United States Department of Labor
Employees' Compensation Appeals Board

S.D., Appellant	)	
and	)	**Docket No. 19-0955**
	)	**Issued: February 3, 2020**
U.S. POSTAL SERVICE, HARKER HEIGHTS POST OFFICE, Harker Heights, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 1, 2019 appellant, through counsel, filed a timely appeal from a March 11, 2019 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 March 11, 2019 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 for the period commencing March 28, 2018 causally related to her accepted November 15, 2017 employment injury.

FACTUAL HISTORY

On November 16, 2017 appellant, then a 37-year-old postal support employee (PSE) mail clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 2017 she sprained and bruised her right foot and leg when an equipment gate fell and hit her leg while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant received medical treatment on November 16, 2017 and returned to work on November 17, 2017. OWCP accepted the claim for right ankle sprain and right foot sprain. Appellant stopped work on November 21, 2017.

A November 28, 2017 right ankle magnetic resonance imaging (MRI) scan demonstrated marrow edema within the anterior process of the calcaneous and subarticular marrow edema along the dorsal and posterior cuboid, mild tendinosis of the noninsertional Achilles tendon, and thickening of the anterofibular ligament (ATFL). It also noted no osteochondral defect present. A right foot MRI scan of even date revealed an osteochondral (OCD) injury affecting the distal medial aspect of the proximal phalanx of the great toe, mild-to-moderate joint effusion at the first metatarsophalangeal, mild effusions at the second through fifth metatarsophalangeal joints, intermetatarsal bursitis, nonspecific plantar foot pad edema, mild arthrosis of the first metatarsophalangeal joint space, subtle marrow edema noted along the lateral aspect of the fifth metatarsal head, and focal probable adventitial bursitis at the level of the head of the fifth metatarsal along the plantar aspect.

In a December 4, 2017 narrative report, Dr. Thomas Martens, a family practitioner, recounted that he examined appellant for complaints of right leg and foot pain due to a November 15, 2017 employment injury. Examination of appellant's right ankle revealed edema and tenderness, especially over the lateral ligament. Range of motion was limited secondary to pain. Dr. Martens also observed tenderness in the right foot between the toes. He diagnosed other specific joint derangements of the right ankle and foot. Dr. Martens opined that appellant's diagnosed conditions were caused by the November 15, 2017 employment injury. He released appellant to work modified duty.

On December 13, 2017 appellant returned to part-time work in a limited-duty capacity, for approximately six hours per day.

Appellant received medical treatment from Dr. Ryan Shock, a podiatrist. In a March 14, 2018 report, Dr. Shock recounted appellant's complaints of right ankle pain and severe pain in the first metaphalangeal. Upon examination of appellant's right lower extremity, he noted positive Tinel's sign at the right tibial nerve and effusion of the ankle. Dr. Shock diagnosed right ankle sprain.

Dr. Martens completed duty status reports (CA-17 forms) dated March 14, 2018, which noted a date of injury of November 15, 2017 and described findings related to her right ankle and right foot. He advised that appellant could work part-time modified duty up to four hours per day.

In a March 28, 2018 Form CA-17, Dr. Martens described the November 15, 2017 employment injury and noted clinical findings related to her right ankle and right foot. He completed an additional Form CA-17 dated April 11, 2018, which indicated that he had not advised appellant to resume work.

In an April 6, 2018 report, Dr. Shock reviewed appellant's history and noted examination findings of positive Tinel's at the right tibial nerve. He related that appellant had failed to improve with boot immobilization and continued to complain of pain deep within the ankle joint. Dr. Shock diagnosed right ankle sprain. He indicated that an MRI scan showed an OCD in the talus, which was likely causing her pain. Dr. Shock reported that, although appellant's injury was diagnosed as a sprain, an OCD can take time to present on an MRI scan.

In an April 25, 2018 Form CA-17, Dr. Martens noted that appellant could work part-time modified duty, effective April 30, 2018, up to five hours per day.

In an April 27, 2018 report, Dr. Shock recounted appellant's complaints of continued pain in her right ankle. He noted right lower extremity findings of effusion of the ankle and severe pain with range of motion (ROM). Dr. Shock diagnosed right ankle sprain.

On April 30, 2018 appellant accepted a modified job offer as a PSE mail clerk.

In a May 15, 2018 letter, Dr. Martens noted appellant's accepted conditions of right ankle and right foot sprains. He provided examination findings and noted that an MRI scan of the right foot revealed OCD injury *versus* a bone contusion. Dr. Martens opined that the OCD injuries of the right ankle and foot were a direct result of the already approved right foot and ankle injury. He explained that OCD of the right ankle and foot were consequential to the original claim and requested that they be added to her claim. Dr. Martens indicated that appellant could continue working with current restrictions.

On May 5, 2018 appellant filed claims for wage-loss compensation (CA-7 forms) for partial disability on March 28, 2018 and for total disability for the period March 30 through April 28, 2018. On the reverse side of the CA-7 form, a human resource manager, indicated that an eight-hour job offer was on file and that no medical rationale was provided for reduced work hours. In the subsequent time analysis forms (CA-7a forms), appellant indicated that on March 28, 2018 she worked for 1.5 hours and claimed leave without pay (LWOP) for 1.5 hours. Beginning March 30, 2018 she claimed three hours of LWOP each day.[4] Appellant indicated that the leave use was because the doctor had reduced her work hours to zero.

In a May 21, 2018 development letter, OWCP informed appellant that it had received her claims for wage-loss compensation for the period March 28 through April 28, 2018. It advised her that the evidence received was insufficient to establish that she was temporarily totally disabled from work during the claimed period. OWCP afforded appellant 30 days to submit the requested information.

OWCP referred appellant's case, along with a statement of accepted facts (SOAF), to an OWCP medical adviser for an opinion on whether appellant had developed OCD of the right ankle

[4] In a January 26, 2018 Form CA-7a, the employing establishment indicated that appellant was entitled to 15 hours per week and did not have a fixed 40-hour workweek.

and foot as a consequence of her accepted November 15, 2017 employment injury. In a May 30, 2018 report, Dr. Ari Kaz, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that he had reviewed the SOAF and noted that appellant's claim was accepted for right foot and right ankle sprains. He discussed the medical records he had reviewed and indicated that the November 28, 2017 MRI scan report of the right foot and ankle "clearly stated that there was no osteochrondral defect." Dr. Kaz opined that there was no evidence to support that appellant had OCD in her right ankle.

In a July 12, 2018 letter, Dr. Martens indicated that as appellant's treating physician, his goal was that appellant would have the ability to perform clerical finance duties in six months. He completed a Form CA-17, which indicated that appellant could work part-time modified duty up to six hours.

In a July 20, 2018 report, Dr. Shock noted examination findings of continued right ankle pain and effusion of the medial ankle. He diagnosed right ankle sprain.

By decision dated August 6, 2018, OWCP denied appellant's claim for wage-loss compensation "for the period March 28 through April 28, 2018." It found that the medical evidence submitted was insufficient to establish that she was unable to work her modified-duty position during the claimed period due to her accepted November 15, 2017 employment injury.

OWCP received CA-17 forms dated August 9 and 24, 2018 by Dr. Martens, who indicated that appellant could work full time with restrictions.

On September 5, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The telephonic hearing was held on February 8, 2019.

In a September 10, 2018 report, Dr. Shock recounted appellant's complaints of continued right ankle pain and effusion of the medial ankle. He indicated that diagnostic testing of the right ankle showed medial joint space narrowing. Dr. Shock diagnosed right ankle sprain.

In a September 10, 2018 Form CA-17, Dr. Martens indicated that appellant could work part-time, modified duty up to six hours per day. In an October 26, 2018 Form CA-17, he reported that she could work her usual job.

In reports dated December 27, 2018 and March 8, 2019, Dr. Shock noted that appellant complained of a new area of pain in the plantar midfoot of her right foot. He reported examination findings of reduced ROM with diffuse tenderness to palpation along the subtalar joint and lateral ankle. Dr. Shock diagnosed ankle sprain.

By decision dated March 11, 2019, an OWCP hearing representative affirmed the August 6, 2018 decision.[5]

[5] The hearing representative further noted that OWCP had yet to issue a formal decision regarding the claimed consequential injuries.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] has the burden of proof to establish the essential elements of his or her claim.[7] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[8] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[9] The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[10]

OWCP's implementing regulations define a recurrence of disability as 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 injury or illness without an intervening injury or new exposure to the work environment.[11] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force) or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.[12]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and an inability to perform such limited-duty work. As part of this burden of proof, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[13]

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[6] *Supra* note 2.

[7] *See B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

[8] *See D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson, id.*

[9] *Amelia S. Jefferson, supra* note 7; *William A. Archer*, 55 ECAB 674 (2004).

[10] *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer, id.*; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[11] 20 C.F.R. § 10.5(x).

[12] *Id.*

[13] *S.D.*, Docket No. 19-1245 (issued January 3, 2020); *L.S.*, Docket No. 18-1494 (issued April 12, 2019); *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Terry R. Hedman*, 38 ECAB 222 (1986).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing March 28, 2018 causally related to her accepted November 15, 2017 employment injury.

First, the Board notes that appellant did not allege, and the evidence does not establish, a change in the nature and extent of appellant's light-duty job requirements. Additionally, there is no indication from the record that the employing establishment withdrew light-duty work. The remaining issue is whether the medical evidence demonstrated a worsening of appellant's accepted right ankle and right foot sprains.

The medical evidence received in support of appellant's claim included a series of CA-17 forms and reports by Dr. Martens dated March 14 to October 26, 2018. In a March 14, 2018 CA-17 form, Dr. Martens advised that she could work part-time modified duty up to four hours per day. In CA-17 forms dated March 28 and April 11, 2018, he recommended that appellant not work. The Board finds, however, that Dr. Martens has not explained how her conditions had worsened such that she was suddenly unable to perform her modified-duty position.[14] Dr. Martens has not provided an explanation or referred to objective evidence to support appellant's inability to work, nor did he explain why she was unable to work her part-time limited-duty position as a result of her accepted right foot and ankle sprain injuries.[15] His remaining reports and CA-17 forms postdate the claimed period of disability, and do not otherwise, address her inability to work.[16] Dr. Martens' opinion is, therefore, of diminished probative value and is insufficient to establish appellant's claim.

Appellant was also treated by Dr. Shock. In reports dated April 27, 2018 to March 8, 2019, Dr. Shock related appellant's complaints of continued right ankle pain, despite using a boot and undergoing physical therapy. He provided examination findings and diagnosed right ankle sprain. Dr. Shock did not, however, provide an opinion or specify that appellant could not work her modified-duty position due to her November 15, 2017 employment injury. Accordingly, his reports fail to establish disability from work during the claimed time period due to appellant's accepted employment injury.[17]

As appellant has not submitted rationalized medical evidence establishing a recurrence of disability for the period commencing March 28, 2018 causally related to the accepted November 15, 2017 employment injury, she has not met her burden of proof.

On appeal counsel contends that the March 11, 2019 hearing decision was contrary to law and fact. As explained above, the medical evidence submitted is insufficient to establish that

[14] *See S.H.*, Docket No. 18-1398 (issued March 12, 2019); *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

[15] *See M.C.*, Docket No. 16-1238 (issued January 26, 2017); *see also Jaja K. Asaramo*, 55 ECAB 200 (2004) (the Board found that for conditions not accepted or approved by OWCP as due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury). *M.M.*, Docket No. 16-0541 (issued April 27, 2010).

[16] *Id.*

[17] *See A.W.*, Docket No. 19-0400 (issued July 8, 2019).

appellant was unable to work her modified-duty position for the period commencing March 28, 2018 as a result of her November 15, 2017 employment injury.

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 appellant has not met her burden of proof to establish a recurrence of disability for the period commencing March 28, 2018 causally related to her accepted November 15, 2017 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2020
Washington, DC

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

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

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