

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

B.F., Appellant)	
)	
and)	Docket No. 12-146
)	Issued: November 16, 2012
U.S. POSTAL SERVICE, POST OFFICE, Vorhees, NJ, Employer)	
)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 28, 2011 appellant, through her attorney, filed a timely appeal from a July 5, 2011 merit 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.

ISSUE

The issue is whether appellant has established a consequential back injury as a result of her accepted employment injuries.

FACTUAL HISTORY

On October 27, 2003 appellant, then a 43-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her left leg and shoulder in the performance of duty on October 14, 2003. She indicated that a case of mail had fallen and caused her to fall

¹ 5 U.S.C. § 8101 *et seq.*

backwards. OWCP accepted the claim for left ankle sprain and left tarsal tunnel syndrome. Appellant underwent left tarsal tunnel surgery on February 25 and May 21, 2004. She accepted a light-duty position on September 1, 2004.

In a report dated September 13, 2007, Dr. Todd Lipschultz, a Board-certified orthopedic surgeon, indicated that appellant was treated for left calf pain at the junction of the gastroc muscle and the tendon. He noted that it was in a different location from the tarsal tunnel and ankle pain and appellant denied any new trauma. In a report dated February 12, 2008, Dr. Daniel Ragone, a Board-certified physiatrist, indicated that appellant reported chronic left calf pain with associated numbness in the heel, as well as occasional low back pain. He indicated that appellant had an antalgic gait on the left.

On February 3, 2009 appellant filed a claim for a recurrence of disability commencing January 3, 2009. She submitted an undated attending physician's report (Form CA-20) from Dr. Brian Brislin, a Board-certified orthopedic surgeon, indicating appellant was treated on January 6, 2009 and diagnosing low back pain and degenerative disc disease. Dr. Brislin checked a box "yes" the conditions were employment related and report total disability commencing January 3, 2009. In a narrative report dated January 6, 2009, he indicated that appellant had been seen in the emergency room on January 3, 2009 for back pain. Dr. Brislin indicated that he had reviewed x-rays taken at the hospital and diagnosed degenerative disc disease at L2 through S1.

By decision dated April 16, 2009, OWCP denied the claim for a recurrence of disability. It found a back condition that was not employment related.

Appellant requested a hearing before an OWCP hearing representative, which was held on August 20, 2009. In a report dated October 4, 2009, Dr. Gene Salkind, a Board-certified neurosurgeon, provided a history and results on examination. He diagnosed degenerative disc disease and lumbar spondylosis. Dr. Salkind reported that appellant stated that as a result of her left tarsal tunnel syndrome her left foot would tire very easily and she would put her weight on her right foot and drag her left foot. He stated, "I do believe that her gait pattern was affected which ultimately caused her to favor her right leg. This ultimately reflected significant stress on her low back due to her altered gait pattern." Dr. Salkind also opined that appellant's job duties had aggravated her back and that she was disabled as of January 3, 2009.

By decision dated November 18, 2009, the hearing representative affirmed the April 16, 2009 OWCP decision, finding the evidence did not establish a recurrence of disability. The hearing representative also stated that, since OWCP had not addressed the consequential injury issue, it would not be addressed at that time.

In a letter dated February 17, 2010, appellant, through her representative, requested that OWCP make a determination with respect to a consequential injury. OWCP referred appellant to Dr. Robert Smith, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 27, 2010, Dr. Smith provided a history and results on examination. He stated that he needed to review a November 2008 MRI scan before he could render an opinion as to causal relationship of a back condition.

In a report dated July 26, 2010, Dr. Smith indicated that he had reviewed additional evidence. He opined that appellant's degenerative lumbar condition was preexisting and was not structurally aggravated by her work activities or an altered gait.

By decision dated January 30, 2011, OWCP determined that appellant had not established a back condition as a consequential injury. Appellant requested a hearing before an OWCP hearing representative, which was held on April 13, 2011.

In a decision dated July 5, 2011, the hearing representative affirmed the January 30, 2011 OWCP decision. The hearing representative found the weight of the evidence was represented by Dr. Smith. According to the hearing representative, there was no evidence in the medical record that appellant had complained of dragging her left foot.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.² Regarding the range of compensable consequences of an employment-related injury, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Thus, once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.³

Section 8123(a) of FECA provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁴ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to a referee physician, pursuant to section 8123(a) and the implementing regulations, to resolve the conflict in the medical evidence.⁵

² *Albert Ranieri*, 55 ECAB 598 (2004).

³ A. Larson, *The Law of Workers' Compensation* § 10.01 (November 2000).

⁴ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

⁵ *William C. Bush*, 40 ECAB 1064 (1989).

ANALYSIS

In the present case, appellant filed a claim for a recurrence of disability commencing January 3, 2009. At that time she was treated for complaints of back pain. Since a back injury had not been accepted with respect to this claim, the initial question presented is whether appellant has established a back condition as a consequence of the accepted left ankle sprain and left tarsal tunnel syndrome. The Board notes that the issue of whether work activity caused a back condition is not before the Board on this appeal.

An attending physician, Dr. Salkind, provided a probative opinion that appellant's altered gait from the left tarsal tunnel syndrome had contributed to appellant's degenerative disc disease and lumbar spondylosis. The hearing representative found that Dr. Salkind's opinion was of diminished probative value as the medical evidence did not show that appellant complained of dragging her left foot, as stated by appellant. The medical evidence from Dr. Lipschultz regarding left calf pain were generally brief reports that did not purport to contain a complete factual background. Moreover, Dr. Salkind did not base his opinion solely on appellant's statement that she dragged her left foot. He noted that appellant favored her right leg because of the accepted injuries and as a result her gait was altered. Dr. Ragone had noted an antalgic gait and occasional complaints of low back pain in his February 12, 2008 report.

The second opinion physician, Dr. Smith, opined that appellant's back condition was preexisting and was not related to an altered gait. He provided a probative medical opinion based on a complete background. In cases where there is a disagreement with respect to an opinion that an altered gait resulted in a consequential injury, the Board has found a conflict and remanded the case for resolution of the conflict pursuant to 5 U.S.C. § 8123(a).⁶ The Board finds there is a conflict between Dr. Salkind and Dr. Smith with respect to a consequential back injury. The case will be remanded to OWCP for resolution of the conflict in accord with established principles and procedures. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and will be remanded to OWCP for resolution of a conflict under 5 U.S.C. § 8123(a).

⁶ See *J.S.*, Docket No. 10-1938 (issued June 21, 2011); *G.B.*, Docket No. 07-1435 (issued February 21, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 5, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 16, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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