United States Department of Labor
Employees' Compensation Appeals Board

N.L., Appellant	)	
and	)	**Docket No. 19-1456**
	)	**Issued: July 14, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Shenandoah, PA, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 25, 2019 appellant, through counsel, filed a timely appeal from a May 29, 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 May 29, 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 commencing July 30, 2018 causally related to her accepted June 15, 2017 employment injury.

FACTUAL HISTORY

On June 15, 2017 appellant, then a 34-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she twisted her left ankle as she stepped out of her mail truck while in the performance of duty. On July 5, 2017 OWCP accepted sprain of the calcaneofibular ligament of the left ankle. On January 5, 2018 it expanded the acceptance of appellant's claim to include strain and laceration of muscles and tendons of peroneal muscle group of the lower left leg and laceration of muscle and tendon of the peroneal muscle group at the lower left leg. Appellant worked intermittent modified-duty work until January 11, 2018 when Dr. John J. Stapleton, a podiatrist, performed authorized repair of a left peroneal brevis split tear and fibular groove deepening. OWCP paid appellant wage-loss compensation on the supplemental rolls from January 20 to April 13, 2018. Appellant returned to full-time, modified-duty work on April 17, 2018.[4]

OWCP subsequently received a May 14, 2018 report wherein Dr. Stapleton described physical examination findings and advised that appellant could return to full duty on May 15, 2018, but that she should wear supportive high-top shoes. On June 13, 2018 Dr. Stapleton noted that she was progressing well post-surgery, but reported twisting her ankle the previous day and was experienced pain with weight bearing. He noted that a left ankle x-ray that day showed no evidence of fracture and opined that appellant's recent injury did not do significant damage and recommended bracing for strenuous activity.

A July 24, 2018 magnetic resonance imaging (MRI) scan of the left ankle revealed post-surgical changes, no other tendon or ligament injury, and a stable osteochondral injury along the posterior dome of the talus.

In a July 25, 2018 progress note, Dr. Stapleton noted that appellant had twisted her left ankle on June 12, 2018 and subsequently had persistent left ankle pain that was increasing in intensity. He described the July 24, 2018 MRI scan findings. Left ankle examination demonstrated tenderness over the peroneal tendon, laxity of the peroneal tendon with hypermobility, instability to the contralateral ankle, and mild edema. Dr. Stapleton diagnosed acute left ankle pain, osteochondral defect, and tendinosis. He recommended conservative treatment. In unsigned correspondence of same date, Dr. Stapleton noted that appellant was under his care and advised the she should not work due to "medical illness."

In a July 30, 2018 report, Dr. Daniel Fuchs, an orthopedic surgeon, noted the history of appellant's June 2017 work injury. He described her medical and surgical history, and noted her complaint of persistent pain and swelling in the area of the peroneal tendons status post tendon

[4] Appellant signed an offer of modified assignment on April 17, 2018. The duties of the position were one to two hours each casing mail, administrative duties, and working undeliverable mail with two hours delivering/carrying mail. Appellant was restricted to two hours each, standing, walking, and delivering.

repair, and that she had a mild aggravation the previous month when she rolled her left ankle. Dr. Fuchs indicated that a July 2018 MRI scan demonstrated a small posterolateral osteochondral lesion of the talar dome. Findings on left ankle examination included intact sensation to light touch, a well-healed surgical incision of the peroneal tendons, mild swelling, and tenderness to palpation. Dr. Fuchs diagnosed left lower extremity peroneal tendinitis and recommended immobilization in a controlled ankle movement (CAM) boot and physical therapy. He advised that appellant was disabled from work. On a form report of same date, Dr. Fuchs diagnosed left peroneal tendon tear, recommended a CAM boot, weight bearing as tolerated, and advised that appellant could return to modified sedentary work.

On July 31, 2018 appellant filed a notice of recurrence (Form CA-2a). She indicated that the recurrence began on July 18, 2018 due to left ankle pain and weakness, and that it was causally related to her accepted June 15, 2017 employment injury. Appellant stopped work on July 30, 2018.

On August 14, 2018 K.F., an employing establishment human resources specialist, indicated that it was controverting appellant's recurrence claim. She noted that, following surgery, appellant had returned to full-duty work on May 15, 2018 and had continued to work without incident until July 30, 2018 when she was placed on sedentary duties. K.F. indicated that appellant had been treated by a new physician, and that she had not submitted medical evidence regarding the cause of the recurrence. She maintained that appellant had not met her burden of proof to establish a recurrence.

By report dated September 4, 2018, Dr. Fuchs noted appellant's complaint of continued ankle soreness with weight bearing, and that she had recently reaggravated the peroneal tendon area. Left ankle examination revealed mild instability to the anterior drawer and mild swelling about the peroneal tendons. Dr. Fuchs reiterated his diagnoses, prescribed a CAM boot, recommended an ultrasound of the peroneal tendons, and a course of physical therapy. On a form report of same date, he advised that appellant should continue modified duty, and on a duty status report (Form CA-17) of same date, he diagnosed peroneal tendon instability and advised that she could work full time with restrictions that she could only stand three hours and walk one hour daily.

By development letter dated September 13, 2018, OWCP provided a definition of a recurrence of disability. It advised appellant of the type of factual and medical evidence necessary to establish her claim, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

In correspondence dated September 19, 2018, K.F. updated the employing establishment's controversion. She noted that appellant had returned to full-duty work on May 15, 2018 with an accommodation of wearing a high-top boot and related that she worked four hours on July 18, 2018 due to prescheduled leave and continued to work without incident, including overtime, until she filed the recurrence claim on July 31, 2018. K.F. attached a copy of appellant's work schedule.

Appellant subsequently submitted her completed recurrence claim development questionnaire, dated October 12, 2018. She indicated that, since the January 11, 2018 surgery, her left ankle was weak and had been giving out. Appellant noted that she had been released to full-duty work without limitation in May 2018, but wore a high-top boot, and that on June 12, 2018 she twisted her left ankle while delivering mail. She reported filing an additional claim for a

November 24, 2017 incident when she twisted her left ankle stepping off the sidewalk while delivering mail. That claim was denied by OWCP.[5] Appellant reported no hobbies outside of work. She also submitted a July 30, 2018 employing establishment form in which she requested four weeks of light-duty work beginning July 30, 2018 due to the June 15, 2017 work injury. In a handwritten statement dated July 31, 2018, appellant indicated that her left ankle was weak and sore in the location of her original injury. She maintained that walking on uneven surfaces for six hours a day and standing for two hours a day irritated her left ankle condition.[6]

In a September 5, 2018 report, Dr. Stapleton noted appellant's complaint of significant left ankle pain with no improvement since her last visit on July 25, 2018. He reiterated his diagnoses and opined that appellant's recalcitrant pain over the peroneal tendon was secondary to tendinosis. Dr. Stapleton recommended resection of the diseased portion of the peroneal brevis.

OWCP also received an October 12, 2018 Form CA-17 report by Dr. Stapleton which indicated that she could not work.

By decision dated October 19, 2018, OWCP denied appellant's claim, finding that she sustained a recurrence of disability commencing July 30, 2018 causally related to her June 15, 2017 employment injury.

On October 31, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

Additional medical evidence submitted included an October 12, 2018 progress note in which Dr. Stapleton noted seeing appellant following the September 27, 2018 left ankle surgery.[7] In procedure notes dated November 5, 2018 and January 7, 2019, Dr. Stapleton noted seeing appellant in follow-up. He opined that her current condition was clearly related to the initial work injury, noting that, after she had repair of her peroneal brevis tendon, her symptoms continued and were secondary to tendinosis and scarring from this repair and that she required revision surgery. In the January 7, 2019 report, Dr. Stapleton advised that appellant could return to modified-duty work for four hours a day on January 28, 2019 and could return to full-time regular duty on March 11, 2019. On March 4, 2019 he noted that appellant was doing well, but had a complaint of mild, intermittent pain over the medial aspect of her left ankle, worsened with extended activity, and that ankle range of motion was still limited due to pain. Dr. Stapleton diagnosed status post-surgery and a low-grade osteochondral defect. He reiterated his opinion that appellant's current condition was due to the June 15, 2017 employment injury.

During the March 14, 2019 hearing, appellant testified that, after the June 15, 2017 employment injury, she always wore a high-top boot when working and continued to roll and twist her left ankle. She reported at least one incident in November 2017, for which she had filed a claim that had been denied. Appellant stated that she was off work beginning June 30, 2018

[5] OWCP adjudicated the November 24, 2017 claim under File No. xxxxxx563.

[6] Appellant also submitted copies of reports from Dr. Stapleton, previously of record.

[7] A copy of the operative report is not found in the case record.

because no light duty was available, and that she returned to work on February 4, 2019 and was working full duty at present.

Medical evidence submitted subsequent to the hearing included a March 21, 2019 progress note in which Dr. Stapleton noted appellant's persistent left ankle pain after being on her feet all day at work. He diagnosed a symptomatic low-grade osteochondral defect of the left ankle.

In an April 10, 2019 report, Dr. Mitchell E. Cooper, a Board-certified orthopedic surgeon, noted appellant's complaint of a two-year history of left ankle pain with current complaints of lateral midfoot pain, aggravated by direct pressure and weight bearing. He noted the September 27, 2018 surgery and that appellant reported that she had twisted her ankle the previous week and had some increased pain since. Examination demonstrated a nontender ankle joint, no left ankle pain with range of motion, and nontender ankle ligaments, but tenderness more distal toward the lateral foot incision and calcaneal cuboid. Dr. Cooper reviewed the July 24, 2018 left ankle MRI scan and advised that he was not sure that appellant was symptomatic from osteochondritis dissecans that day. He recommended a new left ankle MRI scan.

On April 15, 2019 Dr. Stapleton provided a narrative of his treatment for appellant's June 15, 2017 employment injury. He described her medical and surgical history and advised that she was taken out of work in July 2018 because she required revision surgery to repair her peroneal tendons due to the employment injury and to the initial surgery, and continued to be unable to work to recover from this revision surgery. Dr. Stapleton noted that appellant continued to complain of intermittent ankle pain with prolonged activities and had a low-grade osteochondral defect.

An April 17, 2019 MRI scan of left ankle demonstrated subchondral edema in the talar dome medially, suggesting a stage 1 and possibly a slight stage 2 osteochondral injury, with thinning of overlying hyaline cartilage suggested; no definite full-thickness defect; no unstable fragment or loose body; and mild peroneal tenosynovitis and postoperative changes.

On May 22, 2019 Dr. Cooper reviewed the MRI scan findings and discussed surgical options with appellant who continued to complain of left ankle pain.

By decision dated May 29, 2019, an OWCP hearing representative affirmed the October 19, 2018 decision. The hearing representative recommended that OWCP combine the instant case, File No. xxxxxx157, with File No. xxxxxx563.[8]

LEGAL PRECEDENT

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.[9]

[8] The case record indicates that OWCP has not, in fact, administratively combined OWCP File No. xxxxxx563 with the present claim.

[9] 20 C.F.R. § 10.5(x).

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[10] Where no such rationale is present, the medical evidence is of diminished probative value.[11]

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.[12]

ANALYSIS

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

The medical evidence contemporaneous with the claimed recurrence includes a July 24, 2018 left ankle MRI scan that demonstrated a stable osteochondral injury along the posterior dome of the talus. On July 25, 2018 Dr. Stapleton noted that appellant had again twisted her left ankle on June 12, 2018 and subsequently had increasing left ankle pain. He described the MRI scan findings and advised that appellant could not work. On July 30, 2018 Dr. Fuchs noted appellant's report that she had aggravated her left ankle condition at work the previous month. He noted the MRI scan findings diagnosed tendinitis, and recommended that appellant not work. Dr. Stapleton performed a second left ankle procedure on September 27, 2018. In reports dated November 5, 2018 to March 4, 2019, he consistently opined that appellant's current condition was clearly related to the initial work-related injury, noting that after she had surgical repair of her peroneal brevis tendon, her symptoms continued and were secondary to tendinosis and scarring from this repair such that she required surgical revision.

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 in the development of the evidence.[13] OWCP has an obligation to see that justice is done.[14]

---

[10] *See J.S.*, Docket No. 19-1035 (issued January 24, 2020).

[11] *Id*.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *D.T.*, Docket No. 19-1064 (issued February 20, 2020).

[13] *T.L.*, Docket No. 19-1572 (issued March 12, 2020).

[14] *Id*.

The Board finds that, although Dr. Stapleton's opinion was insufficiently rationalized to meet appellant's burden of proof to establish that her claimed recurrence was due to the June 15, 2017 employment injury, it is sufficient to require further development of the case by OWCP.[15] Thus, the Board will remand the case to OWCP for further development of the medical evidence to obtain a rationalized medical opinion as to whether the accepted June 15, 2017 employment injury caused additional left ankle conditions and/or whether continued job duties aggravated her left ankle condition such that she required a second surgical procedure. On remand OWCP shall administratively combine OWCP File No. xxxxxx157 and File No. xxxxxx563, as suggested by OWCP's hearing representative in her May 29, 2019 decision. It shall then prepare a statement of accepted facts, which includes the accepted condition, and then obtain a second opinion examination as to whether the June 15, 2017 employment injury caused or aggravated additional left ankle conditions which required additional surgery, and if she had any ensuing employment-related disability.[16] After such further development as may be deemed necessary, OWCP shall issue a *de novo* decision regarding whether appellant established a recurrence of disability on July 30, 2018.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: July 14, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

---

[15] *See M.H.*, Docket No. 18-1068 (issued June 2, 2020); *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[16] *Id*.