

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pueblo, CO, Employer**

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**Docket No. 16-0205
Issued: October 11, 2016**

Appearances:
*John S. Evangelisti, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 13, 2015 appellant, through counsel, filed a timely appeal from a June 25, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish right knee or back conditions causally related to factors of his federal employment.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference.

On July 19, 2012 appellant, then a 46-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an aggravation of chronic right knee strain, chronic left ankle strain with a permanent aggravation of arthritis, lumbar degenerative joint disease, sacroiliac joint dysfunction, myofascial pain syndrome, and thoracic myofascial syndrome due to factors of his federal employment. He stopped work on March 1, 2010.⁴

In a report dated April 12, 2012, Dr. Jack L. Rook, a Board-certified physiatrist, evaluated appellant for complaints of low back, right knee, and left ankle pain. He noted that appellant had a history of work injuries, including an accepted claim, assigned file number xxxxxx055, for a right knee contusion and lumbosacral strain sustained on December 18, 1995 after he fell on stairs. Dr. Rook further noted that on August 1, 1997 appellant fell off a porch injuring his back. Appellant filed a recurrence of disability under file number xxxxxx055 for the August 1, 1997 fall, but it was denied. OWCP also accepted in file number xxxxxx213 that on July 19, 2005 he sprained his left ankle.

On examination Dr. Rook found full strength of the lower extremities with no atrophy, tenderness of the left sacroiliac joint, left paralumbar muscle spasm, and tenderness of the posterior right knee capsule. He diagnosed chronic right knee strain, chronic left ankle strain, a permanent aggravation of underlying ankle joint arthritis with osteochondritis dessicans on magnetic resonance imaging (MRI) scan study, chronic low back pain, a history of L4-5 degenerative disc disease, sacroiliac joint dysfunction on the left, myofascial pain syndrome, and thoracic myofascial pain syndrome. Dr. Rook advised that appellant's back condition was "likely perpetuated by [appellant's] ongoing work activities and over time his back pain did progressively worsen as his mail routes seemed to get progressively longer. However, from a medical perspective, it seems to me that it would be most appropriate to label his thoracic and lumbar spinal injuries as being secondary to the fall that occurred on August 1, 1997."

Dr. Rook further obtained a history of appellant sustaining multiple right knee injuries at work, including injuries on December 18, 1995 and July 12, 2006. He indicated that a left ankle injury aggravated appellant's right knee condition. Dr. Rook opined that lifting, twisting, and bending while casing and delivering mail over a period of years stressed the annular fibers of his lumbar spine. He concluded, "This type of activity likely caused some degree of degeneration to [appellant's] L4/5 disc and it likely also caused significant stress to the muscles of his back resulting in the associated myofascial condition."

By decision dated October 17, 2012, OWCP denied appellant's claim after finding that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the identified work factors. It found that Dr. Rook's April 2012 report was

³ Docket No. 14-0214 (issued May 7, 2014).

⁴ Appellant retired on disability effective October 4, 2010.

insufficiently rationalized to show that his employment caused or aggravated these diagnosed conditions.

On November 12, 2012 appellant, through counsel, requested an oral hearing. At the hearing, held on March 22, 2013, counsel asserted that Dr. Rook's opinion was based on an accurate history and review of the medical records. He maintained that OWCP did not explain why Dr. Rook's opinion lacked rationale. Counsel noted that appellant had a prior accepted claim on July 19, 2005 for a left ankle injury under file number xxxxxx213.

In a March 12, 2013 report, Dr. Rook diagnosed a permanent aggravation of left ankle joint arthritis and osteochondritis.⁵ He quoted from his April 12, 2012 report finding that a July 19, 2005 work injury likely aggravated an underlying degenerative joint disease.

By decision dated June 5, 2013, the hearing representative affirmed the October 17, 2012 decision. She found that there was no rationalized medical evidence showing that the claimed conditions were caused or aggravated by employment. The hearing representative informed appellant that he could pursue a recurrence of an accepted condition under the claim number for that injury.

Appellant appealed to the Board. In a decision dated May 7, 2014, the Board affirmed the June 5, 2013 decision denying his occupational disease claim.⁶ The Board found that Dr. Rook's opinion that appellant's employment "likely" aggravated lumbar disc and left ankle degeneration was speculative in nature. The Board further determined that Dr. Rook relied upon an inaccurate history of accepted work injuries on August 1, 1997 and July 12, 2006, diminishing the probative value of his opinion.

By letter dated May 28, 2014, counsel requested that Dr. Rook explain his use of the term "likely" in his April 12, 2012 report and provide an opinion assuming that the August 1, 1997 and July 12, 2006 incidents were not due to employment.

In a report dated June 1, 2014, Dr. Rook advised that he used the term "likely" to mean medical probability, or more likely than not. He noted that appellant sustained a work injury to his right knee and low back on December 18, 1995 when he fell down stairs, accepted by OWCP for a right knee contusion and lumbosacral strain. Dr. Rook opined, "This condition has persisted since the 1995 injury. It was aggravated and perpetuated by [appellant's] work activities as a letter carrier. These activities included repetitive lifting, twisting, carrying, bending, and prolonged weight-bearing." Dr. Rook noted that appellant periodically missed work as a result of "flare-ups of back and knee pain" and retired on disability in January 2010 as he was unable to continue working due to left ankle and back pain.⁷ He discussed the

⁵ On March 28, 2013 counsel submitted a February 22, 2012 letter he sent to Dr. Rook and medical evidence dated 1995 through 2006 that the physician had reviewed in reaching his April 12, 2012 conclusion.

⁶ Docket No. 14-0214 (issued May 7, 2014).

⁷ Dr. Rook noted that OWCP had accepted that appellant sustained an aggravation of degenerative joint disease due to his July 19, 2005 employment injury. He indicated that he would not address the left ankle injury as it had been accepted.

examination findings from his April 2012 report and diagnoses of chronic right knee strain and chronic low back pain with a history of L4-5 degenerative disc disease, left sacroiliac joint dysfunction, myofascial pain syndrome, and a negative lower extremity neurological examination. Dr. Rook described appellant's work duties and opined that the repetitive activities associated with casing and mail delivery stressed annular fibers on the outside of his lumbar disc. He related, "With medical probability, I would state that these activities contributed to accelerated degeneration of [appellant's] L4-5 disc level. Additionally, I felt that these activities caused stress to his low back musculature resulting in perpetual muscle spasm, muscle fiber microtrauma, and scar tissue formation. I render these opinions with medical probability."

Dr. Rook additionally determined that appellant had chronic right knee strain that was aggravated by weight-bearing work such as mail casing and deliver. He opined, "With prolonged standing activities, there is quadriceps muscle contraction which pushes the patella back into the notch formed by the medial and lateral femoral condyles. This direct and prolonged impact causes gradual erosion/degeneration of the cartilage of the joint thereby perpetuating his ongoing knee condition." Dr. Rook concluded that, with medical probability, appellant experienced a permanent aggravation of his right knee and low back condition due to his work duties and noted that he had provided "a pathophysiological explanation for his worsening back and knee pain." He noted that his use of "likely" in his prior report meant "a 51 [percent] likelihood as opposed to less than 50 [percent]."

On July 17, 2014 counsel requested reconsideration.

By decision dated November 10, 2014, OWCP denied modification of its June 5, 2013 decision. It found that Dr. Rook's report was speculative in nature and that he relied upon an inaccurate history.

On December 11, 2014 counsel again requested reconsideration. He questioned why OWCP found that Dr. Rook had relied upon an inaccurate history of injury, noting that it was not explained in the decision.

In a decision dated December 29, 2014, OWCP denied modification of its November 10, 2014 decision. It found that Dr. Rook relied upon a history of appellant sustaining work injuries on August 1, 1997 and July 12, 2006.

On March 6, 2015 counsel requested reconsideration.⁸ He noted that OWCP did not adjudicate whether the July 12, 2006 work injury occurred as alleged. Counsel also indicated that appellant filed the August 1, 1997 injury claim as a recurrence of disability and OWCP advised him to file a new injury claim. He requested that OWCP determine whether the events occurred as alleged. Counsel submitted a medical report from August 1, 1997 discussing appellant's fall from a landing and evidence from 1999 regarding a notice of recurrence of disability in 1997 due to a December 18, 1995 work injury. He further provided an October 8, 1999 OWCP decision finding that appellant had not established a recurrence of disability on

⁸ In a statement dated February 28, 2015, appellant described an injury that occurred on an unspecified date when a shelf fell on his right knee.

August 1, 1997 after he jumped off a porch escaping a dog. OWCP advised appellant to file a new claim rather than a recurrence of disability.

By decision dated March 16, 2015, OWCP denied appellant's request for reconsideration after finding that he had failed to submit evidence or had failed to raise an argument sufficient to warrant reopening the case for further merit review under 5 U.S.C. § 8128.

On March 27, 2015 appellant, through counsel, again requested reconsideration. He contended that the opinion of Dr. Rook was not speculative. In a report dated April 2, 2015, Dr. Rook indicated that he expressed the opinions in his April 12, 2012 report within reasonable medical certainty.

By decision dated June 25, 2015, OWCP denied modification of its November 10 and December 29, 2014 decisions. It found that Dr. Rook did not fully describe the etiology of the diagnosed conditions, including the baseline from which the aggravation occurred. OWCP also determined that he based his opinion in part on August 1, 1997 and July 12, 2006 work injuries not accepted as work related.

On appeal counsel contends that he did not have to show that OWCP accepted the August 1, 1997 and July 12, 2006 incidents and that OWCP should determine whether the events occurred as alleged. He maintains that the opinion of Dr. Rook is uncontroverted and sufficient to warrant further development of the evidence, citing Board case law and OWCP procedures.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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.⁹ 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.¹⁰

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;¹¹ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;¹² and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for

⁹ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *See Ellen L. Noble*, 55 ECAB 530 (2004).

¹¹ *Michael R. Shaffer*, 55 ECAB 386 (2004).

¹² *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

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.¹³

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,¹⁴ must be one of reasonable medical certainty¹⁵ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁶

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁷ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁸

ANALYSIS

Appellant filed an occupational disease claim alleging an aggravation of chronic right knee strain, chronic left ankle strain with a permanent aggravation of arthritis, lumbar degenerative joint disease, sacroiliac joint dysfunction, myofascial pain syndrome, and thoracic myofascial syndrome causally related to his employment. On his prior appeal the Board found that the April 12, 2012 and March 12, 2013 reports of Dr. Rook were insufficient to establish an occupational disease due to the identified work factors. The Board determined that Dr. Rook's use of the word "likely" was speculative and that he relied upon an inaccurate history of appellant sustaining work injuries on August 1, 1997 and July 12, 2006.

Following the Board's decision, counsel requested that Dr. Rook address the deficiencies in his reports identified in the Board's decision. In a report dated June 1, 2014, Dr. Rook reported that he used the word "likely" in his April 12, 2012 report to mean medical probability, or more likely than not. He reviewed the examination findings from his April 12, 2012 report and appellant's history of a December 19, 1995 right knee contusion and lumbosacral strain. Dr. Rook diagnosed chronic right knee strain and chronic low back pain with a history of degenerative disc disease at L4-5, left sacroiliac joint dysfunction, and myofascial pain syndrome. He advised that these conditions were aggravated by appellant's work duties as a carrier, including extensive carrying, lifting, twisting, and bending. Dr. Rook explained that repetitive work activities, including casing and delivering mail, stressed the annular fibers of his lumbar disc thereby accelerating his degenerative condition at L4-5 and causing muscle spasms, microtrauma, and the formation of scar tissue in his lower back. He additionally attributed

¹³ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁴ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹⁵ *John W. Montoya*, 54 ECAB 306 (2003).

¹⁶ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹⁷ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁸ 20 C.F.R. § 10.121.

appellant's chronic right knee strain to his employment. Dr. Rook provided rationale for his opinion by explaining that his extensive standing, casing, and delivering mail caused contraction in the quadriceps muscle which pushed the patella into the "notch formed by the medial and lateral femoral condyles," resulting in the gradual degeneration of the joint cartilage of the knee. On April 2, 2015 he clarified that he rendered the opinions in his April 12, 2012 report within reasonable medical certainty.

The Board finds that the case is not in posture for decision. Dr. Rook has further clarified his report to explain his rationale for finding that appellant's employment aggravated a degenerative condition at L4-5 and a right knee condition. He identified the history of injury, provided more detailed examination findings, and explained the physiologic process by which the employment factors caused or aggravated the diagnosed conditions. The Board finds that Dr. Rook's reports are sufficient, given the absence of any opposing medical evidence, to require further development of the record.¹⁹

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.²⁰ On remand, OWCP should refer appellant, the case record, and a statement of accepted facts to an appropriate specialist for an evaluation and a rationalized medical opinion regarding causation. After such further development as OWCP deems necessary, it should issue a *de novo* decision.²¹

CONCLUSION

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

¹⁹ See *L.C.*, Docket No. 16-0655 (issued May 26, 2016); *John J. Carlone*, 41 ECAB 354 (1989).

²⁰ See *W.W.*, Docket No. 15-1130 (issued August 7, 2015); *Phillip L. Barnes*, 55 ECAB 426 (2004).

²¹ On appeal counsel argues that OWCP should determine whether he had factually established the occurrence of the alleged August 1, 1997 and July 12, 2006 work incidents. The issue, however, is whether appellant has met his burden of proof to establish an occupational disease as a result of factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 11, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board