United States Department of Labor
Employees' Compensation Appeals Board

F.M., Appellant	)	
and	)	**Docket No. 18-1793**
	)	**Issued: April 24, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Dedham, MA, Employer	)	

Appearances:
Daniel B. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 24, 2018 appellant, through counsel, filed a timely appeal from an August 28, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

[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] Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated March 12, 2019, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-1793 (issued March 12, 2019).

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish bilateral hip and left knee conditions causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On May 29, 2018 appellant, then a 60-year-old letter carrier, filed an occupational disease claim (Form CA-2) for bilateral hip and left knee injuries resulting from the performance of his federal duties. He claimed that he first became aware of his conditions and their relationship to his federal employment on July 20, 2017. In an accompanying narrative statement dated June 1, 2017, appellant described his work duties, noting in detail the walking, climbing, lifting, carrying, squatting, reaching, stooping, twisting, foot pivoting, pushing, and pulling he had to perform while casing and delivering hundreds of pounds and mail and parcels on a daily basis. He also related that he slipped and fell 372 times or more while on his route. Appellant noted that he performed very little vigorous physical activity outside of work.

On the reverse side of the claim form appellant's postmaster controverted the claim, contending that appellant had told him many times that he was a marathon runner, but this was not mentioned in a medical evaluation. He further contended that it had been 10 months since appellant became aware of the alleged correlation, yet he never reported it to anyone and continued to perform the duties that allegedly caused his conditions.

In support of his claim, appellant submitted a medical report dated November 6, 2014 from Dr. Louis A. Maggio, a Board-certified internist, who diagnosed mild soreness *versus* early bursitis and epicondylitis.

Appellant also submitted bilateral hip and left knee x-ray reports dated August 25, 2016 from Dr. Robert L. Gore, a Board-certified diagnostic radiologist. In the bilateral hip x-ray report, Dr. Gore provided an impression that degenerative changes were present in both hips. He also provided an impression of no acute fracture or dislocation of the right or left hip. In the left knee x-ray, Dr. Gore provided an impression that degenerative changes were present. He also provided an impression of no acute fracture or dislocation.

A letter dated September 5, 2016 by Dr. Justin W. Kung, a Board-certified diagnostic radiologist, indicated that he had reviewed the August 25, 2016 bilateral knee and hip x-ray reports. Dr. Kung found that overall there was mild degenerative change in the medial

[3] 5 U.S.C. § 8101 *et seq.*

[4] Following the issuance of OWCP's August 28, 2018 decision, appellant submitted new evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

compartment of the right knee and mild degenerative change in the right and left femoroacetabular compartments.

In a report dated May 5, 2018, Dr. George P. Whitelaw, an attending Board-certified orthopedic surgeon, noted that he examined appellant on July 20, 2017. He also noted that he had reviewed medical records and appellant's statement describing in detail his letter carrier work activities. Dr. Whitelaw indicated that appellant worked as a letter carrier at the employing establishment for 31 years. Appellant's work duties included walking, lifting, carrying, standing, bending, squatting, reaching, stooping, twisting, foot pivoting, reaching, pushing, and pulling while casing and delivering 200 pounds of mail and parcels. During the winter months, he slipped, tripped, stumbled, and fell at least a dozen times. Appellant performed very little other vigorous physical activity outside of work.

Dr. Whitelaw reviewed an American Academy of Orthopaedic Surgeons (AAOS) inventory form and Dr. King's September 5, 2016 bilateral knee and hip x-rays. He noted appellant's medical history and diagnosed bilateral hip and left knee degenerative arthritis. Dr. Whitelaw opined that appellant had reached maximum medical improvement (MMI) as of the date of his examination. He further opined that his lower extremity osteoarthritis was causally related to the cumulative work stresses "given the very lenient contribution standard for causal relationship used by the Department of Labor (DOL), especially the definition of acceleration." Dr. Whitelaw maintained that these work stresses occurred over a period of years, resulting in the breakdown of the weight-bearing articular cartilage in the lower extremities, which left appellant in his current state. He noted the definition of arthritis and related that the condition was caused by repetitive microtraumas associated with heavy impact loading activities of the kind and type described by appellant's statement describing his regular job responsibilities. Dr. Whitelaw related that there was voluminous scientific evidence that factors contributing to progressive degenerative changes within weight-bearing joints of the lower extremities included heavy impact loading activities such as standing, walking, kneeling, stooping, bending, and twisting. He specifically indicated medical science and biomechanics determined that climbing stairs loaded the lower body joints three times the body weight and descending stairs loaded the lower body joints six times the body weight. Dr. Whitelaw concluded, therefore, that a 35-pound mail satchel of the type that appellant regularly carried would add 105 pounds of effective weight when appellant ascended stairs and 210 pounds of effective weight when he descended stairs. He indicated that medical science and biomechanics had also determined that greater weight caused greater stresses on the lower extremity joints, thus, increasing inflammation and contributing to the process that deteriorated articular cartilage, *i.e.*, contributed to osteoarthritis. Dr. Whitelaw maintained that there was no medical dispute that a letter carrier job over a long career aggravated and accelerated arthritis due to continuous walking, stopping, squatting, stair climbing/descending, and the like, which appellant experienced during his extensive career as a letter carrier. He indicated that appellant was required to perform various impact loading activities on a regular basis over a series of decades. Dr. Whitelaw related that, while his repetitive high-impact loading work activities did not necessarily cause the arthritis in the first instance, there was no doubt that they contributed to the development, aggravation, exacerbation, acceleration, and progression of his lower extremity arthritis. He opined that, based on what medical science knows about arthritis and appellant's medical history and job activities, the accumulative stresses of his work activities, at a bare minimum, contributed to his arthritis and, thus, medical causation was established by DOL's own standards. Dr. Whitelaw advised that, by the very nature of arthritis, this progression,

aggravation, and acceleration was permanent in nature as cartilage never regrows or goes back to its prior state after impact loading activities destroy it. While the symptoms of arthritis of the lower extremities (pain, swelling, stiffness, aching, and loss of motion) may change from day to day, the loss of the articular surface was permanent and irreversible.

Dr. Whitelaw related that, even after appellant stopped working, his work activities still had a permanent effect as his arthritic condition would not cease simply because he had stopped working since he would never regain the cartilage he had lost. He determined that appellant had 14 percent permanent impairment of the left lower extremity in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5]

In a development letter dated June 26, 2018, OWCP requested that the employing establishment respond to appellant's allegations and provide a copy of his position description.

On July 9, 2018 OWCP received the employing establishment's response to its June 26, 2018 development letter. In an undated letter, the postmaster again controverted the claim arguing that appellant's participation in marathons "may have" contributed to his claimed work-related condition, that he failed to timely report his injury, and that he continued to participate in the employment duties that allegedly caused his injury. He submitted an official description of appellant's carrier (city) position.

In a development letter dated July 26, 2018, OWCP notified appellant of the factual and medical deficiencies of his claim. It provided a factual questionnaire for his completion. OWCP also requested additional medical evidence, including a narrative medical report from his physician, which contained a detailed description of findings and diagnoses, explaining how his work activities caused, contributed to, or aggravated his medical condition. It explained that appellant's physician should rule out other causes for his condition such as age, weight, preexisting medical conditions, or other injuries outside of his federal employment. OWCP also explained that his physician should explain whether running in marathons caused or aggravated appellant's conditions. It afforded appellant 30 days to submit the requested evidence.

On August 13, 2018 appellant responded to OWCP's questionnaire. He related that he first treated with Dr. Maggio in 2014 regarding his right hip condition and in 2016 regarding his left hip and left knee conditions. Appellant had no prior injuries or conditions to his hips and left knee. He listed his strenuous or repetitive activities outside his federal employment, which included running in the San Diego marathon in 1999 and Boston marathon from 2000 to 2004. Appellant had not run in a marathon since 2004. He noted that he did not work for periods of time due to his nonwork-related heart and back conditions. Appellant did not report his dozens of slips and stumbles over the years because he often treated them with over-the-counter pain medication, ice, and rest.

In a letter dated August 15, 2018, appellant's prior counsel also responded to OWCP's development letter. She contended that Dr. Whitelaw's May 5, 2018 report was sufficient to

[5] A.M.A., *Guides* (6th ed. 2009).

establish that appellant's repetitive and extensive impact loading activities during the course of his federal employment caused his bilateral hip and left knee arthritis.

An October 1, 2013 report by Dr. Maggio was received. Dr. Maggio examined appellant, recommended stretches to prevent plantar fasciitis, and offered a podiatry evaluation if bothersome.

A partial copy of an undated lower limb questionnaire completed by appellant indicated that, during the past week, his lower limb was moderately stiff and mildly swollen. Appellant noted that it was mildly painful for him to walk on flat surfaces and lie in bed at night. It was moderately painful for him to go up or down stairs. Appellant did not need support or assistance at all. He had a little bit of difficulty with putting on or taking off socks/stockings during the past week.

By decision dated August 28, 2018, OWCP denied appellant's occupational disease claim finding that the medical evidence of record was insufficient to establish that his diagnosed bilateral hip and left knee conditions were causally related to the accepted employment factors. It found that Dr. Whitelaw's May 5, 2018 report was not based on a complete and accurate factual history as he did not mention appellant's marathon activities. OWCP further found that appellant failed to submit all the medical reports regarding the treatment of his bilateral hip and left knee conditions.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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.[7] 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.[8]

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;[9] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[10] and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which

[6] *Supra* note 3.

[7] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

[9] *Michael R. Shaffer*, 55 ECAB 386 (2004).

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

compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[11]

The medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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.[12]

ANALYSIS

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

In support of his claim, appellant submitted a May 5, 2018 report from his attending physician, Dr. Whitelaw. Dr. Whitelaw noted that he had examined appellant and provided a detailed description of appellant's work duties. He diagnosed bilateral hip and left knee degenerative arthritis. Dr. Whitelaw opined that the diagnosed conditions were caused, contributed to, and aggravated by appellant's work duties, including walking, lifting, carrying, standing, bending, squatting, reaching, stooping, twisting, foot pivoting, reaching, pushing, and pulling while casing and delivering mail and parcels weighing 200 pounds on a daily basis. He also provided medical rationale explaining how and why the diagnosed conditions were caused by the accepted employment factors. `

While Dr. Whitelaw's opinion is an uncontroverted affirmative opinion on causal relationship.

The Board thus finds that the medical evidence of record is sufficient to require further development of the case record.[13] It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[14]

The Board will remand the case for further development of the medical evidence. On remand OWCP should prepare a statement of accepted facts which includes all preexisting conditions as well as the accepted conditions and refer appellant to an appropriate Board-certified physician to obtain a rationalized opinion as to whether his bilateral hip and left knee conditions are causally related to his federal employment duties, directly or through aggravation,

[11] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[12] *See J.R.*, Docket No. 17-1781 (issued January 16, 2018); *I.J.*, 59 ECAB 408 (2008).

[13] *S.T.*, Docket No. 18-1119 (issued March 6, 2019).

[14] *Phillip L. Barnes*, 55 ECAB 426 (2004); *William J. Cantrell*, 34 ECAB 1233 (1993); *see also Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

precipitation, or acceleration.[15] Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision on his occupational disease claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: April 24, 2019
Washington, DC

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

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

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

[15] *S.T., supra* note 13; *P.A.*, Docket No. 09-0319 (issued November 23, 2009).