United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 13-227**
	)	**Issued: April 9, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Federal Way, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 1, 2012 appellant filed a timely appeal from a May 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied his disability compensation claim and a September 20, 2012 decision denying his claim for consequential injury. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant was disabled beginning July 7, 2011 as a result of his accepted November 28, 1998 employment injury; and (2) whether he sustained drug dependence as a consequence of his injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on November 28, 1998 appellant, then a 39-year-old letter carrier, sustained a fractured left tibia/fibia with internal fixation when he tripped on a water hose while delivering mail in the performance of duty. He stopped work on November 30, 1998 and received disability compensation. Appellant underwent authorized left tibia and fibula malreduction and revision of intramedullary (IM) nailing of the left tibia. In March 2000, he returned to work as a modified general clerk.[2] On May 30, 2000 OWCP reduced appellant's compensation. It determined that the position of modified general clerk fairly and reasonably represented his wage-earning capacity and that his actual wages met or exceeded the wages of the job held when injured.

On February 22, 2011 OWCP accepted consequential injuries of hyperkeratosis of the left ankle and plantar flexed fifth metatarsal. It authorized left fifth metatarsal head resection, which was performed on December 30, 2010. Appellant stopped work. He submitted claims for disability compensation beginning January 1 until August 8, 2011 and received wage loss until July 7, 2011.

In a July 1, 2011 hospital discharge report, Dr. Jacqueline Anderson, a Board-certified psychiatrist, related that appellant was examined for bacterial pyomyositis and necrotizing fasciitis secondary to methicillin-resistant staphylococcus aureus (MRSA) in his right thigh. She noted that he underwent a right thigh wound vacuum and wound change.

In a July 1, 2011 diagnostic report, Dr. Evert-Jan M. Imkamp, a Board-certified radiologist, noted that appellant underwent left foot surgery in December 2010. She observed a grossly normal alignment and unremarkable left foot and soft tissues.

In a July 7, 2011 report, Dr. Barney Yanklowitz, a podiatrist and food surgeon with the Department of Veterans Affairs, related that appellant underwent left foot surgery on December 30, 2010 and that his incision was well healed. He noted that appellant was currently under treatment for a right thigh abscess. Dr. Yanklowitz reported that appellant continued and persistent left foot pain and disability were not caused by his left foot surgery, but was due to his altered gait due to his right thigh condition. He explained that appellant's altered gait was exacerbating his service-connected conditions and that appellant needed 12 weeks for recovery.

In a July 7, 2011 duty status report, Dr. Yanklowitz stated that appellant sustained a consequential injury to his left foot and ankle due to tibia and fibular fractures. He also diagnosed foot pain and noted another disabling condition of MRSA abscess of the right thigh. Dr. Yanklowitz listed physical restrictions noting that appellant was not advised to resume work.

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[2] On May 12, 2000 OWCP granted appellant a schedule award for 22 percent permanent impairment for the left leg. The award ran from October 28, 1999 to January 14, 2001. Appellant submitted several requests for additional schedule award. In a decision dated April 25, 2012, OWCP denied his claim for additional schedule award. Because more than 180 days has elapsed between the April 25, 2012 decision and appellant's appeal on November 1, 2012, the Board does not have jurisdiction over the schedule award issue in this case. 20 C.F.R. § 501.3(e).

He noted lifting limitations, allowing up to five pounds without restrictions and setting specific hourly limitations on lifting up to 35 pounds.

On July 15, 2011 OWCP informed appellant that the evidence submitted was insufficient to establish total disability beginning July 7, 2011. It requested additional evidence to establish that he was disabled from work as a result of his November 28, 1998 employment injury.

Appellant submitted the December 30, 2010 surgical report for the left fifth metatarsal resection and a diagnostic report that revealed status post resection of distal fifth metatarsal with internal fixation plate and screw in the distal fibula and tibia. He also resubmitted Dr. Yanklowitz's reports.

In a decision dated August 24, 2011, OWCP denied appellant's claim for disability compensation beginning July 7, 2011. It found that the medical evidence established that he was not totally disabled after July 7, 2011 as a result of the November 28, 1998 employment injury or left foot surgery.

On September 15, 2011 appellant submitted a request for reconsideration. He stated that all of the clinic notes maintained that his work restrictions remained in place. Appellant resubmitted various medical reports regarding treatment for his left leg from 1998 to 2010.

In a January 20, 2011 report, Dr. Soren Lance Olson, an orthopedic surgeon, noted a history of appellant's left tibia and fibular shaft fractures that were treated by Dr. Henley in 1998. He noted that appellant previously was a mail carrier but worked a desk job due to his limitations. On examination, Dr. Olson observed a well-healed incision of the left lower extremity with no pain to palpation over the ankle. Appellant had full extension and stable knee ligamentous. Dr. Olson reported that appellant's condition was unchanged from previous evaluations and restrictions, and opined that his condition was fixed and stable at this time.

In an August 5, 2011 Form CA-17 report, Dr. Yanklowitz noted that appellant underwent left foot surgery on December 30, 2010 and that his surgical site was well healed. He set forth no physical limitations on lifting or carrying up to five pounds and noted hourly restrictions on lifting up to 35 pounds. Dr. Yanklowitz listed that appellant had reached maximum medical improvement and authorized his return to work on August 8, 2011 with the noted permanent restrictions.

In a September 1, 2011 x-ray report, Dr. Cyrus Paul Bateni, a Board-certified diagnostic radiologist, noted appellant's complaints of knee pain and previous tibial fracture. He observed that the nail and interlocking screws through the left tibia and fixation plate and multiple screws across the distal fibula appeared intact. Dr. Bateni concluded that prior fracture sites in the distal tibia and fibula were well healed.

In a September 1, 2011 report, Dr. M. Bradford Henley, a Board-certified orthopedic surgeon, related a history that appellant sustained a tibia fracture for which he underwent surgery. He noted that appellant had several other medical problems, including a deep wound infection, supposedly MRSA, to his right thigh, additional foot surgery and back discomfort. Dr. Henley examined appellant intermittently over the years and recommended that he transfer his care to another attending physician who lived closer to him. Appellant was seen by

Dr. Steven Teeny, a Board-certified orthopedic surgeon, who, on September 29, 2009, noted that appellant's tibial fracture had healed and that his condition was completely stable. He disagreed and sought treatment from Dr. Henley. Examination revealed strength throughout and ability to heel walk and toe walk. Dr. Henley observed fairly symmetric quadriceps and calf circumferences. He stated that he was unwilling to override Dr. Teeny's recommendation and advised appellant to see an occupational medicine physician instead of an orthopedic surgeon.

In a September 12, 2011 report, Dr. Yanklowitz related that appellant underwent left foot surgery on December 30, 2010 for treatment of painful pressure-induced plantar keratoma. He stated that appellant's surgical site was well healed and maximum medical improvement reached with permanent restrictions as noted on the CA-17 forms. In response to the denial of appellant's claim, Dr. Yanklowitz noted that a December 13, 2010 x-ray of appellant's left foot revealed subtalar and midtarsal joint supination with the fifth metatarsals and inverted vertical bisector. Appellant's demonstrated varus left ankle position caused the demonstrated supinated/inverted/varus left foot position which forced the lateral half of his left foot to be plantar prominent in relation to the medial half of his left foot. Dr. Yanklowitz reported that the following seven years of longstanding and walking and daily use of custom molded pedal orthoses, left foot surgery had not resolved appellant's painful pressure-induced chronic foot pain, altered gait and permanent work-related disabilities. He recommended that appellant undergo another capacity evaluation to show that his November 28, 1998 injury induced his chronic foot pain, altered gait and permanent work disabilities.

By decision dated October 18, 2011, OWCP denied appellant's request for reconsideration finding that he failed to submit new and pertinent evidence sufficient to warrant further merit review.

On May 2, 2012 appellant submitted a request for reconsideration. He noted that a December 8, 2011 physical capacity evaluation showed that he continued to have permanent limitations of his left leg and foot due to his November 28, 1998 employment injury. Appellant also stated that, in an October 31, 2011 report, Dr. Yanklowitz clearly stated that he had temporary total disability due to his accepted consequential injury and authorized December 2010 left foot surgery.

In the October 31, 2011 report, Dr. Yanklowitz stated that appellant underwent left foot surgery on December 30, 2010 and reached maximum medical improvement. He reiterated that appellant was unable to resume his usual work-related duties and that he was on temporary total disability for the period July 8 to August 8, 2011. Dr. Yanklowitz provided an explanation of the "biomechanical process" linking appellant's conditions and his work-related disabilities as stated in his September 12, 2011 report.

In a March 5, 2012 duty status report, Dr. Dave Cundiff, Board-certified in public health and general preventive medicine, stated that on November 28, 1998 appellant sustained a fracture to his left tibia and fibula when he tripped on a water hose and noted that he sustained a consequential left foot kerotoma injury. He reported that appellant had multiple left foot injuries and thoracolumbar spasm and pain. Dr. Cundiff authorized appellant to return to work on August 20, 2011 with restrictions with specified limitations on lifting from 5 to 35 pounds.

In a March 20, 2012 OWCP-5 work capacity evaluation form, Dr. Cundiff noted appellant's diagnosed conditions of left leg tibia and fibular fractures and consequential left foot kerotoma. He stated that after work conditioning appellant still had significant physical limitations. Dr. Cundiff checked "yes" that appellant reached maximum medical improvement and noted that the time length of his restrictions was indefinite.

On April 19, 2012 appellant called OWCP and alleged that he developed a drug dependency due to the pain medication he was prescribed.

On April 23, 2012 OWCP advised appellant that the evidence was insufficient to establish that he sustained a consequential condition causally related to the November 28, 1998 injury. It requested that he submit a medical report from his physician who included a history of the consequential injury, findings on examination, a firm diagnosis and a rationalized medical opinion explaining the causal relationship between his accepted injury and his alleged consequential condition.

In a May 3, 2012 report, Dr. Henley stated that he had no changes to make after the December 2012 performance capacity evaluation and his December 22, 2011 report. He stated that appellant related "that he became addicted to opiates and is requesting detoxification followed by a 21-day educational program." Dr. Henley noted that he had not prescribed any narcotics to appellant since 1999, but appellant related that he obtained such medications through other manners and still used them. Appellant stated that his addiction started with the treatment of his tibia fracture and that he continued to take narcotics. Dr. Henley supported appellant's request for detoxification and reeducation. He opined that appellant no longer needed care for his tibia fracture because it had healed.

In a May 3, 2012 report, Dr. Joshua Lindsey, a general surgeon and colleague of Dr. Henley, noted that he examined appellant for a left tibia shaft fracture. He related that appellant requested to go to detoxification because he had been taking oxycodone and potentially medical marijuana for pain control. Appellant stated that he used any means necessary to obtain pain medication including going to different emergency rooms, hospitals and off the streets. Dr. Lindsey noted that appellant had minimal complaints about his leg and felt like it had healed but he was still unable to return to his prior employment. Examination of the right leg revealed range of motion from 0 to 120 degrees and stable varus and valgus stress. Dr. Lindsey observed no pain to palpation and intact sensation throughout appellant's foot. X-rays from appellant's last visit demonstrated union of his tibia and near neutral alignment. Dr. Lindsey stated that he was not currently prescribing pain medication and that his office had not prescribed pain medication for several years. He reported that appellant's fracture was healed and that whether he was able to go back to work was to be decided by him and his employer.

In a decision dated May 14, 2012, OWCP denied modification of the August 24, 2011 decision. It determined that the medical evidence was insufficient to establish that appellant was totally disabled as of July 7, 2011 due to the November 28, 1998 employment injury. In a May 6, 2012 statement, appellant requested that his substance abuse issues be approved due to his November 28, 1998 employment injury and subsequent left leg surgeries. He contended that he did not have any substance abuse issues until his tibial fracture and that he did not have any issues with opiates of any kind prior to his accident. Appellant noted that his family life was

suffering because of his addiction to pain medication and that he was serious about undergoing a treatment program.

By decision dated September 20, 2012, OWCP denied appellant's consequential injury claim, finding that his drug dependence was not a consequential condition arising from the November 28, 1998 injury or subsequent surgeries.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee must establish that he or she was disabled for work as a result of the accepted employment injury. Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of reliable, probative and substantial medical opinion evidence.[3] Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.[4]

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.[5] 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.[6]

ANALYSIS -- ISSUE 1

OWCP accepted that on November 28, 1998 appellant sustained a left leg tibia and fibular fracture in the performance of duty. It also accepted that he sustained consequential injuries of left ankle hyperkeratosis and plantar flexed fifth metatarsal. Appellant received disability compensation and returned to work in March 2000. On December 30, 2010 he underwent authorized left fifth metatarsal head resection. Appellant stopped work again. He submitted claims for wage-loss compensation for the period January 1 to August 8, 2011 and received disability compensation until July 7, 2011. Appellant bears the burden of proof to establish that his disability from work from July 7 to August 8, 2011 was causally related to his accepted employment injury.[7] The Board finds that he has failed to meet his burden of proof to

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[3] *Amelia S. Jefferson,* 57 ECAB 183 (2005); *William A. Archer,* 55 ECAB 674 (2004).

[4] *Dean E. Pierce,* 40 ECAB 1249 (1989).

[5] *Laurie S. Swanson,* 53 ECAB 517, 520 (2002); *see also Debra A. Kirk-Littleton,* 41 ECAB 703 (1990).

[6] *Amelia S. Jefferson, supra* note 4.

[7] *Supra* note 4.

establish that he was disabled from work beginning July 7, 2011 as a result of his November 28, 1998 employment injury.

Appellant submitted numerous reports by Dr. Yanklowitz. On July 7, 2011 Dr. Yanklowitz completed a Form CA-17 advising that appellant had a well-healed left foot surgery. While noting that appellant could not return to his regular work as a letter carrier. Dr. Yanklowitz noted, however, that appellant had the capacity for unrestricted duty lifting or carrying up to 5 pounds and specified limitations on intermittent weights up to 35 pounds. He reiterated these limitations in an August 5, 2011 Form CA-17. The record supports that appellant returned to limited duty under these restrictions. In September 12 and October 31, 2011 reports, Dr. Yanklowitz stated that appellant was totally disabled for the period July 8 to August 8, 2011. He noted that he would provide the rationale explaining the biochemical process for appellant's disability after July 7, 2011 to his November 28, 1998 employment injury. Dr. Yanklowitz reported generally that appellant's demonstrated varus left ankle and foot position forced the lateral half of his left foot to be plantar prominent. He explained that following seven years of standing and walking, despite left foot surgery, had not resolved his painful pressure-induced chronic foot pain, altered gait and required permanent work-related disabilities. Dr. Yanklowitz noted that appellant remained unable to resume his "usual work" as a letter carrier but did not address the modified duty to which appellant was assigned. In July 7, 2011 reports, he also noted that appellant was currently being treated for a right thigh MRSA abscess. Dr. Yanklowitz stated that appellant's continued and persistent left foot pain and disability were not caused from his left foot surgery but by his altered gait due to his right thigh condition. The Board finds that he failed to provide a well-rationalized report supporting disability after July 7, 2011.[8] Dr. Yanklowitz initially attributed appellant's inability to work to a right thigh condition and not his accepted left foot injury and subsequent surgeries. These reports, therefore, are insufficient to establish appellant's claim.

In a January 20, 2011 report, Dr. Olson provided an accurate history of injury regarding appellant's November 28, 1998 employment injury. Upon examination, he observed no pain to palpation over the ankle and stable knee ligamentous. Dr. Olson opined that appellant's condition was fixed and stable. The Board finds that he did not address whether appellant was disabled from work from July 7, 2011. Dr. Olson stated only that appellant's condition was stable and did not mention his capacity for work from July 7 to August 8, 2011. In a May 3, 2012 report, Dr. Olson concluded that appellant's fracture had healed. Similarly, Dr. Henley, in his September 1, 2011 report, conducted an examination and advised that he was unwilling to override another physician's recommendation that appellant's tibial fracture had healed. As neither physician addressed appellant's capacity for work as of July 7, 2011, the reports do not support appellant's wag-loss claim. Additionally, in the July 1, 2011 diagnostic report, Dr. Imkamp observed normal alignment and unremarkable left foot and soft tissues. The Board finds that none of the reports provided a rationalized medical explanation as to whether appellant was disabled from July 7 to August 8, 2011 as a result of the accepted November 28, 1998 employment injury.

[8] *K.S.,* Docket No. 11-2071 (issued April 17, 2012); *Cleona M. Simmons,* 38 ECAB 814 (1987).

In March 5 and 20, 2012 reports, Dr. Cundiff noted appellant's November 28, 1998 tibial fracture and consequential left foot kerotoma injury. He also stated that appellant had multiple left foot injuries and thoracolumbar spasms and pain. Dr. Cundiff reported that after work conditioning he still had significant physical capacity limitations. He authorized appellant to return to work on August 20, 2011 with restrictions. Although Dr. Cundiff noted that appellant still had significant physical limitations, he did not attribute those limitations to the November 28, 1998 employment injury. He did not address appellant's work capacity as of July 7, 2011. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[9] Dr. Cundiff failed to provide any opinion on appellant's disability for the period claimed. Without a clear opinion relating an inability to work due to the accepted November 28, 1998 injury, the Board finds that his reports are insufficient to establish his disability claim.

The additional reports by Drs. Bateni and Anderson are similarly insufficient to establish appellant's claim as they do not address whether he was disabled from July 7 to August 8, 2011 due to the November 28, 1998 employment injury. Both physicians noted appellant's diagnoses of tibia and fibular fractures and that he underwent left foot surgery. Dr. Anderson further reported that appellant was examined for MRSA in his right thigh.

On appeal, appellant contends that his left foot was not properly healed since he had to undergo numerous surgeries. He contends that Dr. Yanklowitz's reports are sufficient to establish his entitlement to wage loss as of July 7, 2011. As noted, however, Dr. Yanklowitz's September 12 and October 31, 2011 reports failed to address the limitations the physician recommended as of July 7 and August 5, 2011. The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to his employment injury and supports that conclusion with sound medical reasoning.[10] Appellant has not submitted such rationalized medical evidence in this case.

LEGAL PRECEDENT -- ISSUE 2

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 attributable to the employee's own intentional conduct.[11] The Board has held that the subsequent progression of an employment-related condition "remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[12] A claimant weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the

[9] *R.E.,* Docket No. 10-679 (issued November 16, 2010); *K.W.,* 59 ECAB 271 (2007).

[10] *V.L.,* Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid,* 52 ECAB 382 (2001).

[11] *Clement Jay After Buffalo,* 45 ECAB 707, 715 (1994); *John R. Knox*, 42 ECAB 193, 196 (1990).

[12] *Raymond A. Nester,* 50 ECAB 173, 175 (1998); *Robert W. Meeson*, 44 ECAB 834, 839 (1993).

further medical complication flows from the compensable injury, *i.e.,* "so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances."[13]

A claimant bears the burden of proof to establish a claim for consequential injury. As part of this burden, he must present rationalized medical opinion evidence, based on a complete medical and factual background, establishing causal relationship.[14] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[15]

ANALYSIS -- ISSUE 2

Appellant alleges a consequential drug-dependency condition due to the pain medication he took for his accepted left foot conditions. He bears the burden of proof to provide rationalized medical evidence to establish that treatment of his accepted employment injuries caused or contributed to his dependency on drugs.

In a May 3, 2012 report, Dr. Henley related that appellant had become addicted to opiates. He reported, however, that his office had not prescribed any narcotics to appellant since 1999; rather appellant acknowledged other sources for such medications. Similarly, Dr. Lindsey stated that he had not prescribed pain medication for several years. Neither physician provided a medical opinion to support appellant's claim that he developed a drug dependence condition as a result of his accepted left foot conditions. Both physicians noted that his left foot conditions had healed and they had not prescribed pain medication for years. The reports fail to provide support for appellant's contention that any dependency arose due to his accepted condition or surgeries. The Board finds that he has not provided medical opinion evidence to establish his consequential injury claim.

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.

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[13] *S.M.*, 58 ECAB 166 (2006); *Raymond A. Nester,* 50 ECAB 173, 175 (1998).

[14] *Jennifer Atkerson,* 55 ECAB 317 (2004); *R.C.,* Docket No. 10-1789 (issued April 22, 2001).

[15] *D.S.,* Docket No. 09-860 (issued November 2, 2009); *B.B.,* 59 ECAB 234 (2007).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he was disabled from July 7 to August 8, 2011 as a result of his November 28, 1998 employment injury.[16] The Board also finds that he has not met his burden of proof to establish that he developed a drug-dependence condition as a consequence of his accepted left foot conditions.

ORDER

IT IS HEREBY ORDERED THAT the September 20 and May 14, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 9, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[16] The Board notes that appellant submitted additional evidence following the May 14, 2012 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt,* 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.