

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

C.N., Appellant)	
)	
and)	Docket No. 17-1751
)	Issued: May 3, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Oakland, CA,)	
Employer)	
)	

Appearances:
Denise Eaton-May, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 9, 2017 appellant, through counsel, filed a timely appeal from a February 13, 2017 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.

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.*

ISSUES

The issues are: (1) whether appellant has established a back condition causally related to or as a consequence of his May 5, 2013 employment injury; (2) whether OWCP properly denied authorization for back surgery; and (3) whether appellant has established that he sustained an employment-related recurrence of disability commencing November 2, 2013.

FACTUAL HISTORY

On May 8, 2013 appellant, then a 59-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on May 5, 2013, he strained his left ankle in the performance of duty. OWCP accepted the claim for left ankle sprain and a contusion of the left foot. Appellant stopped work on May 9, 2013 and returned to work on May 17, 2013. He again stopped work on July 23, 2013.

On May 9, 2013 Dr. Jessica Ellen Pierog, an osteopath, treated appellant for swelling and pain of the left ankle joint. In a work status report, she released him to resume his usual employment on May 11, 2013. On May 13, 2013 Dr. Christopher Harold LeMaster, Board-certified in emergency medicine, advised that appellant was unable to work until May 13, 2013. In an accompanying report, he indicated that he denied back or neck pain.

Appellant received treatment from May to August 2013 for a left foot contusion, and gout of the big toe. In an August 19, 2013 report, Dr. Roman P. Kownacki, an occupational medicine specialist, related that he was performing modified duty until three weeks earlier when he “experienced nonindustrial back pain which has required him to bear more weight on his [left] foot because of his [right] leg pain.” Appellant later had more left foot pain. Dr. Kownacki noted that he had been off work for three weeks “due to back pain.” He diagnosed a left foot contusion and gout of the big toe, and found that appellant could perform modified employment.

Dr. Richard C. Lavigna, a podiatrist, evaluated appellant on October 7, 2013. He discussed the history of injury on May 5, 2013 and related, “[Appellant] states that his back also hurt that night, but the pain in his left foot and ankle was so severe and the swelling so severe, he felt that it was just aggravation of a sciatic condition that he had been suffering from. He states that one week later, his back symptoms started to intensify to the point where he could not even go up steps because of the pain in his back and hips that radiated down into his thigh [and] the constant throbbing and swelling of his left foot and ankle.” Dr. Lavigna indicated that after his left foot injury he “developed a compensatory flare up or aggravation of his sciatic or a strain of his low back...”

In an October 17, 2013 progress report, Dr. Lavigna noted that OWCP had not accepted a hip or low back condition. He indicated that he strained his low back and hip on May 5, 2013 trying to hold back three other carts. He diagnosed a foot contusion, ankle sprain, lumbosacral strain, and sciatica. Dr. Lavigna found that he could perform sedentary employment, noting that appellant was currently taking a class at work. He referred appellant to Dr. Michael Hebrard, a Board-certified physiatrist, for treatment of his back.

On October 30, 2013 Dr. Hebrard found that appellant was disabled for work from October 30 to November 4, 2013. Electrodiagnostic testing performed on October 30, 2013 revealed left L5 radiculopathy or probable bilateral sciatic neuropathy.

Appellant, on December 3, 2013, telephoned OWCP and requested approval for scheduled back surgery. It advised him to submit a comprehensive medical report explaining the need for surgery and its relationship to his accepted work injury, and the cause of any claimed disability.

On December 11, 2013 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation beginning November 2, 2013.

In a December 12, 2013 progress report, Dr. Lavigna indicated that he was treating appellant for an injury to his left foot ankle, and that he also had “chronic low back pain, which is a compensatory condition from this work-related injury.” He noted that appellant favored his left foot and ankle when he walked.

OWCP, in a December 23, 2013 letter, requested that appellant submit a detailed medical report explaining why he was not able to perform his limited-duty employment beginning November 12, 2013 and the relationship of his disability to his work injury.

By decision dated February 20, 2013, OWCP denied appellant’s wage-loss claim for the period November 2 to December 13, 2013. It found that the medical evidence of record was insufficient to establish that he was totally disabled due to his May 5, 2013 employment injury.

Appellant, in January 2014, underwent spinal surgery that included a decompression laminectomy at T8 through T10, and a posterior lumbar fusion at L5-S1.

Dr. Hebrard, in a February 24, 2014 report, provided a history of the May 5, 2013 work injury, noting that appellant experienced pain across the low back radiating into the left foot. He diagnosed left radiculopathy at L5, bilateral sciatic neuropathy, and a left foot contusion. Dr. Hebrard attributed the left L5 radiculopathy and bilateral sciatic neuropathy to the May 5, 2013 work injury. He related:

“As the cart rolled over [appellant’s] foot, [he] retropulsed, that is, hyperextension of the lumbar spine followed by a recovery trying to prevent a fall. This initial extension caused traction along the sciatic nerve bilaterally leading to inflammatory changes. An altered gait resulted from the injury to the left foot and ankle and caused a toggling of the pelvis which put stress along the lower lumbosacral spine segments leading to posterior bulging of the disc which pressed against the adjacent nerve roots, leading to paresthesias, numbness, weakness, and pain, primarily on the left side *versus* the right.”

Dr. Hebrard opined that appellant’s antalgic gait caused the piriformis muscle to be in a “state of constant contraction” causing sciatic nerve compression. He concluded, “it is my opinion that his ongoing condition arose out of the initial aggravation with retropulsion and flexion of the lumbar spine leading to entrapment of the L5 nerve root, and a compensatory altered gait from the left swollen foot leading to stress and strain along the sciatic nerve complex bilaterally.”

On March 4, 2014 Dr. Andrew Vitali Slucky, a Board-certified orthopedic surgeon, found that appellant could return to his usual employment on April 28, 2014.

On March 20, 2014 appellant requested an oral hearing before an OWCP hearing representative.³

In a report dated May 5, 2014, Dr. Hebrard evaluated appellant for back pain with lower extremity weakness and bilateral ankle pain. He noted that appellant had thoracic and lumbar spine surgery performed January 28, 2014. Dr. Hebrard diagnosed thoracic myelopathy, lumbar myelopathy, and sciatica. He related that “ongoing mechanical instability, particularly involving his left foot and ankle, led to a compensatory lumbar aggravation thereby causing his preexisting spinal disc disease to undergo torsional and rotation stress and aggravating and accelerating damage to the intervertebral discs, as well as impingement of the adjacent nerve roots.” Dr. Hebrard again described how the spinal injury occurred and opined that the thoracic and lumbar myelopathy with sciatic were both directly related to and a consequence of the accepted work injury. He provided a similar report on June 2, 2014. Dr. Hebrard found that appellant was totally disabled.

During the hearing, held on June 18, 2014, appellant described his injury and noted that he had back surgery on January 28, 2014.⁴

Dr. Hebrard, on June 30, 2014, diagnosed a foot contusion, ankle sprains and strains, sacroiliac ligament sprains and strains, and sciatica. He advised that appellant’s altered gait aggravated his spinal nerve root and caused “contraction of the lumbar paraspinal muscles which are significantly weakened and denervated from the previous lumbar surgery.” Dr. Hebrard opined that the work injury caused a consequential lumbar spine injury due to his altered gait and requested expansion of the acceptance of his claim to include lumbar radiculitis and sacral sprain.

By decision dated August 5, 2014, OWCP’s hearing representative vacated the February 20, 2014 decision. She found that the reports from Dr. Hebrard were sufficient to require further medical development. The hearing representative instructed OWCP to obtain reports associated with appellant’s January 28, 2014 surgery and refer him for a second opinion examination to determine whether he sustained a back condition either directly related to, or as a consequence of, his May 5, 2013 employment injury. She found that the physician should also provide an opinion regarding any periods of disability due to the work injury and whether OWCP should authorize the January 28, 2014 surgery.⁵

In a January 26, 2015 progress report, Dr. Hebrard opined that appellant sustained a consequential injury to his low back due to his work injury of lumbar radiculitis, an aggravation

³ Dr. Lavigna provided progress reports from April through July 2014 describing his treatment of appellant for his left ankle symptoms.

⁴ Appellant also indicated that he had a psychiatric condition.

⁵ The record contains progress reports from Dr. Lavigna dated August 5 and November 4, 2014 and from Dr. Hebrard dated August 26 and October 13, 2014.

of lumbar disc degeneration, and sciatica.⁶ He described the mechanism by which a change in gait resulted in the low back condition. Dr. Hebrard also recommended a psychiatric evaluation and expansion of his claim to include a “mood adjustment secondary to this chronic pain syndrome....” He opined that appellant was totally disabled.

OWCP, by letter dated May 26, 2015, referred appellant to Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he advise whether appellant sustained a back condition either directly due to or aggravated by his May 5, 2013 work injury and, if so, whether it should authorize the January 2014 back surgery. OWCP also requested that Dr. Fong provide any periods of disability.

In a report dated September 2, 2015, Dr. Fong discussed appellant’s history of injury and the medical reports of record. On examination he found bilateral muscle spasms of the paralumbar muscles and a reduced left ankle motion. Dr. Fong diagnosed a left foot contusion, left ankle sprain, postlaminectomy syndrome, and obesity. He attributed the ankle and foot diagnoses to the work injury. Dr. Fong related:

“One cannot say with any degree of reasonable medical certainty whether the incident directly caused, aggravated, precipitated, or accelerated the back problem. While, again, he was severely overweight adding to the force of trauma, [two] separate levels of spine injury severe enough to require ‘immediate’ surgery is very rare except under very unusual circumstances. His injury was not that traumatic to have led to that much damage. It is more likely that he had preexistent spinal pathology and the incident either accelerated or precipitated the pathology. He states that he had sciatica before but was not under treatment so aggravation does [not] appear to be an issue. [Appellant], though, was not a cogent historian so it may turn out that he was under treatment in which case permanent aggravation would have to have been the case since it led to myelopathy and surgery. The claimant[’s] history and the current medical records are insufficient to make this decision.”

Dr. Fong further advised that he was unable to determine the periods of work-related disability based on the current medical evidence. He opined that appellant was currently totally disabled.

On July 14, 2016 OWCP requested a copy of appellant’s medical records of the past 10 years. It received appellant’s medical records from 2007 onward on September 12, 2016. On June 29, 2010 a physician noted that appellant had a history of lumbar radiculopathy and stable chronic low back pain. Appellant also received treatment for low back pain on various dates, including February 15, 2011 and July 10, 2012. He received a diagnosis of lumbar radiculopathy.

By decision dated September 14, 2016, OWCP denied appellant’s request to expand the acceptance of his claim to include an employment-related back condition and his claim for disability compensation. It further denied authorization for back surgery. OWCP noted that the

⁶ Dr. Hebrard and Dr. Lavigna continued to provide progress reports.

record obtained indicated that appellant had received treatment for a back condition from 2010 to 2012.

On October 14, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. At the hearing, held on January 3, 2017, counsel contended that appellant's ankle condition aggravated his sciatica and that his ankle problems also resulted in disability.

Counsel, on February 1, 2017, reviewed the medical evidence and contended that the reports from Dr. Hebrard were sufficient to show that appellant's back condition resulted from his work injury. She further argued that a conflict existed between appellant's physicians, Dr. Hebrard and Dr. Lavigna, and Dr. Fong, OWCP's referral physician.

By decision dated February 13, 2017, OWCP's hearing representative affirmed the September 14, 2016 decision. She found that the weight of the medical evidence was insufficient to support claim expansion or disability compensation. The hearing representative further determined that OWCP properly denied authorization for surgery.

On appeal counsel contends that a conflict in medical opinion exists regarding whether the May 5, 2013 work injury aggravated his back condition. She further argues that Dr. Fong's opinion is equivocal and based on an incomplete medical record, and of less probative value than the opinion of Dr. Hebrard. Counsel also maintains that appellant is entitled to disability compensation due to his ankle injury as he could not perform his usual employment.

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.⁷ The opinion of the physician must be based on a complete factual and medical background of the claimant,⁸ must be one of reasonable medical certainty⁹ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second

⁷ *John J. Montoya*, 54 ECAB 306 (2003).

⁸ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

⁹ *Supra* note 7.

¹⁰ *Judy C. Rogers*, 54 ECAB 693 (2003).

injury, even though not employment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.¹¹

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter.¹² While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹³ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁴ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a left ankle sprain and contusion of the left foot on May 5, 2013. He subsequently requested expansion of the acceptance of his claim to include a back condition.

On October 7, 2013 Dr. Lavigna obtained a history of appellant experiencing back pain the evening of May 5, 2013 that he believed was an aggravation of his sciatica. A week later his back pain increased radiating into his left foot and ankle. Dr. Lavigna opined that appellant had an aggravation of his sciatica or a low back strain due to his May 5, 2013 work injury to his foot.

Dr. Hebrard, on February 24, 2014, opined that appellant sustained radiculopathy on the left at L5 and bilateral sciatic neuropathy both directly due to hyperextending the lumbar spine at the time of the May 5, 2013 work injury and as a consequence of his antalgic gait resulting from the May 5, 2013 employment-related left foot injury. He provided similar findings in reports dated 2014 and 2015.

OWCP referred appellant to Dr. Fong for a second opinion examination to evaluate whether appellant sustained a back condition causally related to the May 5, 2013 work injury, whether it should authorize the January 2014 back surgery, and to determine any periods of disability. On September 2, 2015 Dr. Fong diagnosed a left foot contusion and left ankle sprain due to the accepted work injury and postlaminectomy syndrome. He related that he was not able to determine whether the May 5, 2013 work injury caused or aggravated his back condition. Dr. Fong found that it would be unusual for the trauma to result in two levels of injury to the spine that would require immediate surgery. He opined that it was "more likely that [appellant] had preexistent spinal pathology and the incident either accelerated or precipitated the pathology." Dr. Fong advised that if he was under treatment for his spine prior to his injury then the incident would have resulted in a permanent aggravation "since it led to myelopathy and surgery." He

¹¹ See *S.S.*, 59 ECAB 315 (2008); *Debra L. Dillworth*, 57 ECAB 516 (2006).

¹² See *V.H.*, Docket No. 17-0439 (issued December 13, 2017); *Vanessa Young*, 55 ECAB 575 (2004).

¹³ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁴ 20 C.F.R. § 10.121.

¹⁵ See *E.W.*, Docket No. 17-0707 (issued September 18, 2017); *Melvin James*, 55 ECAB 406 (2004).

noted that the current evidence of record was not sufficient to determine whether appellant was receiving treatment for his back or any periods of disability.

OWCP obtained medical records from 2007 to 2016 which it found demonstrated that appellant received treatment for his back from 2010 to 2012. It did not, however, provide the records to Dr. Fong for review.

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues of the case.¹⁷ Dr. Fong opined that the work injury may have aggravated a preexisting back condition, depending on what prior treatment notes demonstrated. When OWCP selects a physician for an opinion on the employee's employment-related injury, it has an obligation to secure, if necessary, clarification of the physician's report.¹⁸ After receiving the treatment notes from appellant, OWCP had the responsibility to seek clarification from Dr. Fong regarding whether the May 5, 2013 work injury either caused or aggravated a back condition or resulted in a consequential back condition.¹⁹ As it did not do so, OWCP failed to properly discharge its responsibilities in development of the record.²⁰

On remand, OWCP should provide Dr. Fong with the relevant treatment notes and seek clarification regarding whether the May 5, 2013 work injury caused, aggravated, or resulted in a consequential injury to appellant's back and, if so, whether OWCP should authorize the January 2014 surgery. It should further request that Dr. Fong address any periods of disability after reviewing the additional medical evidence.²¹ After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁶ See *R.A.*, Docket No. 14-1918 (issued March 3, 2015).

¹⁷ *Id.*; see also *Richard F. Williams*, 55 ECAB 343 (2004).

¹⁸ See *A.S.*, Docket Nos. 15-0972, 15-1005 (issued September 27, 2016).

¹⁹ See *A.S.*, *id.*

²⁰ See *Richard F. Williams*, *supra* note 17.

²¹ In light of the Board's disposition of the first issue, it is premature to address the issues of whether OWCP properly denied authorization for back surgery or whether appellant sustained an employment-related recurrence of disability beginning November 2, 2013.

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2017 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: May 3, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board