



## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and the law of the case as set forth in the Board's prior decision are hereby incorporated by reference.<sup>1</sup> The relevant facts are set forth below.

On September 26, 1986 appellant, then a 32-year-old temporary general mechanic, was injured in a motor vehicle accident while in the performance of duty. The Office accepted his claim for lumbar and cervical sprains; displacement of a lumbar intervertebral disc without myelopathy; intervertebral disc disorder with myelopathy, lumbar region; right carpal tunnel syndrome; and prolonged depressive reaction.

In a May 5, 2006 report, Dr. James G. Floyd, an attending Board-certified orthopedic surgeon, diagnosed: (1) chronic neck and upper extremity pain, radicular in nature, related to degenerative changes in the upper portion of the cervical spine and associated with bilateral symptoms consistent with carpal tunnel syndrome; (2) chronic lower back pain with radicular symptoms that involve both lower extremities but more prominent in the left lower extremity than the right, occasionally associated with muscle cramps in the lower extremity and in the left foot, as well as some weakness with prolonged standing, sitting, bending and lifting; (3) complaints of pain in the knees bilaterally, associated with mild to moderate degenerative arthritis; and (4) evidence of a hammertoe deformity, particularly the 2<sup>nd</sup> through the 4<sup>th</sup> toes, as well a hallux valgus deformity in the left lower extremity.

By letter dated October 30, 2006, appellant requested authorization for custom shoes following surgery on his left foot which he attributed to his work injury. By letter dated November 6, 2006, the Office returned this request to appellant, noting that no consideration for the purchase could be made since his claim had not been accepted for any foot injury. Appellant submitted letters contending that his bilateral foot condition was causally related to the accepted work injury.

In a February 12, 2007 report, Dr. Floyd had noted that appellant had been treated for complaints of pain in both feet related to deformities of hallux valgus on the left foot and hammertoe deformities. He noted that, on examination, appellant had no significant nerve root findings of a specific loss in a dermatomal distribution but did have findings of decreased range of motion and stiffness in both feet. Appellant also complained of spasms in the lower leg and foot and in the arch bilaterally. It was recommended that he have an orthotic device to support his lower extremity and surgery to correct the deformity in his left foot and surgery was performed without difficulty. As of Dr. Floyd's examination of appellant, no orthotic devices had been received. He opined: "The pain in [appellant's] foot is thought to be related to mild imbalance in his flexor group of the lower extremities, specifically the left side and I am not certain of its causal relation with his previous problem with his lower back in 1986." Dr. Floyd further noted, "It is possible that [appellant's] symptoms ... in the lower extremity, as well as some of the upper extremity symptoms, may be related to his previous diagnosis of fibromyalgia.

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<sup>1</sup> Docket No. 01-1563 (issued August 25, 2004).

On April 3, 2007 appellant forwarded copies of medical records which documented that he had been complaining about his feet for years. Progress notes by an unknown author dated December 22, 1986 through February 14, 1987, indicated that appellant had trouble with his feet among other complaints. Notes from the Cooper Green Hospital dated September 24, 1987 found that appellant had pain in his feet, worse on the left side. A March 6, 1989 note listed pain in his legs and toes. In a report dated January 22, 1992, Dr. Charles W. Breaux, a Board-certified surgeon, noted that during examination, appellant complained of pain radiating to the left big toe. In an April 19, 2001 report, Dr. Floyd indicated that appellant experienced pain in the plantar aspect of the second toe in the region of the second metatarsal.

By decision dated April 30, 2007, the Office denied appellant's claim for a bilateral foot condition due to the accepted injury. It found that the medical evidence did not provide a firm diagnosis or any opinion relating his condition to the September 29, 1986 motor vehicle accident.

On June 23, 2007 appellant requested review of the written record. He submitted reports from Cooper Green Hospital dated August 19, 1987 through October 18, 1991, noting complaints of pain in his feet. In a January 29, 1987 report, Dr. Gordon J. Kirschberg, a Board-certified neurologist, also advised that appellant complained, of pain in his toes.

In a decision dated July 27, 2007, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record as it was untimely filed.

By letter dated October 16, 2007, appellant requested reconsideration of the April 30, 2007 decision. He submitted an October 18, 1992 medical report from Dr. Breaux who listed the impairments related to the September 26, 1986 motor vehicle accident as: "surgically treated disc lesion, with residual symptoms, namely left L5 radiculopathy involving left thigh, leg and foot." In a June 5, 2007 report, Dr. Floyd provided impairment ratings for various members of appellant's body. As to appellant's feet, Dr. Floyd was "uncertain as to any other findings at this point for his lower extremity complaints from his foot and ankle." Dr. Floyd noted that appellant had complained of foot and ankle discomfort starting in 1986 and had foot deformities treated in 2006. He did not rate impairment because "as of this dictation there appear to be no relationships agreed upon the Department of Labor for the lower extremity problems and his old deformities of his lower extremities...."

By decision dated December 20, 2007, the Office denied modification of the April 30, 2007 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. 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.<sup>2</sup> Under the Federal Employees' Compensation Act, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted appellant's claim for a lumbar sprain; cervical sprain; displacement of a lumbar intervertebral disc without myelopathy; intervertebral disc disorder with myelopathy, lumbar region; right carpal tunnel syndrome; and prolonged depressive reaction. However, it rejected appellant's claim that he sustained a bilateral foot condition due to the accepted injury. The Board finds that appellant has not submitted rationalized medical opinion evidence relating any foot condition to his September 29, 1986 work-related motor vehicle accident. The medical evidence submitted by appellant consists largely of treatment records which list his complaint of "foot pain" without any further explanation. Dr. Breaux and Dr. Kirschberg noted pain to the feet as did the records from Cooper Green Hospital. However, neither physician provided an explanation as to how the accepted motor vehicle accident may have caused or contributed to any part of appellant's feet. For this reason, these records are not probative on the issue of causal relations. The only physician to address the September 29, 1986 accident and appellant's foot condition was Dr. Floyd. However, he stated that he was "not certain of its causal relation with his previous problem with his back in 1986." In fact, Dr. Floyd attributed the symptoms to appellant's diagnosis of fibromyalgia. Accordingly, the medical evidence is insufficient to establish that appellant's injury caused his bilateral foot condition. The Board finds that the Office properly denied acceptance of any injury to his feet.

### **LEGAL PRECEDENT -- ISSUE 2**

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.<sup>4</sup> A request for either an oral hearing or review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.<sup>5</sup> If the request is not made within 30 days, a claimant is not entitled to a hearing or review of the written record as a matter of right. Furthermore, Office regulations provide that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>6</sup>

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<sup>2</sup> *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>3</sup> *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *James L. Hearn*, 29 ECAB 278, 287 (1978).

<sup>4</sup> 20 C.F.R. § 10.615 (2008).

<sup>5</sup> 20 C.F.R. § 10.616(a).

<sup>6</sup> *Id.*

Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and it must exercise such discretion.<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's request for review of the written record was postmarked June 23, 2007 which is more than 30 days after the Office issued its April 30, 2007 decision. The regulations clearly specify that the request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing or review of the written record is sought.<sup>8</sup> Appellant's request was, therefore, untimely and as such, he is not entitled to review of the written record as a matter of right.

In its July 27, 2007 decision, the Branch of Hearings and Review also denied appellant's request on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional evidence to the district Office. This is considered a proper exercise of the hearing representative's discretionary authority.<sup>9</sup> Moreover, there is no evidence indicating that the Branch of Hearings and Review otherwise abused its discretion in denying appellant's request.

Accordingly, the Board finds that the Branch of Hearings and Review properly exercised its discretion in denying appellant's request for an oral hearing.

### **CONCLUSION**

The Board finds that the Office properly denied expanding appellant's claim to include acceptance for a foot condition. The Board further finds that it properly denied appellant's request for review of the written record as untimely filed.

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<sup>7</sup> See *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994); *Herbert C. Holley*, 35 ECAB 140 (1981).

<sup>8</sup> 20 C.F.R. § 10.616(a).

<sup>9</sup> *Mary B. Moss*, 40 ECAB 640, 647 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 20, July 27 and April 30, 2007 are affirmed.

Issued: April 7, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board