

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

T.C., Appellant)	
)	
and)	Docket No. 23-1036
)	Issued: April 18, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL EMERGENCY MANAGEMENT)	
AGENCY, Oakland, CA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 1, 2023 appellant filed a timely appeal from a March 2, 2023 merit decision and a June 28, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish intermittent disability from work during the period February 28 through June 6, 2022, causally related to her

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 28, 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.*

accepted March 5, 2021 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 March 10, 2021 appellant, then a 28-year-old emergency management assistance specialist, filed a traumatic injury claim (Form CA-1) alleging that on March 5, 2021 she twisted her left ankle and hurt her right knee when she slipped on a rock and fell while in the performance of duty. OWCP initially accepted her claim for sprain of unspecified ligament of left ankle and subsequently expanded the acceptance of the claim to include sprain of tibiofibular ligament of left ankle. It paid appellant intermittent wage-loss compensation on the supplemental rolls from May 17 through August 14, 2021.

The employing establishment indicated that for the period from June 6 through September 13, 2021 appellant worked in a light-duty virtual assignment after which she elected to be deployed. The assignments which appellant worked from September 18 through October 15, 2021, and from October 30, 2021 through February 24, 2022, were all regular-duty deployment assignments. Appellant stopped work on February 24, 2022, following the end of her regular-duty assignment, and she elected not to deploy. As of June 7, 2022, she returned to pay status for training.

A March 10, 2022 functional capacity evaluation (FCE) indicated that appellant was capable of performing work at the medium level, with lifting up to 22.5 pounds floor to waist and up to 13 pounds frequent lifting. It found that she struggled with positional tolerances during material handling due to increased left leg pain when in a dependent standing position or walking. The evaluation recommended that appellant use a railing or ledge to aide in balance on stairs, and, due to left lower leg pain, no walking greater than 15 minutes, no standing greater than 45 minutes, no crouching/squatting, no crawling, and no climbing of ladders.

On March 11, 2022 OWCP received a report dated October 25, 2021 from Dr. Rebecca Cerrato, a treating Board-certified orthopedic surgeon. Dr. Cerrato indicated that appellant was seen for reevaluation of her left ankle, following left ankle sprain. She related that appellant's injury was complicated by complex regional pain syndrome (CRPS) for which she had received several nerve blocks. Dr. Cerrato further noted that since her last visit, appellant had deployed to a field site and if she was on her feet for over two hours her left ankle would be severely swollen. She related that appellant was restricted to work from home, rather than deployment. In an addendum dated February 7, 2022, Dr. Cerrato related that appellant's most recent magnetic resonance imaging (MRI) scan examination revealed an anterior medial talar osteochondral defect. She explained that appellant's CRPS could complicate an arthroscopic debridement procedure.

In March 11, 2022 letters, appellant indicated that her March 5, 2021 deployment service resulted in additional conditions of CRPS/reflex sympathetic dystrophy (RSD) and limitations. She advised that she was unable to physically deploy and no virtual work from home assignments were available.

On March 11 and April 1, 2022 appellant filed claims for compensation (Forms CA-7) for disability from work for the period February 28 through March 11, 2022, and March 14 through 25, 2022, respectively.

In a March 24, 2022 report, Dr. William Raofi, a Board-certified physiatrist, opined that appellant had CRPS type 1 of the left foot and ankle after a March 5, 2021 work-related ankle injury. In a March 24, 2022 note, he opined that she could return to work from home with no field deployments. Dr. Raofi indicated that appellant should remain off work if work was not available within those restrictions.

In an April 15, 2022 report, Dr. Cerrato noted examination findings of limited ankle motion, tenderness, discoloration, and hypersensitivity without ankle instability.

Other medical reports of record noted diagnoses of CRPS and RSD. Physical therapy reports were also submitted.

In development letters dated March 17 and April 11, 2022, OWCP advised appellant that additional evidence was needed to establish disability from work during the period claimed. OWCP afforded her 30 days to respond.

In letters dated March 17 and April 14, 2022, appellant reiterated that she could not be physically deployed and, as of February 26, 2022, there was no virtual work from home available. She reiterated that the medical evidence supported additional consequential conditions.

In a June 8, 2022 memorandum of telephone call (Form CA-110), the employing establishment related that appellant would have been permitted to continue on virtual deployment as light duty where she worked from home, but she elected, on her own, to be deployed. It indicated that her position did not require lifting over 20 pounds, that a logistic team was assigned to each deployment and was responsible for any lifting involved in the deployment, and that the most she would be required to lift, or carry was an iPad or a laptop. The employing establishment also noted that the walking/standing requirement would depend on the type of deployment. It further explained that if no deployments were available, some employees obtained unemployment benefits. The employing establishment advised that as of June 7, 2022, appellant was back in pay status for training.

Appellant continued to file CA-7 forms for disability from work for the periods March 28 through April 8, 2022, and April 11 through 22, 2022. In an April 25, 2022 development letter, OWCP advised her that additional evidence was needed to establish disability. It afforded appellant 30 days to respond.

OWCP developed the claim for a possible consequential condition of CRPS/RSD and, on May 25, 2022, informed appellant that she would be scheduled for a second opinion evaluation.

By decision dated June 8, 2022, OWCP denied appellant's claim for disability from work commencing February 28, 2022.

In a progress note dated June 13, 2022, Dr. Kevin Schafer, a treating orthopedic surgeon, referred appellant for an MRI scan due to poorly-controlled CRPS. In a June 15, 2022 report, Dr. Amiethab A. Aiyer, a Board-certified orthopedic surgeon, noted appellant's history of injury and provided an impression of osteochondral defect of talus and CRPS type 1 left lower extremity. He indicated that she had to get her CRPS under better control before surgery to remove the osteochondral defect.

In a June 16, 2022 report, Dr. John C. Barry, a Board-certified orthopedic surgeon and second opinion physician, reviewed a May 25, 2022 statement of accepted facts (SOAF) and the medical record, and presented examination findings. He opined that appellant's left ankle ligamentous injury appeared to have resolved with no need for further treatment. However, the MRI scan showed evidence of an osteochondral lesion at the talar dome medially which was probably due to the ankle injury and may require additional medical treatment, to include possible surgery. Thus, Dr. Barry opined that appellant had not reached maximum medical improvement (MMI). He further stated that his examination did not show the presence of any objective criteria diagnostic points for a CRPS diagnosis, which apparently been based primarily on appellant's complaints of allodynia. Dr. Barry indicated that due to appellant's persistent complaints of hypersensitivity at the ankle and foot, she does not appear to be capable of returning to her previous work, but could return to work with a 20-pound lifting restriction. In a June 16, 2022 work capacity evaluation (Form OWCP-5c), he opined that she could work a sedentary position with restrictions on walking and standing, and restrictions on pushing, pulling, and lifting no more than 10 pounds with no climbing.

On June 28, 2022 appellant's then-representative requested a hearing before a representative of OWCP's Branch of Hearings and Review. The representative indicated that appellant wanted to expand the acceptance of the claim to include additional consequential conditions of CRPS, osteochondral defect diagnosed on February 7, 2022, and adjustment disorder with mixed anxiety and depressed mood diagnosed on June 14, 2022. Additional evidence was received including treatment notes, and physical therapy notes from a medical facility, Drs. Paul Cohen, a Board-certified internist, and Dr. Cerrato, as well as a May 6, 2022 behavioral medicine evaluation.

On July 19, 2022 OWCP determined that a conflict in medical opinion existed between the opinions of Dr. Cerrato and Dr. Barry as to whether appellant developed a consequential left ankle CRPS causally related to the March 5, 2021 employment injury. On August 25, 2022 it referred appellant to Dr. Kenneth Tepper, a Board-certified orthopedic surgeon, serving as the impartial medical examiner (IME).

In an October 7, 2022 report, Dr. Tepper noted the history of injury, his review of the May 25, 2022 SOAF and medical record, and provided examination findings. He provided an impression of left ankle CRPS and left ankle talar osteochondral defect, which he opined were causally related to the March 5, 2021 employment injury. Dr. Tepper further opined that the work-related conditions had not resolved, and that appellant required further medical treatment, noting that she was not at MMI. In an October 7, 2022 Form OWCP-5c, he opined that appellant could only perform sedentary work with limitations on walking, climbing, operating a motor vehicle for half the number of hours, and pushing, pulling and lifting no more than 10 pounds for one hour.

A telephonic hearing was held on November 16, 2022.

By decision dated November 29, 2022, OWCP accepted the claim for the additional condition of CRPS 1 of left lower limb.

By decision dated January 30, 2023, OWCP expanded the acceptance of the claim to include the additional condition of talar osteochondral defect, left ankle.

By a second decision also dated January 30, 2023, OWCP's hearing representative set aside OWCP's June 8, 2022 decision and remanded the case for further development. It noted that further development was warranted to determine if disability for the period February 28 through June 6, 2022 was due to the additional accepted conditions of CRPS of the left limb, accepted on November 29, 2022, and a talar osteochondral defect left ankle, accepted on January 30, 2023. The hearing representative instructed OWCP to update the SOAF to include the two conditions recently accepted and refer the SOAF and medical records to its district medical adviser (DMA) for review and an opinion as to whether the claimed disability for the period February 28 through June 6, 2022 was due to the accepted work-related conditions.

On February 3, 2023 OWCP updated the SOAF to include the additional conditions of CRPS of left limb and talar osteochondral defect, left ankle and referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as OWCP's DMA. In a February 6, 2023 report, Dr. Harris reviewed the SOAF and the medical records, including the March 10, 2022 FCE, the March 24, 2022 report of Dr. Raoofi, and the June 16, 2022 second opinion report of Dr. Barry, which found that appellant was capable of performing full-duty work with restrictions. He further noted that Dr. Raoofi's March 24, 2022 note did not discuss work capacity. Furthermore, Dr. Cerrato, in her April 15, 2022 treatment note, indicated that appellant had limited ankle motion and hypersensitivity, but she did not discuss gait mechanics and employment capacity. The DMA concluded that while those reports documented appellant's condition, there was no discussion as to her work capacity or need for restrictions. Based on the physician's evaluations, Dr. Harris opined that appellant was not temporarily totally disabled for work as a result of the diagnosed conditions. In addition, the March 10, 2022 FCE indicated that appellant was capable of performing full-duty work activities with work restrictions. Dr. Harris thus opined that based on his review of the medical records, appellant was not totally disabled from work during the period February 28 through June 6, 2022, as a result of her accepted employment-related conditions.

By decision dated March 2, 2023, OWCP denied appellant's disability claim for the period February 28 through June 6, 2022, finding that she failed to submit sufficient medical evidence to establish that she was disabled as a result of her accepted medical conditions.

On April 6, 2023 appellant requested reconsideration. She continued to argue that she was disabled from work due to physical restrictions. Appellant submitted duplicative reports previously of record, which included Dr. Raoofi's March 24, 2022 report; a May 6, 2022 behavioral medicine evaluation; reports and referrals from Dr. Cerrato. She also submitted physical therapy reports, and medical reports pertaining to the medical treatment of her left talar osteochondral defect and CRPS of left ankle. This included: an April 20, 2023 report, from Dr. Andrew Harris, a Board-certified orthopedic surgeon, who provided an impression of CRPS of left ankle with a known left talar osteochondral defect and indicated that a new MRI scan would be performed before spinal cord stimulator placement; an April 20, 2022 report from Dr. Ohmin Kwon, a Board-certified physiatrist, who diagnosed CRPS type 1 of left lower extremity and recommended medical treatment prior to spinal stimulator or surgical intervention for osteochondral defect; and a June 16, 2022 report from Dr. Amiethab A. Aiyer, a Board-certified orthopedic surgeon, who diagnosed osteochondral defect of talus, CRPS type 1 of left lower extremity and recommended appellant follow-up with pain management to better control her CRPS prior to surgery to remove the osteochondral defect.

By decision dated June 28, 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

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁵ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁶ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.⁷

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.⁸

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.⁹

ANALYSIS -- ISSUE 1

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

³ See *S.F.*, Docket No. 20-0347 (issued March 31, 2023); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁵ See *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁶ See *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

⁷ See *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

⁸ *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

⁹ *K.A.*, Docket No. 19-1564 (issued June 3, 2020); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

Based on Dr. Tepper's October 7, 2022 IME opinion, OWCP expanded acceptance of the claim to include additional conditions of left ankle CRPS and a talar osteochondral defect. Per the hearing representative's January 30, 2023 decision, the SOAF was updated to include the additional conditions of CRPS of left limb and a talar osteochondral defect, left ankle. The Board finds that at the time OWCP referred appellant to Dr. Tepper, it did not request that Dr. Tepper address the issue of disability during the period February 28 through June 6, 2022. As OWCP subsequently expanded appellant's claim to include additional conditions of left ankle CRPS and a talar osteochondral defect, OWCP should have referred appellant to Dr. Tepper for an addendum report and a rationalized medical opinion on the issue of whether the accepted conditions rendered appellant disabled from work during the period February 28 through June 6, 2022.¹⁰

Upon return of the case record, OWCP shall refer appellant, if necessary, an updated SOAF, and the medical evidence of record, to Dr. Tepper for a supplemental opinion as to whether appellant was disabled from work during the period February 28 through June 6, 2022. After this and other such further development of the case record, OWCP shall issue a *de novo* decision regarding whether appellant has met her burden of proof to establish intermittent disability from work during the period February 28 through June 6, 2022, causally related to her accepted March 5, 2021 employment injury.

CONCLUSION

The Board finds that this case is not in posture for decision.¹¹

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); C.C., Docket No. 19-1631 (issued February 12, 2020).

¹¹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 2 and June 28, 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: April 18, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board