as a result of the accepted work injury and should either establish that the claimant is precluded from performing any type of work, or that the claimant has work restrictions due to the injury that the employing establishment was not able to accommodate.⁶

To determine the status of appellant's accepted condition, OWCP referred her to Dr. Thompson for a second opinion evaluation. In a report dated September 12, 2022, Dr. Thompson, opined that her mild residual sprain of the anterior talofibular ligament to the right ankle was not incapacitating and she could return to work in a full, unrestricted duty capacity with possibly the use of a lace-up ankle brace as a palliative measure. OWCP, however, did not specifically ask that he address whether appellant was disabled from August 1 through 19, 2022 due to her accepted right ankle condition.

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

⁶ *R.C.*, Docket No. 18-1812 (issued June 14, 2019); *id.* at Chapter 2.901.5a(2)(a) (September 2020).

It is well established that, proceedings under FECA are not adversarial in nature, it has an obligation to see that justice is done.⁷ While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence.⁸

Once OWCP undertook development of the evidence it had an obligation to do a complete job and obtain a response that would resolve the issue in this case.⁹

The Board will, therefore, set aside OWCP's July 11, 2023 decision, and remand the case for OWCP to request that Dr. Thompson address whether appellant was disabled from work during the claimed period of August 1 through 19, 2022 causally related to the accepted employment injury. After 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.¹⁰

⁷ See *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

⁸ See *R.S.*, Docket No. 20-1448 (issued April 12, 2021); *R.B.*, Docket No. 20-0109 (issued June 25, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

⁹ See *J.M.*, Docket No. 21-0569 (issued December 6, 2021); see *R.L.*, Docket No. 20-1069 (issued April. 7, 2021); *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

¹⁰ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the July 11 and May 24, 2023 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 15, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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