

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

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A.R., Appellant	)	
	)	
and	)	<b>Docket No. 11-590</b>
	)	<b>Issued: September 27, 2011</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Des Moines, IA, 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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 4, 2011 appellant filed a timely appeal from a July 23, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his occupational disease claim and a September 30, 2010 decision, which denied his request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> 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 met his burden of proof to establish that his right ankle condition was causally related to factors of his employment; and (2) whether OWCP properly denied appellant's July 27, 2010 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 25, 2010 appellant, then a 48-year-old mail handler, filed an occupational disease claim alleging that he sustained osteochondritis dissecans and underwent a debridement of his right ankle as a result of working on a low cost tray sorter (LCTS), pivoting back and forth down different lanes and lifting heavy tubs and trays of mail at work. He first became aware of his condition and realized it was caused by his employment on October 1, 2009 and was last exposed to employment factors on May 26, 2010.<sup>2</sup> Appellant also submitted a payrate information sheet.

In a November 30, 2009 report, Dr. Dennis Kessler, a podiatrist, noted appellant's complaints of ankle pain and discomfort, particularly in the anterior aspect of the ankle. Radiology reports revealed bone osteophytic change to the distal anterior tibial plafond. Dr. Kessler diagnosed symptomatic osteochondritis with a symptomatic anterior talar exostosis and recommended surgical intervention.

In a December 23, 2009 report, Dr. Kessler stated that he had treated appellant for a recurrence of right ankle pain and osteochondritis dissecans, which was improving fairly well until appellant's recent complaints. A magnetic resonance imaging (MRI) scan report revealed findings compatible with osteochondritis dissecans and subsequent surgical debridement with a defect similar in size, but he did not observe an unstable or displaced fracture. Dr. Kessler also noted anterior ankle osteophytic changes along the distal talar plafond, which required surgical resection and debridement of the ankle. In a February 22, 2010 report, he diagnosed symptomatic osteochondritis dissecans with a symptomatic anterior exostosis.

In a May 24, 2010 work status report, Dr. Kessler diagnosed a foot injury and authorized appellant for sedentary work only. On May 25, 2010 the employing establishment provided a job offer as a limited-duty mail handler.

On June 15, 2010 OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested additional information. It asked for a description of the employment-related activities which he believed contributed to his condition, all his activities outside of his federal employment, the development of the claimed condition and the date he started working at LCTS. OWCP also requested a comprehensive medical report from appellant's treating physician, which included a description of symptoms, results of examinations and tests, medical diagnosis, treatment provided and an opinion based on medical rationale regarding whether his employment activities contributed to the development of his condition.

On June 15, 2010 OWCP requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's statements regarding this claim, a statement whether the agency agreed with his allegations and a copy of his position description.

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<sup>2</sup> The record also reflects that appellant sustained a previous work-related injury on December 23, 1996, File No. xxxxxx986.

OWCP received an undated and unsigned duty status report from an unknown provider and a description of appellant's position.

In a March 30, 2009 statement, appellant described his employment activities, which included picking up letter trays and flat tubs that slid down rollers, repetitive walking back and forth in lanes, pushing all purpose containers (APC) or over the road (OTR) containers out of the line up and staging them to be loaded up on the trailers. He worked in a building with nine lanes with each lane having 10 to 20 APC's or OTR's and performed these activities for eight hours a day, five days a week. Appellant believed these activities caused extra stress on his knees and ankles. His nonemployment-related activities included working on the computer around 2 hours a week, reading 10 to 15 hours a week, watching television 20 hours a week and doing yard work 1 to 2 hours a week.

Appellant explained that his knees and ankles began aching in April 2009. In October 2009, his left ankle pain became even more severe than in the past and became constant. Appellant described a sharp pain on top of the ankle, radiating down both sides of the ankle joint, which worsened with standing or walking. He also felt a crunching and grinding sensation in his ankle joint, with swelling and redness.

In June 9, 2010 reports, Dr. Kessler reiterated that appellant was awaiting surgical approval through workmen's compensation for his right ankle condition. He again noted that the pain was located primarily in the anterior aspect of appellant's ankle. Dr. Kessler diagnosed ankle arthritis and osteochondritis disease and modified his work duty to include four hours of daily standing and four hours of daily sitting.

In a decision dated July 23, 2010, OWCP denied appellant's claim. It found insufficient medical evidence to establish that his right ankle condition was causally related to the factors of his employment. OWCP accepted that appellant's duties as a postal worker involved picking up letter trays and flat tubs and repetitive walking back and forth in lanes, but the medical evidence did not provide a physician's opinion relating how the employment activities caused or contributed to his right ankle condition.

On September 18, 2010 appellant submitted a request for reconsideration and explained that his injury was ongoing since a previous December 23, 1996 injury. In a September 14, 2010 report, Dr. Kessler stated that he had treated appellant over the past several years regarding his ankle injury and opined that appellant's medical condition was causally related to his previous work event. He reported that appellant had suffered from this condition for an extended period of time and he believed the condition was 100 percent related to appellant's work conditions. Dr. Kessler explained that, as a mail handler, appellant would be on his feet for extended periods of time, which would aggravate his diagnosed condition. He stated that appellant needed surgery and warned that the longer surgery was postponed, the more complex and aggravated his condition would become.

By decision dated September 30, 2010, OWCP denied appellant's request for reconsideration finding that he did not provide relevant legal arguments or medical evidence that was not previously considered sufficient to warrant merit review.

## LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence<sup>3</sup> including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.<sup>4</sup> In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>5</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>6</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether a causal relationship exists between the employee's diagnosed condition and the specified employment factors or incident.<sup>7</sup> 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>8</sup> The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.<sup>9</sup>

## ANALYSIS -- ISSUE 1

OWCP accepted that appellant's duties as a mail handler required picking up letter trays and tubs and repetitively walking back and forth down six lanes. It denied his occupational disease claim on the grounds of insufficient medical evidence to establish causal relationship.

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<sup>3</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>4</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

<sup>5</sup> *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000); *D.U.*, Docket No. 10-144 (issued July 27, 2010).

<sup>6</sup> *D.I.*, 59 ECAB 158 (2007); *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009).

<sup>7</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

<sup>9</sup> *Patricia J. Bolleter*, 40 ECAB 373 (1988).

The Board finds that appellant did not submit sufficient medical evidence demonstrating that the accepted activities caused or contributed to his right ankle condition.

Appellant submitted medical reports from Dr. Kessler, who noted appellant's complaints of ankle pain and discomfort, particularly in the anterior aspect of the ankle and reviewed appellant's history. Radiology reports revealed bone osteophytic change to the distal anterior tibial plafond and an MRI scan showed findings compatible with osteochondritis dissecans. Dr. Kessler diagnosed symptomatic osteochondritis with a symptomatic anterior talar exostosis and recommended surgery. He did not, however, provide any opinion regarding the cause of appellant's right ankle condition or explanation of how his condition was causally related to his federal employment. As medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship, these reports are insufficient to establish appellant's claim.<sup>10</sup> Furthermore, Dr. Kessler did not mention any of appellant's employment duties or discuss how any specific activities, such as repetitively walking back and forth and lifting mail trays and tubs, caused or contributed to his right ankle condition. The Board has found that rationalized medical evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician.<sup>11</sup> Appellant has failed to provide such rationalized medical evidence in this case.

On appeal, appellant states that he obtained a second opinion and that the physician agreed with Dr. Kessler that his job contributed to his condition. The Board's jurisdiction, however, is limited to evidence that was before OWCP at the time it issued its final decision.<sup>12</sup> The Board may not consider this evidence for the first time on appeal.<sup>13</sup> As the medical evidence of record does not contain probative medical opinion discussing how appellant's right ankle condition was caused or aggravated by factors of his employment, OWCP properly denied appellant's 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.

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

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>14</sup> OWCP's regulations provide that OWCP may

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<sup>10</sup> *A.D.*, 58 ECAB 149 (2006); *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

<sup>11</sup> *Solomon Polen*, 51 ECAB 341 (2000); *J.J.*, Docket No. 09-27 (issued February 10, 2009).

<sup>12</sup> *See* 20 C.F.R. § 501.2(c).

<sup>13</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>14</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to OWCP.<sup>15</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>16</sup>

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.<sup>17</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>18</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>19</sup>

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

On September 18, 2010 appellant submitted a request for reconsideration along with a September 14, 2010 report by Dr. Kessler. On September 30, 2010 OWCP denied merit review finding that Dr. Kessler's report was duplicative because it was substantially similar to the medical evidence previously considered. The Board finds that the case is not in posture for decision.

In support of his reconsideration request, appellant provided a September 14, 2010 report by Dr. Kessler, who stated that he had treated appellant over the past several years for the ankle injury. Unlike his previous reports, however, Dr. Kessler also opined that appellant's condition was causally related to his previous work event and was 100 percent related to his work conditions. He further explained that, as a mail handler, appellant was on his feet for extended periods of time, which aggravated his diagnosed condition. This medical evidence is relevant, pertinent and new evidence regarding the issue of causal relationship. Whether or not this evidence is sufficient to establish causal relationship goes to the weight of the evidence and therefore goes beyond the standard to be applied to reopen a case for further review of the merits.<sup>20</sup> The requirement for reopening a claim for merit review does not include the

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<sup>15</sup> 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>16</sup> *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>17</sup> *Id.* at § 10.607(a).

<sup>18</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>19</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>20</sup> *See J.F.*, Docket No. 10-1217 (issued March 2, 2011); *D.G.*, Docket No. 06-1099 (issued September 22, 2006).

requirement that a claimant shall submit all evidence necessary to discharge his burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.<sup>21</sup> Accordingly, OWCP should have reviewed appellant's case on the merits.

**CONCLUSION**

The Board finds that OWCP improperly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 23, 2010 is affirmed and the decision dated September 30, 2010 is set aside and the case remanded for further review consistent with this decision.

Issued: September 27, 2011  
Washington, DC

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

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

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

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<sup>21</sup> *Billy B. Scoles*, 57 ECAB 258 (2005); *Sydney W. Anderson*, 53 ECAB 347 (2002).