United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 19-1468**
	)	**Issued: September 9, 2020**
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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 26, 2019 appellant, through counsel, filed a timely appeal from a June 7, 2019 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.[3]

[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.*

[3] The Board notes that, following the June 7, 2019 decision, OWCP received additional evidence and that appellant submitted additional evidence on appeal. 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include additional bilateral foot or ankle conditions; and (2) whether he has established that he sustained 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.[4] The facts and circumstances as set forth in the prior Board decisions 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 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. OWCP administratively combined the claims in March 2010 with OWCP File No. xxxxxx990 serving as the master file.

On March 4, 2010 the Department of Veterans Affairs (VA) 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 14, 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 had stopped work on November 19, 2010.

By decision dated May 4, 2011, OWCP denied appellant's claim for a recurrence of disability.

On May 10, 2011 appellant requested a review of the written record by an OWCP hearing representative.

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.

[4] *Order Dismissing Appeal*, Docket No. 14-1806 (issued October 31, 2014); Docket No. 15-1013 (issued June 15, 2016); and Docket No. 19-0956 (issued February 8, 2019).

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.

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 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 appellant's current foot and ankle conditions were more likely related to his underlying preexisting conditions and had no relationship to a specific employment injury.

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

Following further development of the claim, on March 29, 2012 OWCP expanded the acceptance of the claim to include aggravation of osteochondritis dissecans, 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 appellant's service-related foot conditions such that on November 19, 2010 he was unable to work.

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

Appellant submitted several requests for reconsideration of the denial of his recurrence claim and submitted progress reports from his attending physicians in support thereof. OWCP continued to deny modification of its prior decisions.

On March 31, 2015 appellant, through counsel, appealed OWCP's February 3, 2015 decision denying modification to the Board. By decision dated June 15, 2016, the Board found a conflict of medical opinion between appellant's treating 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]

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

On January 10, 2018 OWCP referred appellant to Dr. David D. Sanderson, a Board-certified orthopedic surgeon, for an impartial medical evaluation. It provided a statement of accepted facts (SOAF) and a set of questions.

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. He described appellant's employment history and work injuries and 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. Dr. Sanderson opined that there was a significant paucity of evidence to verify either employment injury, and found 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 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 again denied modification of appellant's recurrence claim, finding that the special weight of the medical evidence rested with the opinion of Dr. Sanderson.

Appellant, through counsel, filed an appeal with the Board on April 9, 2018. By decision dated February 8, 2019, the Board found that a conflict of medical opinion remained between appellant's physicians and Dr. Sanderson because his opinion contradicted the SOAF. The Board noted that the SOAF made clear that OWCP had accepted 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. The Board found that Dr. Sanderson disregarded the accepted conditions noted in the SOAF, and instead indicated that he could not verify the initial employment incident and opined that appellant's medical conditions were "irrespective of work-related activities." As such, his opinion was insufficient to resolve the existing conflict in the medical opinion evidence as to whether appellant's service-related foot condition or any other foot or ankle condition was aggravated by his work duties, and, if so, whether he became totally disabled from work commencing November 19, 2010. The Board set aside the March 21, 2018 decision and remanded the case to OWCP.[6]

During the pendency of that appeal, OWCP received additional medical evidence. In a November 7, 2018 report, Dr. York noted that she first saw appellant in 2008. She described serial foot and ankle x-rays and provided examination findings. Dr. York diagnosed chronic ankle and foot pain, degenerative joint disease, and hallux valgus. She opined that the x-ray changes from 2002 to 2010 appeared to be a progression of degenerative disease which was "just as likely as not due to wear and tear related to [appellant's] job which involved long periods of standing and walking." Dr. York opined that his job likely aggravated the underlying condition, causing recurrence and worsening pain to the point that he was unable to work.

In a November 12, 2018 report, Dr. Reeves described examination findings and diagnosed chronic bilateral ankle osteoarthritis, bilateral hallux valgus, and chronic bilateral lichen planus,

[6] Docket No. 18-0956 (issued February 8, 2019).

aggravated by employment activity. He advised that appellant could not work in any employment that required standing, noting that appellant's ankle osteoarthritis and bunion deformity were progressive and would worsen over time. Dr. Reeves concluded that appellant's disability was permanent, and he would continue to require palliative treatment.

On April 4, 2019 OWCP referred appellant, along with an updated SOAF, the medical record, and a set of questions to Dr. Charles D. Varela, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 20, 2019 report, Dr. Varela noted complaints of continual bilateral lower extremity pain that extended from approximately the mid leg distally over both feet, with the right side being somewhat more symptomatic. He indicated that appellant was retired, ambulated without a cane, and took no pain medication for his symptoms. Dr. Varela related that appellant was 100 percent disabled from the VA for cardiac disease and hypertension. He described extensive lower extremity examination findings and noted pes cavus feet bilaterally and dense hyperkeratotic lesions over the posterior plantar surface of the feet extending posteriorly over the heels, and very mild hallux valgus bilaterally. Right ankle x-ray that day demonstrated mildly decreased joint space, primarily at the medial aspect with the joint space is maintained. Left ankle x-ray revealed that joint spaces were maintained with no significant degenerative changes. Dr. Varela reviewed a 2010 magnetic resonance imaging scan of the left ankle, noting that the possible osteochondritis dissecans of the medial talar dome of the left ankle seen was based on irregularity of the articular surface and bone marrow edema change in the medial talar dome with no joint effusion appreciated. He diagnosed asymptomatic bilateral flat feet, hyperkeratosis of plantar surface of bilateral feet, and possible mild degenerative arthritis of bilateral ankles by history, minimally symptomatic. In answer to specific OWCP questions, Dr. Varela advised that there was no evidence in the medical record or based on physical examination to suggest that appellant had any work-related injury of any capacity. He indicated that his above-noted diagnoses were chronic or congenital in nature, and that there was no evidence to support that any of appellant's work activities would be responsible for any of his nonspecific complaints. Dr. Varela opined that there was no particular objective physical or clinical finding to suggest an actual injury on physical examination. He advised that appellant's hyperkeratotic disease, far preexisted appellant's purported work injury, and that his possible mild degenerative arthritis, which was clinically asymptomatic with no physical findings to suggest this was a significant problem, was most likely age related. Dr. Varela further noted that appellant's bunion deformities were minimal and not clinically significant and were not work related. He maintained that most of appellant's complaints appeared to be primarily based on multiple notes by Dr. Reeves who attempted to justify appellant's exaggerated symptoms and indicated his disagreement with the findings and conclusions of Dr. Reeves and Dr. York. Dr. Varela reiterated that there is no evidence to suggest that appellant's nonspecific foot complaints were based on objective physical or clinical findings, noting that no evidence presented that these nonspecific findings would be related to any type of work appellant may have done in the past, and no medical evidence that he sustained any type of injury condition that would be responsible for his nonspecific complaints. He advised that there was no evidence of an employment injury on or about November 19, 2010 that would have made appellant unable to perform his job as a mail sorter. Dr. Varela related that, since appellant had no specific injury or trauma, it was difficult to ascertain why appellant did not perform his employment duties as of November 19, 2010, opining that he most likely exaggerated his symptoms for secondary gain, while being misled by Dr. Reeves concerning the severity of the symptoms. He concluded that, after his review of the medical records presented, he agreed with

both Dr. Sanderson and Dr. Holladay that appellant did not have a work-related injury or condition and only has congenital or age-related degenerative conditions. Dr. Varela found no orthopedic disabling conditions or impairment, noting that appellant had congenital flat feet and hyperkeratosis, which were not related to any specific activity, to include his duties as a mail carrier or as an Army personnel clerk.

By decision dated June 7, 2019, OWCP denied modification of its denial of appellant's recurrence claim, finding that the special weight of the medical opinion evidence rested with the opinion of Dr. Varela 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 appellant's preexisting service-related conditions, and that his inability to work beginning November 19, 2010 was not employment related.

LEGAL PRECEDENT -- ISSUE 1

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[7] 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.[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]

[7] *B.M.*, Docket No. 19-1341 (issued August 12, 2020).

[8] *T.S.*, Docket No. 20-0343 (issued July 15, 2020).

[9] *C.H.*, Docket No. 20-0440 (issued August 3, 2020).

[10] 5 U.S.C. § 8123(a); *see S.N.*, Docket No. 19-1050 (issued July 31, 2020).

[11] 20 C.F.R. § 10.321; *see V.S.*, Docket No. 19-1792 (issued August 4, 2020).

[12] *S.H.*, Docket No. 19-1033 (issued July 23, 2020).

[13] *See K.D.*, Docket No. 19-0281 (issued June 30, 2020); *Y.A.*, 59 ECAB 701 (2008).

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 March 21, 2018 decision because the Board considered that evidence in its February 8, 2019 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.[14]

On remand from the Board's February 8, 2019 decision, OWCP properly referred appellant to Dr. Varela for an impartial medical evaluation.

Upon referral of the medical record to Dr. Varela, a SOAF dated April 4, 2019 was also provided. The SOAF covered both the master and subsidiary 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 May 20, 2019 report, Dr. Varela concluded that, after his review of the medical records presented, appellant did not have a work-related injury or condition and only had congenital or age-related degenerative conditions. He found no orthopedic disabling conditions or impairment, noting that appellant had congenital flat feet and hyperkeratosis, which were not related to any specific activity, to include his duties as a mail carrier.

The Board finds that Dr. Varela'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 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.[15] Herein, in direct contradiction of the SOAF, Dr. Varela disregarded the accepted conditions noted in the SOAF and opined that none of appellant's foot and ankle conditions were caused by his federal employment. However, OWCP has already accepted that appellant's work-related activities resulted in the accepted conditions contained in the SOAF. As such, Dr. Varela 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

[14] *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11 (September 2010); *see R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Roger W. Griffith*, 51 ECAB 491 (2000).

rationalized.[16] As Dr. Varela's opinion is inconsistent with the April 4, 2019 SOAF, it therefore is insufficient to resolve the existing conflict in the medical opinion evidence.[17]

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.[18] As OWCP undertook development of the evidence by referring appellant to Dr. Varela, 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. Varela'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 an updated list of questions that emphasize the importance of the accepted conditions, 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.

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

[17] *Id*.

[18] *C.H.*, *supra* note 9; *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[19] *See A.M.*, Docket No. 19-1602 (issued April 24, 2020).

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

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2019 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: September 9, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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