

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANK B. GILBRETH and U.S. POSTAL SERVICE,  
POST OFFICE, Larchmont, NY

*Docket No. 02-1310; Submitted on the Record;  
Issued May 14, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On October 30, 2000 appellant, then a 51-year-old letter carrier, filed an occupational disease claim alleging that on September 6, 2000 he realized that his left foot condition was aggravated by factors of his federal employment. Appellant stated that he aggravated a left foot infection due to walking eight to nine miles per day as a letter carrier.

In support of his claim, appellant submitted correspondence between himself, the employing establishment and his treating physicians regarding his ability to work. He also submitted a magnetic resonance imaging (MRI) report dated March 11, 2000 regarding his left foot. It indicated abnormal enhancement suggestive of osteomyelitis of the fifth metatarsal head with surrounding soft tissue edema and no discrete abscess collection. It also indicated abnormal enhancement and signal involving the base and shaft of the second metatarsal, which was also suggestive of osteomyelitis. Appellant submitted a February 29, 2000 document authorizing medical treatment for an abscess of his left foot. In disability certificates dated February and March 6, 2000 Dr. Joel S. Buchalter, a Board-certified orthopedic surgeon and treating physician, noted that appellant had an abscess of the left foot and that he was unable to work. Dr. Buchalter's September 11, 2000 disability certificate noted a diagnosis of an infected foot, that appellant was admitted into the hospital on September 8, 2000 and that he was totally disabled until further notice. Appellant submitted a May 16, 2000 letter from Dr. Gerald Singer, a Board-certified internist and employing establishment physician, releasing him to return to work.

The employing establishment controverted appellant's claim on the grounds that the medical evidence submitted failed to establish that appellant's injury was caused or aggravated

by his employment.<sup>1</sup> The employing establishment contended that the medical evidence predated the date of injury as indicated by appellant on his occupational disease claim form.

By letter dated December 13, 2000, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office advised appellant about the type of factual and medical evidence he needed to submit to establish his claim.

Appellant submitted a narrative statement dated January 2, 2001 contending that his foot condition was due to standing two to four hours a day and walking on his route to deliver mail approximately six hours each day. Appellant stated that he had congenital sensory neuropathy, which caused poor sensation in his lower extremities and prevented him from noticing a problem until it persists. He alleged that his work factors caused an infection in his left foot. Appellant noted that the medical treatment he received and his physician's opinion that his job requirements contributed to his condition.

In a March 7, 2001 report, Dr. Buchalter indicated that he first treated appellant in December 1993 for an infected right foot status post podiatric surgery. He diagnosed congenital sensory neuropathy, which rendered appellant susceptible to chronic injury and infection because he did not have protective sensation of his foot. Dr. Buchalter noted that appellant had been treated for foot problems intermittently since that time and that he was evaluated on February 7, 2000 for an infection in his left foot by his associate, Dr. Nicholas Bavaro, an orthopedic surgeon. Dr. Buchalter provided a history of appellant's subsequent medical treatment for this condition. He diagnosed congenital sensory neuropathy with recurrent infections in the left foot, including osteomyelitis and soft tissue infections and stated that appellant had recurrent infections in his left foot due to factors of his employment as a letter carrier. Dr. Buchalter further stated that the infections were brought on by the underlying condition of congenital sensory neuropathy. He opined that appellant's disability from work from February 7, 2000 until the end of February was secondary to injuries sustained as a result of factors of his employment. Dr. Buchalter opined that appellant's disability from February and March 2000 through mid-May 2000 and August 26 through September 6, 2000 was also secondary to injuries sustained as a result of his employment. He stated that these disabilities were secondary to congenital sensory neuropathy in which case appellant's ambulation as a letter carrier caused injuries to his left foot resulting in infections. Dr. Buchalter stated that appellant's condition was permanent and that appellant's underlying condition of congenital sensory neuropathy would lead to recurrent injuries or recurrent infections and loss of work. He stated that appellant had not reached maximum medical improvement as his condition required future treatment. Dr. Buchalter noted that appellant did not have any loss of range of motion, but exhibited a deformity, complete loss of sensation in the plantar surface and dorsal surface of the foot, thereby, causing recurrent soft tissue damage, scarring and drainage of his left foot. He concluded that, secondary to the underlying foot condition, appellant would be susceptible to recurrent injuries to his foot and should not work as a letter carrier.

Appellant submitted excerpts of a transcript from a January 15, 1998 hearing before an Office representative regarding his neurological condition.

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<sup>1</sup> The employing establishment indicated that appellant filed a previous claim assigned number 02-0715267 for a similar condition that was denied.

By decision dated June 23, 2001, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. The Office accepted that appellant stood while sorting mail between two to four hours a day and delivered mail on foot up to six hours a day. The Office, however, found that Dr. Buchalter's March 7, 2001 report failed to provide any medical rationale explaining how or why the accepted employment factors aggravated appellant's preexisting neurological condition.

In a letter dated November 1, 2001, appellant, through his counsel, requested reconsideration. In support of his request, appellant submitted an undated narrative statement providing a history of his left foot condition dating back to February 2000. He also resubmitted Dr. Buchalter's March 7, 2001 report.

By decision dated January 28, 2002, the Office denied appellant's request for a review of the merits of his claim on the grounds that it was cumulative, repetitious, irrelevant and immaterial, and thus, insufficient to warrant a review of its prior decision.

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

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>3</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>5</sup>

In support of his claim, appellant submitted a March 11, 2000 MRI scan report revealing abnormal enhancement suggestive of osteomyelitis of the fifth metatarsal head and second metatarsal of the left foot. This report, however, does not address whether appellant's conditions were caused by factors of his employment.

In a March 7, 2001 report, Dr. Buchalter reviewed the history of appellant's congenital foot condition from when he first treated appellant in 1993. He addressed appellant's left foot infection of February 2000 and opined that appellant's recurrent left foot infections were caused by factors of his federal employment as a letter carrier. He reviewed appellant's medical treatment through September 2000, noting that the ambulation required by appellant's job as a letter carrier contributed to the reinfections resulting from the underlying congenital sensory neuropathy. Dr. Buchalter attributed appellant's left foot condition of osteomyelitis and disability or work as secondary to congenital sensory neuropathy aggravated by factors of his employment as a letter carrier.

Proceedings under the Act<sup>6</sup> are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>7</sup>

The Board finds that while Dr. Buchalter's opinion that appellant's work duties aggravated his underlying foot condition is generally supportive of appellant's claim, it is not sufficiently rationalized to meet his burden of proof. Dr. Bishop's report does, however, raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.<sup>8</sup> The case will be remanded to the Office for further development of the medical evidence. On remand the Office should prepare a statement of accepted facts, which includes a description of appellant's work duties and refer appellant to an appropriate medical specialist for an opinion on whether he sustained a left foot condition aggravated by factors of his federal employment. After such further development as is necessary, the Office should issue a *de novo* decision on appellant's claim.<sup>9</sup>

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<sup>5</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *Id.*

<sup>9</sup> In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.

The January 28, 2002 and June 23, 2001 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC  
May 14, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member