

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

K.C., Appellant)	
)	
and)	Docket No. 19-1251
)	Issued: January 24, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Bedford Park, IL, Employer)	
)	

Appearances:
Appellant, pro se
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 May 15, 2019 appellant filed a timely appeal from a January 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 14, 2019 decision, OWCP received additional 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 evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that her complex regional pain syndrome (CRPS) was a consequence of her accepted conditions of left tarsal tunnel syndrome, left plantar fibromatosis, and lumbar sprain.

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 September 7, 2012 appellant, then a 45-year-old window clerk, filed an occupational disease claim (Form CA-2) alleging that as a result of standing at the retail window on a concrete floor she sustained left foot nerve damage, plantar fascia, fractures, joint separation, and inflammation. OWCP accepted her claim for left tarsal tunnel syndrome, left plantar fibromatosis, and lumbar sprain.⁴

In a March 25, 2013 report, Dr. Drason Gastezski, a physician Board-certified in anesthesiology and pain medicine, diagnosed left lower CRPS, right lower lumbar facet arthropathy with axial low back pain, and bilateral paraspinous muscle spasm with myofascial pain. Dr. Faris Abusharif, a physician specializing in anesthesiology and interventional pain management, diagnosed CRPS in an August 18, 2014 report.

In a November 8, 2016 medical report, Dr. Daniel Luetkehans, a podiatric surgeon, opined that the acceptance of appellant's claim should be expanded to include the diagnosis of CRPS, which was due to her original work injury. He summarized her medical treatment and employment injury, and noted that she had been referred to Dr. Gastezski for an evaluation of CRPS.

On November 30, 2016 OWCP referred appellant's case record to an OWCP district medical adviser (DMA) for a determination as to whether she had CRPS and, if so, whether it was a consequence of the accepted employment-related injury. In a report dated December 20, 2016, Dr. Arnold T. Berman, a Board-certified surgeon serving as a DMA, opined that the acceptance of her claim should not be expanded to include the diagnosis of CRPS as she had not met the "diagnostic criteria" for CRPS. He further noted that appellant's four operative procedures had been performed by a podiatrist without an orthopedic consultation. Thus, Dr. Berman concluded that the surgery, mechanism of injury, and subsequent events were insufficient to produce CRPS, and that her neurogenic pain was attributable to complications of surgical intervention.

Dr. Luetkehans, in an April 11, 2017 report, responded to Dr. Berman's report and alleged bias against podiatric surgeons. He noted his qualifications and expertise in foot and ankle conditions, and opined, that appellant met the criteria for a diagnosis of CRPS contrary to

³ Docket No. 18-0234 (issued September 14, 2018).

⁴ Under OWCP File No. xxxxxx593, OWCP accepted that appellant sustained a lumbar sprain as the result of lifting heavy boxes on July 12, 2011. This case is open for medical treatment only, OWCP administratively combined OWCP File No. xxxxxx593 with the current claim, OWCP File No. xxxxxx046, with the latter serving as the master file.

Dr. Berman's opinion. In support of this conclusion, he noted that she had vasomotor and skin changes, hyperesthesia and allodynia, decreased range of motion, temperature changes, and chronic edema. Moreover, appellant's increase in skin temperature following injections by Dr. Gastezski was pathognomic for CRPS. In concluding, Dr. Luetkehans determined that appellant met the criteria for CRPS, which he found was a complication and consequence of surgery authorized by OWCP for the accepted employment-related injury. He requested expansion of the acceptance of her claim to include CRPS as a consequential injury.

OWCP found that there was a conflict in the medical evidence. On May 24, 2017 it referred appellant, along with a statement of accepted facts (SOAF) to Dr. Matthew L. Jimenez, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), to resolve the conflict in the medical opinion evidence between Dr. Luetkehans, appellant's physician, and Dr. Berman, for the government. In a June 29, 2017 report, Dr. Jimenez noted his review of appellant's medical record and his physical examination findings, and concluded that she did not have CRPS and that if she did have this condition that it was not work related. He concluded that she did not have a documented employment injury and that her symptoms were not related, in any way, to an alleged work event, but were instead caused by her multiple surgeries.

By decision dated July 20, 2017, OWCP denied expansion of the acceptance of appellant's claim to include CRPS. It accorded the special weight of the medical evidence to the opinion of Dr. Jimenez, serving as an IME.

On November 17, 2017 appellant appealed to the Board. By decision dated September 14, 2018, the Board set aside OWCP's July 20, 2017 decision. The Board found that the opinion of IME, Dr. Jimenez, was of diminished probative value as he disregarded key findings of the SOAF and did not rely upon the SOAF in his determination regarding CRPS. The Board also noted that, while he had attributed appellant's symptoms to unwarranted surgeries, FECA requires that residuals from surgeries authorized by OWCP are compensable. The Board therefore found an unresolved conflict and remanded the case to OWCP for selection of a new IME to determine whether she had CRPS and whether the condition was causally related to her federal employment.

On remand OWCP referred appellant, along with the medical record, and SOAF, to Dr. Michael Gear, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence.

In a December 31, 2018 report, Dr. Gear conducted a physical examination and reviewed her medical reports including the SOAF and diagnostic testing. A physical examination of the left foot revealed that the lateral scar was hypersensitive to light touch, normal pulses, no evidence of temperature abnormalities, and no mottling or hair growth abnormalities. Dr. Gear concurred with Dr. Berman that appellant had not met the criteria for a diagnosis of CRPS. He attributed her hyperalgesia to her left foot scars, which he found were secondary to the surgeries performed and were unrelated to the accepted plantar fibromatosis and tarsal tunnel syndrome or attributable to repetitive trauma. Dr. Gear also opined that appellant's employment injury and subsequent surgery had not resulted in CRPS. In support of these conclusions, he explained that there was no evidence showing the development of CRPS directly or as a consequence of "the alleged repetitive trauma to the foot."

By decision dated January 14, 2019, OWCP denied expansion of the acceptance of appellant's claim to include the additional condition of CRPS.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law 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 attributable to the employee's own intentional conduct.⁵ The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁶ With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.⁷

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, explaining causal relationship. Rationalized medical evidence is an opinion of reasonable medical certainty supported by sound medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁸

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁹ 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.¹⁰

Where a case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹

⁵ *C.W.*, Docket No. 18-1536 (issued June 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019); *Albert F. Ranieri*, 55 ECAB 598 (2004); *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

⁶ *R.M.*, Docket No. 18-1621 (issued August 23, 2019); *Debra L. Dillworth*, 57 ECAB 516 (2006); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005); *Carlos A. Marrero*, 50 ECAB 117 (1998).

⁷ *R.M.*, *id.*; *R.V.*, Docket No. 18-0552 (issued November 5, 2018); *L.S.*, Docket No. 08-1270 (issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

⁸ *R.M.*, *supra* note 6; *C.W.*, *supra* note 5; *J.B.*, Docket No. 14-1474 (issued March 13, 2015).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *C.W.*, *supra* note 5; *R.C.*, 58 ECAB 238 (2006).

¹¹ *V.K.*, Docket No. 18-1005 (issued February 1, 2019).

ANALYSIS

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

In the prior appeal, the Board remanded the case to OWCP to obtain a report from a new IME who was to determine whether appellant had CRPS and, if so, whether the condition was causally related to her accepted employment injury.

The Board finds that the report of Dr. Grear, serving as the IME, is insufficient to carry the special weight of the medical evidence. In his December 31, 2018 report, Dr. Grear explained that, based on the medical record and examination, it was clear appellant failed to meet the criteria for a diagnosis of CRPS. However, he failed to provide sufficient medical rationale to resolve the issues of whether she has CRPS and whether the condition is causally related to her employment injury. The Board has found that, when an IME fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.¹²

Dr. Grear also disregarded the tenets of the SOAF which set forth the accepted conditions in the claim, including the condition of repetitive foot trauma, by finding that appellant had "alleged repetitive trauma to the foot." The Board has explained that the report of an IME who disregards a critical element of the SOAF, for instance disagreeing with the medical basis for acceptance of a condition in the claim, is defective and insufficient to resolve the existing conflict in the medical opinion.¹³ The Board finds that Dr. Grear failed to rely upon the SOAF by ignoring the accepted conditions of the claim and thus his report is not based upon an accurate history. For these reasons the Board finds that his report is insufficient to resolve the existing conflict in the medical opinion evidence.

The Board has held that, when OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, it must secure a supplemental report to correct the defect in his or her original report.¹⁴ If the IME is unable to clarify or elaborate on his or her original report, or if the supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to another IME for the purpose of obtaining a rationalized medical opinion on the issue.¹⁵ Upon return of the case record OWCP shall obtain a medical opinion from a new IME which properly resolves the remaining conflicts in the medical opinion evidence. Following this and such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

¹² *B.J.*, Docket No. 18-1186 (issued July 9, 2019); *A.R.*, Docket No. 12-0443 (issued October 9, 2012); *see also P.F.*, Docket No. 13-0728 (issued September 9, 2014).

¹³ *J.S.*, Docket 17-0626 (issued January 22, 2019); *M.D.*, Docket No. 18-0468 (issued September 4, 2018).

¹⁴ *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(c)(1)-(2) (September 2010).

¹⁵ *Id.*

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 24, 2020
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