

**United States Department of Labor  
Employees’ Compensation Appeals Board**

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M.V., Appellant

and

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DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, FEDERAL CORRECTIONAL  
COMPLEX, Beaumont, TX, Employer  
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**Docket No. 20-0872**  
**Issued: January 27, 2021**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*<sup>1</sup>  
*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 March 11, 2020 appellant, through counsel, filed a timely appeal from a January 27, 2020 merit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the January 27, 2020 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 recurrence of disability for the period February 25 through March 7, 2019, causally related to his accepted January 23, 2019 employment injury.

## FACTUAL HISTORY

On March 5, 2019 appellant, then a 48-year-old corrections officer, filed a traumatic injury claim (Form CA-1) alleging that on January 23, 2019 he was pushed by an inmate, causing him to lose balance and injure his left and right ankles, while in the performance of duty. He stopped work on January 26, 2019. OWCP assigned the claim File No. xxxxxx708.<sup>4</sup>

In reports dated January 24, 2019, Dr. Keith J. Hill, a Board-certified orthopedic surgeon, provided a history of injury and noted his treatment of appellant from June 23, 2017 onward. He noted findings on examination of moderate swelling of the left ankle and tenderness to palpation.<sup>5</sup> Dr. Hill diagnosed bilateral ankle sprains. He held appellant off work from January 24, 2019 for two weeks and returned him to full-duty work effective February 7, 2019. Dr. Hill prescribed physical therapy.

Appellant returned to limited-duty work on February 9, 2019, and to full duty on February 29, 2019.<sup>6</sup> Following a brief period of full-duty work, appellant again stopped work on or before March 8, 2019.<sup>7</sup>

By decision dated April 17, 2019, OWCP accepted the claim under File No. xxxxxx708 for sprain of unspecified ligament of left ankle.<sup>8</sup>

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<sup>4</sup> Previously, OWCP accepted that on June 21, 2017 appellant sustained a nondisplaced fracture of the body of right calcaneus when he slipped and fell on a wet floor while in the performance of duty. OWCP assigned the claim File No. xxxxxx827. On May 15, 2019 appellant filed an occupational disease claim (Form CA-2) for the January 23, 2019 bilateral ankle injury. OWCP assigned the claim File No. xxxxxx928. In a May 17, 2019 memorandum, it noted that File No. xxxxxx928 was a duplicate of the current claim, File No. xxxxxx708, and that File No. xxxxxx708 would be “upgraded” to include the right ankle.

<sup>5</sup> January 24, 2019 x-rays of the right ankle demonstrated a chronic distal medial malleolus avulsion in the right ankle, and chronic degenerative changes across the distal tibular-fibular joint, possibly from an old, healed fibular injury. Left ankle x-rays were within normal limits.

<sup>6</sup> At the time of the January 23, 2019 employment injury, appellant was assigned to the employing establishment’s facility in Beaumont, Texas. In late February 2019, he transferred to an employing establishment facility in Florida, where he filed his traumatic injury claim.

<sup>7</sup> The employing establishment did not provide timekeeping forms documenting the date when appellant stopped work.

<sup>8</sup> By decision dated April 17, 2019, OWCP denied continuation of pay as appellant had not filed his traumatic injury claim within 30 days of the date of injury.

In a letter dated April 18, 2019, the employing establishment indicated that it had no work available within appellant's medical restrictions.<sup>9</sup> However, on April 29, 2019, the employing establishment offered appellant a full-time, limited-duty position.

On April 22, 2019 OWCP received a February 21, 2019 narrative report by Dr. Hill, who noted appellant's history of a June 2017 right calcaneal fracture, with subsequent return to full duty. Appellant then experienced swelling in the right ankle with pain in the anterior and medial aspects, increased with prolonged standing. On examination, Dr. Hill noted considerable pain at the right ankle joint line, tenderness at the anterolateral corner, some boggiess of the ankle joint, and restriction in the subtalar joint with medial tenderness of the calcaneus. He noted that appellant wore an ankle stabilizing orthosis (ASO) brace. Dr. Hill diagnosed arthritis of the right foot, closed nondisplaced fracture of the right calcaneus, and right ankle synovitis. He administered a cortisone injection to the anterior right ankle. Dr. Hill opined that appellant had attained maximum medical improvement and did not require work restrictions. He noted that appellant could stand and be on his feet for prolonged periods.

In a report dated April 30, 2019, Dr. Bruce Kammerman, a physician specializing in family practice and emergency medicine, provided a history of the June 21, 2017 right calcaneal fracture and January 23, 2019 employment injury. On examination, he found swelling and tenderness of both ankles, intact ligaments without laxity in both ankles, and limited range of motion of the left ankle due to pain. Dr. Kammerman diagnosed an unspecified left ankle sprain. He noted work restrictions.<sup>10</sup>

On May 7, 2019 OWCP received a claim for compensation (Form CA-7), for leave buy back for the period March 8 through April 17, 2019, and loss of night differential pay from February 25 through April 30, 2019.

OWCP also received reports dated from May 7 through July 3, 2019, by Dr. Jean E. Holewinski, a podiatrist. Dr. Holewinski diagnosed an unspecified fracture of the shaft of the right fibula, sequela, and sprain of the calcaneofibular ligament of the left ankle, sequela. She opined that appellant could continue light-duty work.

In a May 15, 2019 e-mail, the employing establishment noted that appellant returned to full duty on February 9, 2019 with no loss of premium pay.

By decision on May 15, 2019, OWCP expanded its acceptance of the claim to include a sprain of other ligament of right ankle, initial encounter, and nondisplaced fracture of body of right calcaneus, initial encounter for closed fracture.<sup>11</sup> It paid appellant wage-loss compensation under the supplemental rolls commencing April 29, 2019.

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<sup>9</sup> In an April 10, 2019 e-mail, the employing establishment indicated that appellant could not return to duty until he provided updated medical documentation of any work limitations.

<sup>10</sup> Dr. Kammerman provided periodic reports dated May 8 through July 18, 2019, noting continued work restrictions.

<sup>11</sup> OWCP administratively combined File Nos. xxxxxx708 and xxxxxx928 under File No. xxxxxx827 with File No. xxxxxx827 as the master file.

In a May 15, 2019 development letter, OWCP advised appellant regarding his claims for compensation for the period February 25 through April 30, 2019, wage loss from February 25 through April 30, 2019, and leave buy back from March 8 through April 17, 2019. It specifically requested a complete, comprehensive narrative report from appellant's physician to include a history of injury and thorough explanation, with objective findings, as to how his condition had worsened such that he was no longer able to perform the duties of his position during the claimed period. OWCP afforded appellant 30 days to submit the evidence requested.

In a development letter of even date, OWCP advised the employing establishment of the required timekeeping forms needed for appellant to buy back leave for the period March 8 through April 17, 2019. It afforded the employing establishment 30 days to submit the necessary documents.

By decision dated July 17, 2019, OWCP denied compensation from February 25 through April 17, 2019, as appellant had not submitted medical evidence relevant to the claimed period. It noted that it had not received the necessary timekeeping forms and required evidence to provide payment for leave buy back commencing March 8, 2019. OWCP authorized payment of compensation from April 18 through 30, 2019.

On July 23, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with regard to the July 17, 2019 decision.

OWCP received reports dated from July 31 through October 9, 2019 by Dr. John P. Wilkerson, Jr., a Board-certified orthopedic surgeon, who summarized appellant's history of injury and treatment. Dr. Wilkerson diagnosed sinus tarsi syndrome of the left ankle, post-traumatic osteoarthritis of the right foot and ankle, and a sprain of the right talofibular ligament. On October 22, 2019 he performed an authorized right ankle arthroscopy with excision of sinus tarsal scar tissue, synovectomy, chondroplasty, and removal of an intraarticular loose body.<sup>12</sup>

Appellant also provided reports by Dr. Kammerman dated August 9 through September 13, 2019, noting ongoing bilateral foot and ankle symptoms.

A hearing was held on November 13, 2019. During the hearing, counsel stated that she would contact appellant regarding submitting medical evidence pertinent to the claimed period of disability. The hearing representative held the record open for 30 days to allow appellant to submit additional evidence.

OWCP subsequently received additional reports from Dr. Wilkerson dated October 28 through December 18, 2019, and from Dr. Kammerman dated December 20, 2019 through January 22, 2020, addressing appellant's ongoing symptoms.

By decision dated January 27, 2020, OWCP's hearing representative affirmed the July 17, 2019 decision, finding that appellant had not submitted medical evidence contemporaneous with the claimed period.

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<sup>12</sup> Appellant also provided a preoperative physical examination report and laboratory test results.

## LEGAL PRECEDENT

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 injury or illness without an intervening injury or new exposure to the work environment.<sup>13</sup> 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 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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>17</sup>

## ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability for the period February 25 through March 7, 2019 causally related to his accepted January 23, 2019 employment injury.

In his January 24, 2019 report, Dr. Hill noted appellant's history of bilateral ankle injuries, with moderate swelling of the left ankle. He diagnosed bilateral ankle sprains and held appellant off work through February 7, 2019, when he returned appellant to full duty. Dr. Hill did not,

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<sup>13</sup> 20 C.F.R. § 10.5(x).

<sup>14</sup> *Id.*

<sup>15</sup> Federal (FECA) Procedure Manual Part 2 -- Claims, *File Maintenance and Management, Doubling Case Files*, Chapter 2.1500.2 (June 2013); *P.R.*, Docket No. 20-0596 (issued October 6, 2020); *D.T.*, Docket No. 19-1064 (issued February 20, 2020).

<sup>16</sup> *See J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>17</sup> *Id.*

however, address the period of claimed recurrence.<sup>18</sup> 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 their disability and entitlement to compensation.<sup>19</sup> Thus, Dr. Hill's January 24, 2019 report is insufficient to meet appellant's burden of proof.

The remaining medical evidence of record postdates the claimed period of disability and does not provide an opinion concerning appellant's recurrence of disability for the period February 25 through March 7, 2019. Dr. Hill's February 21, 2019 letter, and the opinions of Drs. Holewinski, Kammerman, and Wilson do not address whether appellant was disabled for work from February 25 through March 7, 2019. They are, therefore, of no probative value and insufficient to establish the recurrence claim.<sup>20</sup>

As appellant has not submitted medical evidence establishing a recurrence of disability for the period February 25 through March 7, 2019, causally related to his accepted employment injuries, the Board finds that he has not met his burden of proof.

On appeal counsel alleges that the decision was contrary to law and fact, but has not cited any basis for such assertion. As explained above, appellant has not met his burden of proof.

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 his burden of proof to establish a recurrence of disability for the period February 25 through March 7, 2019, causally related to his accepted January 23, 2019 employment injury.

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<sup>18</sup> *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

<sup>19</sup> *P.R.*, *supra* note 15; *D.P.*, Docket No. 18-1439 (issued April 20, 2020); *William A. Archer*, 55 ECAB 674 (2004).

<sup>20</sup> *P.R.*, *supra* note 15; *M.L.*, Docket No. 18-1058 (issued November 21, 2019); *D.J.*, Docket No. 18-0200 (issued August 12, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27 , 2021  
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