United States Department of Labor
Employees' Compensation Appeals Board

J.O., Appellant	)	
and	)	**Docket No. 19-0326**
	)	**Issued: July 16, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Newburgh, NY, Employer	)	

Appearances:
Brigitte M. Gulliver, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 26, 2018 appellant, through counsel, filed a timely appeal from an August 8, 2018 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 appellant submitted additional evidence on appeal. 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 OWCP has abused its discretion by denying appellant's request for authorization of right foot surgery.

FACTUAL HISTORY

On September 15, 2015 appellant, then a 27-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right ankle/foot injury on September 12, 2015 while in the performance of duty. He asserted that he was on his mail delivery route when a dog chased him and that the injury occurred when he went up some stairs to escape the dog. Appellant stopped work on September 12, 2015, but later returned to light-duty work.

OWCP accepted appellant's claim for sprain of an unspecified ligament of the right ankle and unspecified sprain of the right foot.

Appellant had visited an emergency room on September 12, 2015 where Dr. Alexis Johnson, a Board-certified emergency medicine physician, produced a report on that date in which he detailed the September 12, 2015 twisting incident and diagnosed right foot and ankle sprain. Dr. Johnson obtained right foot x-rays which showed no fracture and he placed appellant's right foot/ankle in a splint.

Appellant received follow-up care from Dr. Mikhail Itingen, a Board-certified orthopedic surgeon, who advised on September 16, 2015 that appellant had removed his splint and was walking without crutches. Dr. Itingen's physical examination of appellant's right foot/ankle demonstrated minimal swelling, no ecchymosis, mild tenderness at the anterolateral ankle, and normal motor function.

The findings of an October 21, 2015 magnetic resonance imaging (MRI) scan of appellant's right foot showed a mild-to-moderate chronic Lisfranc sprain with subcortical cysts in the medial cuneiform and base of the first metatarsal. The scan also showed slight arthrosis of the dorsolateral second tarsometatarsal (TMT) joint and distal peroneus longus thickening at the plantar base of the first metatarsal.

In a November 12, 2015 report, Dr. Itingen noted that recent right foot x-rays showed mild TMT spurring. He placed appellant on light-duty work. On February 8, 2016 Dr. Itingen advised that appellant had reported his right foot/ankle condition had improved and that he had been working full duty. Upon physical examination, he observed mild swelling and spurring over the first TMT joint. Dr. Itingen provided a diagnosis of TMT ligament sprain.

In a March 28, 2018 report, Dr. John L. Zboinski, a podiatrist specializing in foot and ankle surgery, reported that appellant made an initial visit for his workers' compensation case. He provided a summary of appellant's factual and medical history, including a description of the September 12, 2015 injury, and reported findings of the physical examination he conducted. Appellant had a positive anterior drawer sign in the right ankle, pain across the midtarsal joint of the right foot, and pain upon range of motion of the right ankle. Dr. Zboinski advised that appellant

had an antalgic gait and that he might have some Lisfranc instability. On April 5, 2018 Dr. Zboinski advised that appellant could continue to work full duty.

In a June 4, 2018 report, Dr. Zboinski provided an assessment of appellant's right foot/ankle condition which was similar to his previous assessments. He diagnosed right foot pain, post-traumatic arthritis of the right ankle, and unspecified sprain of the right foot. Dr. Zboinski recommended surgical excision of the metatarsal bossing/exostosis of appellant's right foot and requested that OWCP provide authorization for such surgery. He noted, "Based upon the history as provided by the patient, the subjective complaints, and the objective findings, it is within a reasonable degree of podiatric medical certainly that the above[-]noted diagnoses are causally related to the [September 12, 2015] accident…."[4] The request for right foot surgery was made on July 10, 2018.

In a July 11, 2018 development letter, OWCP requested that appellant submit additional evidence in support of his request for authorization of right foot surgery, including a physician's rationalized medical opinion on the issue of causal relationship between the September 12, 2015 employment injury and the proposed surgery. It afforded him 30 days to submit such evidence.

Appellant subsequently submitted an April 20, 2018 MRI scan of his right foot/ankle which indicated that the bone marrow signal of the osseous structures of his right foot was intact without occult fracture or bone marrow edema/contusion. The scan listed an impression of no acute bony or ligamentous findings and intact anterior talofibular ligament.

In a July 25, 2018 report, Dr. Zboinski discussed the September 12, 2015 employment injury and advised that, when he first examined appellant, he exhibited enlargement of the medial cuneiform area of his right foot with pain upon direct palpation.[5] He noted that appellant had denied injury to that area of his right foot either before or after suffering the September 12, 2015 injury. Dr. Zboinski opined that the September 12, 2015 employment incident was, within a reasonable degree of podiatric medical certainty, the cause of appellant's right foot pain and the diagnosed conditions of unspecified ligament sprain of the right ankle and unspecified sprain of the right foot. He further indicated that appellant recently underwent a right foot MRI scan which demonstrated no significant pathology and he explained that a ligamentous sprain of the right foot can lead to palpable enlargement of the peri-joint area of the right foot. Dr. Zboinski noted, "This can slowly develop over [two] years and would be considered somewhat degenerative in nature. The area has not progressed to the point where it's appreciable on MRI [scan] evaluation." Dr. Zboinski maintained that surgical intervention was warranted in order to remodel appellant's right foot and allow him to wear a shoe with less pain. He advised that appellant only had pain and enlargement in his right foot and noted that there were no preexisting conditions contributing to his right foot pain. Dr. Zboinski indicated, "Again, this is related to the accident of September 12, 2015."

[4] Dr. Zboinski opined that the September 12, 2015 accident was a competent producing cause for appellant's clinical presentation, his complaints were consistent with the history of injury, and his history of injury was consistent with the objective findings.

[5] Dr. Zboinski observed that appellant currently had palpable enlargement of the first metatarsocuneiform and cuneiform navicular areas of his right foot.

In July 2018 OWCP referred appellant's case to Dr. Ari Kaz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that he provide an opinion regarding whether the proposed right foot surgery was necessitated by appellant's September 12, 2015 employment injury.

In an August 6, 2018 report, the DMA noted that, although Dr. Zboinski had opined that appellant's right foot pain was due to midfoot osteophytes occurring over time due to the September 12, 2015 employment injury, an October 21, 2015 MRI scan showed slight arthrosis of the dorsolateral second TMT joint of the right foot, indicating that TMT arthritis was already present by the date of the scan. He also noted that Dr. Itingen had reported that x-rays from November 12, 2015 showed TMT spurring in the right foot. The DMA opined that diagnostic studies from within two months of the September 12, 2015 injury both indicate the presence of TMT arthrosis and dorsal TMT spurring and therefore these studies directly refuted the opinion of Dr. Zboinski, who asserted that the spurring developed over a two-year period after the injury. Moreover, although Dr. Zboinski indicated that appellant's right foot problem was degenerative in nature, the April 20, 2018 MRI scan made no mention of a degenerative process.

The DMA further maintained that, if the right foot spurring was due to a degenerative process significant enough to cause pain severe enough to warrant surgical intervention, one would expect marrow edema or some other evidence of arthritis in the diagnostic studies. However, there was no evidence of record supporting the existence of marrow edema or arthritis in appellant's right foot. The DMA advised that the April 20, 2018 MRI scan interpretation made no mention of marrow edema or a degenerative process, and that it showed no evidence of inflammation, edema, or bruising in the midfoot. He indicated that, for these reasons, the medical evidence of record did not support that the surgical intervention proposed by Dr. Zboinski was necessitated by the accepted employment injury. Moreover, the evidence did not support that the employment injury was "a source of pain significant enough that excision will provide symptomatic relief." The DMA concluded that the proposed surgery "is not medically indicated, and is not causally related to the work injury of [September 12, 2015]."

By decision dated August 8, 2018, OWCP exercised its discretion and denied appellant's request for authorization of right foot surgery. It found that the weight of the medical evidence with respect to this matter rested with the well-rationalized opinion of the DMA. OWCP further noted that Dr. Zboinski had not provided a rationalized medical opinion regarding causal relationship between the September 12, 2015 employment injury and the proposed surgery.

LEGAL PRECEDENT

Section 8103(a) of FECA states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[6]

[6] 5 U.S.C. § 8103.

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[7] The only limitation on OWCP's authority is that of reasonableness.[8] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[9] In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[10] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[11]

ANALYSIS

The Board finds that OWCP has not abused its discretion by denying appellant's request for authorization of right foot surgery.

On June 4, 2018 Dr. Zboinski recommended surgical excision of the metatarsal bossing/exostosis of appellant's right foot and requested that OWCP provide authorization for such surgery. The Board finds that OWCP correctly exercised its discretion and denied appellant's request for authorization of such right foot surgery. OWCP properly found that the weight of the medical evidence with respect to this matter rested with the well-rationalized opinion of the DMA. In an August 6, 2018 report, the DMA found that the proposed surgery was not necessitated by the September 12, 2015 employment injury.[12]

In his August 6, 2018 report, the DMA noted that although Dr. Zboinski opined that appellant's right foot pain was due to midfoot osteophytes occurring over time due to the September 12, 2015 employment incident, diagnostic studies from October and November 2015 showed that TMT arthritis was already present by the time of the September 12, 2015 employment injury. He further explained that, although Dr. Zboinski indicated that appellant's right foot problem was degenerative in nature, an April 20, 2018 MRI scan made no mention of a degenerative process. The DMA maintained that, if the right foot spurring was due to a degenerative process significant enough to cause pain severe enough to warrant surgical intervention, one would expect marrow edema or some other evidence of arthritis in the diagnostic studies. However, there was no evidence of record supporting the existence of marrow edema or arthritis in appellant's right foot. The DMA concluded that the medical evidence of record did not support that the surgical intervention proposed by Dr. Zboinski was necessitated by the accepted

[7] *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *Vicky C. Randall*, 51 ECAB 357 (2000).

[8] *B.L.*, Docket No. 17-1813 (issued May 23, 2018); *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

[9] *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Rosa Lee Jones*, 36 ECAB 679 (1985).

[10] *J.R.*, Docket No. 17-1523 (issued April 3, 2018); *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[11] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[12] It is noted that OWCP accepted appellant's claim for sprain of an unspecified ligament of the right ankle and unspecified sprain of the right foot.

September 15, 2015 employment injury.[13] The Board notes that the weight of the medical evidence with respect to the proposed right foot surgery rests with the opinion of the DMA because his opinion is supported by adequate medical rationale.[14]

The Board further notes that Dr. Zboinski's reports merely contain conclusory opinions of an employment-related need for right foot surgery without the necessary rationale explaining how the accepted September 12, 2015 employment injury, a soft-tissue injury, was sufficient to necessitate the proposed surgery. Dr. Zboinski's reports are of limited probative value on the underlying issue of this case as the Board has held that such conclusory opinions are insufficient to meet a claimant's burden of proof to establish a claim.[15] Although Dr. Zboinski indicated in his July 25, 2018 report that appellant had no right foot problems prior to September 12, 2015, he did not explain how this opinion was supported by the evidence of record, including the diagnostic studies of appellant's right foot. He posited that appellant developed some type of degenerative condition due to the accepted September 12, 2015 employment injury which necessitated right foot surgery, but his comments in this regard are vague and lack a rationalized medical explanation of how such a process could have occurred due to the employment injury. On appeal, counsel argues that Dr. Zboinski's reports show that the proposed right foot surgery was necessitated by the September 12, 2015 injury, but the Board has explained the deficiencies of these reports.

As noted above, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[16] For the above-noted reasons, the Board finds that OWCP's denial of appellant's request for authorization of right foot surgery was reasonable and did not constitute an abuse of discretion.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has not abused its discretion by denying appellant's request for authorization of right foot surgery.

[13] As previously noted, appellant's claim has only been accepted for right foot and ankle sprains. It has not been accepted for any bone or degenerative condition.

[14] *See W.C.*, Docket No. 18-1386 (issued January 22, 2019) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).

[15] *J.D.*, Docket No. 14-2061 (issued February 27, 2015).

[16] *See supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 16, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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