

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID SUMMERHILL and U.S. POSTAL SERVICE,  
POST OFFICE, Gary, IN

*Docket No. 01-1117; Submitted on the Record;  
Issued March 25, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant established that his preexisting foot condition was aggravated by factors of his federal employment.

On September 16, 1998 appellant, then a 39-year-old mailhandler, filed a notice of occupational disease claiming that his foot condition was caused by factors of his federal employment. He stated that he works on his feet for 8 to 10 hours per day, 6 days a week, pushing and pulling heavy equipment and that these activities caused severe pain and swelling in his feet, at times causing them to bleed, eventually leading to extensive foot surgery.

On July 28, 1998 appellant's treating physician, Dr. George V. Tsoutsouris diagnosed appellant with "severe degenerative joint disease with hallux valgus, bilateral feet." In a report dated September 17, 1998, he opined that appellant's position as a mailhandler aggravated his preexisting foot condition due to the nature of his work, including stooping, lifting, pushing and pulling. Appellant eventually underwent foot surgery on August 10, 1998 and returned to sedentary duty on October 8, 1998.

The Office of Workers' Compensation Programs accepted appellant's claim on November 4, 1998 for "aggravation of hallux valgus, bilateral, exostosis, bilateral base of 5<sup>th</sup> metatarsal, contracted left 4<sup>th</sup> toe and degenerative joint disease, bilateral." The claim was accepted based on an aggravation of a preexisting condition.

By letter dated November 16, 1998, the Office referred appellant, along with a statement of accepted facts and medical evidence of record, to Dr. Julie M. Wehner, a Board-certified orthopedic surgeon, for a second opinion examination. The Office wanted to determine whether appellant's preexisting condition and subsequent aggravation necessitated his August 10, 1998 foot surgery.

Dr. Wehner examined appellant on December 21, 1998 and submitted a report dated the same day, in which she discussed the history of appellant's preexisting condition and surgeries and stated:

“[Appellant] may have had an exacerbation of his problems by his walking at the post office, however, I believe this would be a temporary exacerbation. There are many people at this type of employment who do not develop these types of problems and[,] therefore, there is no medical reason to expect that this type of job caused the problem that required the recent surgery, therefore, I do not feel the recent surgery was job related.”

The Office found a conflict between appellant's treating physician, Dr. Tsoutsouris and the second opinion physician, Dr. Wehner and referred appellant to Dr. Marvin E. Gold, a Board-certified orthopedic surgeon, to resolve the conflict.

Dr. Gold examined appellant on March 10, 1999 and submitted a report dated February 25, 1999, in which he opined that appellant's preexisting condition and the subsequent job-related aggravation did necessitate his August 10, 1998 surgery.

When asked by the Office to clarify his opinions, Dr. Gold submitted a supplemental report dated September 9, 1999, in which he stated: “[a]ppellant's work at the [employing establishment] has had nothing to do with the condition of his feet other than to cause pain while performing his duties.” He indicated that any progression in the deterioration of his feet was due to the natural progression that occurs with time and the aging process. Dr. Gold concluded that appellant's last surgery was not work related.

By letter dated November 17, 1999, the Office referred appellant to Dr. George Holmes, a Board-certified orthopedic surgeon, for a second independent medical examination. In a report dated December 1, 1999, Dr. Holmes stated that he agreed with the opinion of Dr. Gold and concluded that appellant's August 10, 1998 surgery was not a consequence of any job-related aggravation.

By decision dated March 6, 2000, the Office found that appellant's employment factors did not accelerate, aggravate or precipitate the preexisting foot conditions to warrant the August 10, 1998 foot surgery.

By letter dated February 19, 2001, appellant requested reconsideration. He indicated that he did not understand how his claim could be accepted as employment related on November 4, 1998 and the surgery denied on March 6, 2000. In support of his request, appellant submitted a copy of a statement of accepted facts, a copy of the Office's letter accepting his claim, a copy of a letter from his agency challenging his claim, a copy of the Office's March 6, 2000 decision and a copy of a limited-duty assignment.

By decision dated March 5, 2001, the Office denied appellant's request for reconsideration.

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

In this case, the Office accepted appellant's claim for "aggravation of hallux valgus, bilateral, exostosis, bilateral base of 5<sup>th</sup> metatarsal, contracted left 4<sup>th</sup> toe and degenerative joint disease, bilateral." Appellant's attending physician, Dr. Tsoutsouris, opined that appellant's employment duties as a mailhandler aggravated his preexisting condition and necessitated the August 10, 1998 foot surgery. The second opinion physician, Dr. Wehner, opined that appellant's position may have caused a temporary exacerbation of his condition, but did not necessitate the need for the August 10, 1998 foot surgery. Because of the conflict in medical opinion evidence between Drs. Tsoutsouris and Wehner, the Office referred appellant to Dr. Gold for an impartial medical examination.

Dr. Gold initially opined on February 25, 1999 that appellant's preexisting condition and the subsequent job-related aggravation necessitated the August 10, 1998 surgery. He subsequently stated in his September 9, 1999 report that appellant's duties at the employing establishment had nothing to do with the condition of his feet other than to cause pain and that his last surgery was not job related.

The Office referred the case record to Dr. Holmes, a second impartial specialist, without explaining why it did so. Dr. Holmes stated that he agreed with the opinion of Dr. Gold. The Office then weighed the medical evidence from Drs. Wehner, Gold and Holmes and found in its March 6, 2000 decision that appellant's employment factors did not accelerate or aggravate his preexisting condition to warrant the surgery.

The Board has found that in situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>1</sup>

In this case, the Office incorrectly referred the case record to a second impartial specialist without explaining why it did so. The Office should have given special weight to the impartial medical opinion of Dr. Gold or explained why it considered Dr. Gold's report defective and the necessity to send appellant for a new impartial medical examination. Instead, the Office referred the case record to Dr. Holmes. After obtaining Dr. Holmes' opinion, the Office weighed the medical evidence from Drs. Wehner, Gold and Holmes. Once the Office declares a conflict in medical evidence, such conflict can only be properly resolved by a duly selected impartial medical examination.

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<sup>1</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990).

Accordingly, the March 6, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development.

Dated, Washington, DC  
March 25, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member