United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 18-0956**
	)	**Issued: February 8, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Texarkana, TX, Employer	)	

Appearances:
Alan J. 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 April 9, 2018 appellant, through counsel, filed a timely appeal from a March 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 has met his burden of proof to establish that his preexisting foot or ankle conditions were aggravated by the accepted employment injuries; and

[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.*

(2) whether he has met his burden of proof to establish a recurrence of total disability commencing November 19, 2010, causally related to his accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On February 13, 2008 appellant, then a 57-year-old mail handler/Mark II operator, filed an occupational disease claim (Form CA-2) alleging that his federal employment duties caused degenerative joint disease of both feet and hallux valgus (a bunion deformity) on the right. This claim was adjudicated by OWCP under File No. xxxxxx990 and accepted for hallux valgus (acquired), bilateral, on March 31, 2008.

On November 28, 2009 appellant filed a second occupational disease claim (Form CA-2) alleging that he had developed bilateral ankle conditions due to factors of his federal employment. This claim was adjudicated by OWCP under File No. xxxxxx687 and on February 1, 2010 accepted for other disorders of joint, ankle, and foot, bilateral. The claims were administratively combined in March 2010 with OWCP File No. xxxxxx990 serving as the master file.

On March 4, 2010 the Department of Veterans Affairs (DVA) informed appellant that he had a combined service-connected disability rating of 70 percent, 50 percent of which was due to dermatophytosis (a fungal condition) with flattened arches of his feet.

On February 18, 2011 appellant filed a notice of recurrence (Form CA-2a) under OWCP File No. xxxxxx687. He indicated that his foot conditions worsened to where he could no longer bear weight or perform his employment duties. Appellant stopped work on November 19, 2010.

By decision dated May 4, 2011, OWCP denied appellant's claim for a recurrence of disability. Appellant continued to request review of the denial of his claim and OWCP continued to receive medical reports from appellant's treating physicians, including Dr. Andrea L. York, a Board-certified family practitioner, who diagnosed foot and ankle osteoarthritis, and Dr. Austin Reeves, an attending podiatrist, who diagnosed osteochondritis. Both physicians related that appellant's diagnosed conditions were causally related to appellant's employment duties.

Following appellant's request for a review of the written record, by decision dated July 25, 2011, an OWCP hearing representative set aside the May 4, 2011 decision and remanded the case for OWCP to obtain a second opinion evaluation regarding whether appellant was disabled for any period after November 19, 2010 as a direct result of his employment-related injuries.

In August 2011, OWCP referred appellant to Dr. Robert E. Holladay, IV, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding appellant's disability status. In a September 13, 2011 report, Dr. Holladay diagnosed dermatophytosis of feet, bilateral flat feet deformity, and degenerative joint disease of both feet. In answers to OWCP questions, he noted that none of the diagnosed foot conditions had been accepted as employment related. Dr. Holladay

[3] Docket No. 15-1013 (issued June 15, 2016).

concluded that appellant's accepted bilateral foot and ankle conditions had not worsened to the point of total disability on November 19, 2010, finding that his current foot and ankle conditions were more likely related to his underlying preexisting conditions and had no relationship to a specific work injury.

By decision dated September 21, 2011, OWCP found the weight of the medical evidence rested with the opinion of OWCP's referral physician, Dr. Holladay, and denied appellant's claim that he sustained a recurrence of disability on November 19, 2010.

Following further development of the claim, on March 29, 2012 OWCP expanded acceptance of the claim to include aggravation of osteochondritis dissecans,[4] bilateral, ankle and foot.

In April 2012, OWCP again referred appellant to Dr. Holladay for a second opinion evaluation. In a May 24, 2012 report, Dr. Holladay advised that the record contemporaneous with November 19, 2010 did not include objective evidence to support that the accepted conditions of bilateral hallux valgus and osteochondritis dissecans had progressed or showed clinical change such that they became totally disabling on that day or that appellant's work activities aggravated his service-related foot conditions such that on November 19, 2010 he was unable to work.

By decision dated June 8, 2012, OWCP found the weight of the medical evidence rested with the opinion of Dr. Holladay and denied appellant's claim for a recurrence of disability commencing November 19, 2010.

Appellant continued to request further review of the denial of his claim and continued to submit progress reports from his attending physicians. OWCP continued to deny modification of its prior decisions.

By decision dated February 3, 2015, OWCP denied modification of the prior decisions, finding that appellant had not met his burden of proof to establish a recurrence of disability commencing November 19, 2010 because the medical evidence then of record did not establish that the accepted conditions had worsened or that the acceptance of his claim should be expanded to include an aggravation of an underlying medical condition.

Appellant, through counsel, filed an appeal with the Board on March 31, 2015. By decision dated June 15, 2016, the Board found a conflict of medical opinion between appellant's physicians and Dr. Holladay as to whether appellant's service-related foot condition or any other foot or ankle condition was aggravated by his work duties, especially prolonged standing, and, if so, whether he became totally disabled commencing November 19, 2010. The Board set aside the February 3, 2015 decision and remanded the case to OWCP.[5]

On January 10, 2018 OWCP referred appellant to Dr. David D. Sanderson, a Board-certified orthopedic surgeon, for an impartial medical evaluation. It identified the conflict as

[4] Osteochondritis dissecans is defined as inflammation of both bone and cartilage resulting in the splitting of pieces of cartilage into the joint. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (30th ed. 2003).

[5] Docket No. 15-1013 (issued June 15, 2016).

whether appellant's job duties aggravated a preexisting foot or ankle condition and whether this caused a recurrence of total disability commencing November 19, 2010. OWCP asked Dr. Sanderson to provide a firm diagnosis of any medical condition affecting appellant's feet and ankles and to indicate whether any diagnosed condition was attributed to appellant's work activities described in the statement of accepted facts (SOAF) or to the accepted injuries. It also asked Dr. Sanderson to provide a rationalized explanation as to whether appellant's preexisting service-related conditions were caused, aggravated, accelerated, or precipitated by any diagnosed condition. OWCP further inquired as to whether appellant's diagnosed foot conditions would have progressed to the current level irrespective of work and whether the medical evidence of record supported that on November 19, 2010 appellant had a material worsening from his work activities that resulted in an inability to work. It also inquired whether his work activities exacerbated his service-related foot conditions to the point that on November 19, 2010 he became totally disabled, or whether his inability to work was due to a preexisting foot/ankle condition or other personal health-related issue.

In a February 14, 2018 report, Dr. Sanderson noted his review of the medical record and the SOAF and appellant's complaint of pain in both feet with ankle problems such that he was unable to stand for prolonged periods of time. He described appellant's employment injuries and that for the last 20 years appellant had operated a sorting machine which involved standing, twisting, pushing, pulling, and occasional lifting. On examination Dr. Sanderson noted that appellant had a fairly normal gait although he had flat feet. Lower extremity examination demonstrated bilateral flat feet with no appreciable hallux valgus with no bunion noted. Ankle range of motion was good bilaterally with no crepitus. No ankle instability was noted to varus or valgus stress. Severe keratosis was noted over the entire plantar surface of both feet from appellant's heels to his toes. Dr. Sanderson diagnosed diffuse palmoplantar keratoderma affecting both feet and hands, pes planus with flat feet bilaterally, hallux valgus bilaterally, mild, without any sign of bunion formation, and history of subchondral changes bilaterally in the talus, noting that the last x-rays in the medical records, dated August 24, 2011, showed no sign of significant pathology in either the right or left ankle. In response to question two, he advised that there was a significant paucity of evidence to verify either employment injury, noting no note of a doctor visit and only x-ray reports. In response to question four, Dr. Sanderson opined that there was no significant objective evidence to suggest that work-related activities aggravated, accelerated, or precipitated appellant's conditions, noting that pain was a subjective complaint, and that appellant's ankle/foot conditions occurred irrespective of work activities. He further indicated that the medical evidence including physical findings, history, and radiographic changes did not support a worsening of appellant's condition on November 19, 2010, or an exacerbation of his service-related foot condition. Dr. Sanderson noted that appellant had provided an August 28, 2017 left and right ankle x-ray report from the DVA which, he opined, demonstrated small insignificant calcaneal spurs bilaterally and had no mention of an abnormality consistent with arthritis or osteochondritis of either the right or left ankle. He concluded that appellant never had significant ankle arthritis, and that his inability to work was related to the preexisting conditions of bilateral flat feet and diffuse plantar keratoderma, or to personal issues.

By decision dated March 21, 2018, OWCP found the special weight of the medical evidence rested with the opinion of Dr. Sanderson who provided an impartial medical evaluation and opined that appellant's bilateral foot and ankle conditions would have progressed irrespective of work duties, that work did not aggravate his preexisting service-related conditions, and that his

inability to work beginning November 19, 2010 was due to his service-related conditions and not to the conditions accepted under either OWCP File No. xxxxxx687 or OWCP File No. xxxxxx990.

LEGAL PRECEDENT -- ISSUE 1

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[6] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.[7] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[8]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[9]

Section 8123(a) of FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[10] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[12] Where OWCP has referred the case to an impartial examiner to resolve the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

ANALYSIS -- ISSUE 1

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

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's February 3, 2015 decision because the Board

[6] *A.M.*, Docket No. 18-0685 (issued October 26, 2018).

[7] *E.V.*, Docket No. 18-0106 (issued April 5, 2018).

[8] *A.M., supra* note 6; *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[9] *B.Y.*, Docket No. 18-0702 (issued November 21, 2018).

[10] 5 U.S.C. § 8123(a); *see K.C.*, Docket No. 18-0234 (issued September 14, 2018).

[11] 20 C.F.R. § 10.321.

[12] *Darlene F. Kennedy*, 57 ECAB 414 (2006).

[13] *V.G.*, 59 ECAB 635 (2008).

considered that evidence in its June 15, 2016 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.[14]

In its remand decision dated June 15, 2016, the Board found that a conflict in medical evidence had been created between the opinions of appellant's physicians and that of Dr. Holladay, an OWCP referral physician, as to whether appellant's service-related foot conditions or any other preexisting foot conditions or ankle conditions were aggravated by his work duties, and, if so, whether he had become disabled commencing November 19, 2010. In order to resolve the conflict, OWCP properly referred appellant to Dr. Sanderson for an impartial medical evaluation.

Upon referral of the medical record to Dr. Sanderson, a SOAF dated October 17, 2017 was also provided. The SOAF covered both the master and sub files in this claim. It documented that on March 31, 2008 appellant's claim was accepted for the condition of hallux valgus (acquired) bilateral. On February 1, 2010 the claim was accepted for bilateral disorders of the ankle and foot joints. On March 29, 2012 the acceptance of the claim was expanded to include the conditions of bilateral ankle and foot aggravation of osteochondritis dissecans. The SOAF noted other nonwork-related conditions and also set forth appellant's medical history and the employment duties of his employment positions.

In his February 14, 2018 report, Dr. Sanderson noted appellant's diagnosed foot and ankle conditions and described appellant's employment duties in detail. He described a careful review of the evidence of record, the SOAF, and physical examination findings. In reviewing the medical evidence of record, Dr. Sanderson noted that there was "a significant paucity of evidence to verify the original job injury of December 13, 2007." He explained that there was no significant objective evidence to suggest that appellant's work activities aggravated or precipitated any medical condition. Dr. Sanderson related that appellant's foot and ankle conditions occurred irrespective of work activities. He concluded that appellant never had significant ankle arthritis and that his preexisting conditions of bilateral flat feet and diffuse plantar keratoderma had not been aggravated by his job duties.

The Board finds that Dr. Sanderson's opinion contradicts the SOAF. The SOAF made clear that OWCP had accepted, as work related, appellant's conditions of hallux valgus (acquired) bilateral, bilateral disorders of the ankle and foot joints, and bilateral ankle and foot aggravation of osteochondritis dissecans as a result of his federal employment. OWCP procedures[15] provide that, when a referee physician selected by OWCP renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[16] Herein, in direct contradiction of the SOAF, Dr. Sanderson disregarded the accepted conditions noted in the SOAF, and instead opined in response to questions two and four that he could not verify the initial employment incident, but opined that appellant's medical conditions were

[14] *See J.D.*, Docket No. 18-0616 (issued January 11, 2019).

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- *Developing and Evaluating Medical Evidence*, Chapter 2.810.11 (September 2010).

[16] *D.M.*, Docket No. 17-1563 (issued January 15, 2019); *E.G.*, Docket No. 12-1011 (issued November 28, 2012).

"irrespective of work-related activities." However, OWCP has already accepted that appellant's work-related activities resulted in the accepted conditions contained in the SOAF. As such, Dr. Sanderson failed to follow the accepted conditions as set forth in the SOAF and therefore his opinion is insufficient as a basis to determine whether appellant's preexisting conditions have been aggravated or whether he sustained a recurrence of disability. The Board has held that, if a referee physician does not base his opinion on the SOAF, his opinion lacks a proper factual background, and thus, is not rationalized.[17] As Dr. Sanderson's opinion is inconsistent with the October 17, 2017 SOAF, it therefore is insufficient to resolve the existing conflict in the medical opinion evidence.[18]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. 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. As OWCP undertook development of the evidence by referring appellant to Dr. Sanderson, it had the duty to secure an appropriate report based on a proper factual and medical background, resolving the issues in the claim.[19]

Accordingly, as Dr. Sanderson's report lacks a proper factual background, there remains an unresolved conflict in the medical evidence. This case will be remanded to OWCP for further development of the medical evidence. On remand OWCP should refer appellant, an updated SOAF, and a list of specific questions to an appropriate Board-certified physician to resolve the existing conflict. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.[20]

CONCLUSION

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

[17] *D.O.*, Docket No. 17-0911 (issued February 2, 2018); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[18] *See B.G.*, Docket No. 11-1088 (issued November 3, 2011); *see also L.L.*, Docket No. 15-0672 (issued September 23, 2016).

[19] *See Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *William J. Cantrell*, 34 ECAB 1233 (1993); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[20] In light of the Board's disposition of issue 1, issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: February 8, 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