

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

D.K., Appellant and U.S. POSTAL SERVICE, POST OFFICE, Beatrice, NE, Employer))))))))	Docket No. 12-428 Issued: July 6, 2012
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 ALEC J. KOROMILAS, Alternate Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2011 appellant filed a timely appeal from a June 27, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his occupational disease claim and an October 20, 2011 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (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 established that he sustained bilateral degenerative arthritis of his feet, hip and back due to factors of his federal employment; and (2) whether OWCP properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 7, 2011 appellant, then a 51-year-old city letter carrier, filed an occupational disease claim alleging that he sustained degenerative arthritis of both feet as a result of walking 8 to 10 miles per day in the course of his federal employment. He related that his gait changed due to the pain and swelling in his feet causing his “hips and knees to become involved.” Appellant did not stop work.

In a report dated March 11, 2011, Dr. Troy L. Miller, an osteopath, evaluated appellant for pain in his leg and hip. He diagnosed myalgias and noted that appellant was “getting new in-soles for his shoes.”

In a duty status report dated March 21, 2011, Dr. Torrey Rassfeld, a podiatrist, found that appellant could perform his usual employment.

By letter dated May 3, 2011, OWCP informed appellant that the evidence was currently insufficient to meet his burden of proof. It requested additional factual and medical information, including a detailed medical report containing a diagnosis and explaining the relationship between the diagnosed condition and work factors.

In a report dated March 10, 2011, Dr. Rassfeld evaluated appellant for complaints of pain at lateral dorsal area of the foot and at the left first metatarsophalangeal (MP) joint. Appellant’s pain increased after standing and after sitting extended periods. Dr. Rassfeld noted that appellant used custom orthotics. He provided findings on examination and diagnosed hallux limitus, osteoarthritis and pain. Dr. Rassfeld recommended new orthotics.

On April 19, 2011 Dr. Harold G. Jacot, a chiropractor, indicated that appellant had experienced a flare-up of tenderness in his lower back. The pain increased with “extensive walking.” On examination Dr. Jacot found lower back tenderness on palpation at L4-5.

In a report dated April 20, 2011, Dr. Terry Troxel, a podiatrist, found that appellant’s condition had improved after use of his new orthotics. He diagnosed hallux limitus, osteoarthritis and pain.

In a May 18, 2011 statement, appellant related:

“Walking on my job causes my arches to fall. The space fills with fluid, causing pain and eventually calcifies into degenerative arthritis. The degenerative arthritis in my feet causes my gait to change in order to compensate for the pain. This compensation causes overuse and inflammation in muscles in the legs, hips and back progressively as the pain continues. Some of these trigger points in the muscles remain contracted so much that they do not relax normally.”

Appellant related that he walked 8 to 10 miles a day at work carrying up to 35 pounds.

By decision dated June 27, 2011, OWCP denied appellant’s claim finding that the medical evidence was insufficient to establish that he sustained a medical condition causally related to the accepted work factors.

On September 26, 2011 appellant requested reconsideration. He submitted an undated and unsigned duty status report that did not provide a diagnosis, clinical findings or any work restrictions.²

In a decision dated October 20, 2011, OWCP denied appellant's request for reconsideration after finding that he had not submitted relevant evidence or raised a legal argument sufficient to warrant reopening his case for further merit review.

On appeal appellant argued that a report from Dr. Rassfeld addressed the causal relationship between his foot, leg and hip conditions and his work delivering mail.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while 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.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

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;⁶ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁷ and (3) medical evidence establishing 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.⁸

The medical evidence required to establish causal relationship generally 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.⁹ The

² The duty status report is nearly illegible.

³ 5 U.S.C. § 8101 *et seq.*

⁴ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁷ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁸ *Beverly A. Spencer*, 55 ECAB 501 (2004).

⁹ *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

opinion of the physician must be based on a complete factual and medical background of the claimant¹⁰ and must be one of reasonable medical certainty¹¹ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹²

ANALYSIS -- ISSUE 1

Appellant attributed his bilateral foot, back and hip continuous from an altered gait while delivering mail for 8 to 10 hours a day. OWCP accepted the occurrence of the claimed employment factors. The issue, therefore, is whether the medical evidence establishes a causal relationship between the claimed conditions and the accepted employment factors.

On March 10, 2011 Dr. Rassfeld evaluated appellant for complaints of pain at the lateral dorsal area of the foot and the left first MP joint that increased with standing or prolonged sitting. He diagnosed hallux limitus, osteoarthritis and pain and recommended new orthotics. In a March 21, 2011 duty status report, Dr. Rassfeld determined that appellant could perform his usual employment. In the reports, however, he did not discuss the work factors to which appellant attributed his condition or address the cause of the hallux limitus and osteoarthritis. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.¹³

On March 11, 2011 Dr. Miller described appellant's complaints of leg and hip pain and diagnosed myalgias. He indicated that he was getting insoles for his shoes. Dr. Miller did not discuss causation and his report is of little probative value on the issue of causal relationship.¹⁴

On April 19, 2011 Dr. Jacot, a chiropractor, found that appellant had experienced a flare-up of low back tenderness. Section 8101(2) of FECA provides that the "term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...."¹⁵ A chiropractor cannot be considered a physician under FECA unless it is established that there is a subluxation as demonstrated by x-ray evidence.¹⁶ As Dr. Jacot did not

¹⁰ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹¹ *John W. Montoya*, 54 ECAB 306 (2003).

¹² *Judy C. Rogers*, 54 ECAB 693 (2003).

¹³ *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, *supra* note 9.

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

¹⁶ OWCP's regulations, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

diagnose a subluxation as demonstrated by x-ray, he is not considered a “physician” under FECA and his report is of no probative medical value.¹⁷

In a report dated April 20, 2011, Dr. Troxel diagnosed hallux limitus, osteoarthritis and pain and found that appellant’s symptoms had improved with new orthotics. As he did not address the cause of the diagnosed conditions, his report is of little probative value.¹⁸

On appeal appellant maintained that he submitted a report from Dr. Rassfeld addressing causal relationship. The record, however, does not contain such a report. 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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁹ OWCP’s regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²⁰ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²¹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.²²

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²³ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²⁴ While the reopening of a case may be predicated

¹⁷ *Isabelle Mitchell*, 55 ECAB 623 (2004).

¹⁸ *See A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of little probative value on the issue of causal relationship).

¹⁹ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application.”

²⁰ 20 C.F.R. § 10.606(b)(2).

²¹ *Id.* at § 10.607(a).

²² *Id.* at § 10.608(b).

²³ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

²⁴ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁵

ANALYSIS -- ISSUE 2

On September 26, 2011 appellant requested reconsideration. He did not identify a specific point of law or show that it was erroneously applied or interpreted or advance a new and relevant legal argument. In support of his request for reconsideration, appellant submitted an undated, unsigned duty status report that was devoid of clinical findings, a diagnosis, a causation finding or work restrictions. It is thus irrelevant to the underlying issue, which is whether appellant sustained a foot, back or hip condition causally related to the identified work factors. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.²⁶

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not established that he sustained bilateral degenerative arthritis of his feet or hip and back problems due to factors of his federal employment and that OWCP properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128.

²⁵ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

²⁶ *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the October 20 and June 27, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 6, 2012
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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