

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

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**J.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Deptford, NJ, Employer**

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**Docket No. 20-0064  
Issued: September 4, 2020**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 8, 2019 appellant, through counsel, filed a timely appeal from a May 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish a right hip condition causally related to the accepted factors of his federal employment.

## FACTUAL HISTORY

On May 25, 2016 appellant, then a 56-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that the physical demands of his position, over a long period of time, aggravated the wear and tear on his body. He indicated that he first became aware of his claimed condition on May 23, 2016, and first realized its relation to factors of his federal employment on May 23, 2016. Appellant stopped work on May 23, 2016.

In a January 27, 2017 report, Dr. Adam Zucconi, Board-certified in family practice and sports medicine, noted that appellant reported approximately six months of right hip pain exacerbated by his occupation as a mail carrier, where he reported that he could have to walk up to 10 miles per day. He indicated that appellant denied any specific injury which started his pain, rather, appellant experienced a gradual onset over several months. Dr. Zucconi diagnosed symptomatic right hip osteoarthritis and indicated that appellant's treatment included intra-articular corticosteroid injections. He opined that appellant's osteoarthritis was "exacerbated and the degeneration of the joint accelerated by his occupation."

In a February 24, 2017 development letter, OWCP advised appellant of the deficiencies in his claim and requested that he submit additional factual and medical evidence in support of his claim. It afforded him 30 days to submit the requested information.

In a March 13, 2017 statement, appellant explained that he had worked as a letter carrier since 1984 and that he walked 8 to 10 miles per day, in all types of weather, on concrete. He alleged that the walking required by his work duties caused damage to his right hip.

By decision dated May 4, 2017, OWCP denied appellant's claim finding that he had not met his burden of proof to establish that his right hip osteoarthritis was causally related to the accepted factors of his federal employment.

On May 11, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 17, 2017.

On June 2, 2017 OWCP received a March 31, 2017 report from Dr. Eddie Wu, an osteopath Board-certified in orthopedic surgery, who diagnosed symptomatic right hip osteoarthritis, confirmed by x-rays of appellant's right hip. Dr. Wu recounted that appellant continued to perform his usual duties, including prolonged ambulation for 10 miles daily, working six days per week. He explained that there was no inciting injury and opined that "the daily wear and tear of his occupation has directly aggravated and worsened his preexisting right hip osteoarthritis."

In a May 19, 2016 x-ray report, Dr. Jamil Mohsin, a diagnostic radiologist, found no fracture or misalignment of the right hip and moderate degenerative joint disease.

In a May 23, 2016 report, Dr. Wu diagnosed right hip pain and osteoarthritis. He indicated in an August 8, 2017 report that appellant had preexisting severe degenerative joint disease which was aggravated by his current job duties. Dr. Wu noted that appellant ambulated up to 10 miles per day, five to six days per week, walked on concrete pavement and ascended and descended steps, which could increase the joint reaction forces in the hip, leading to increased inflammation, effusion, synovitis, and pain. He opined that it was “within a reasonable degree of medical certainty that increased ‘wear and tear’ on a daily basis can potentially accelerate the progression of his degenerative joint disease.” Dr. Wu further opined that appellant’s symptoms were “obviously being exacerbated by his daily work duties.”

By decision dated October 23, 2017, OWCP’s hearing representative vacated the May 4, 2017 decision. He found that the medical evidence of record was sufficient to warrant further medical development.<sup>3</sup>

In a letter dated February 7, 2018, OWCP referred appellant for a second opinion examination with Dr. Andrew Newman, a Board-certified orthopedic surgeon, scheduled for February 22, 2018.

In a February 22, 2018 report, Dr. Newman noted appellant’s history of injury and medical treatment. He diagnosed moderate to somewhat severe degenerative joint disease of the right hip due to osteoarthritis. In response to the question as to whether appellant’s employment factors during his 32-year career with the employing establishment aggravated his right hip degenerative condition, Dr. Newman opined, “No.” He explained that there was “nothing in the literature that in any way connected normal wear and tear and what we are calling osteoarthritis as anything to do with the amount of walking that somebody carries out. Osteoarthritis is commonly seen in all age groups, particularly above 50, as to the hip. People who are almost totally stationary develop this as well as people who do a lot of walking and running, *etc.*” Dr. Newman also responded to Dr. Wu’s opinion that “[w]ear and tear on a daily basis can potentially accelerate the progression of degenerative joint disease.” He opined “[t]here is nothing that supports this. The fact that anything ‘can’ is the point that Dr. Wu is making but certainly with reasonable medical certainty there is no evidence whatsoever that the degenerative joint disease is any way related to [appellant’s] walking job.” Dr. Newman advised no further medical treatment was warranted and opined with reasonable medical certainty that appellant’s right hip osteoarthritis was not related to the walking he completed at work.

By decision dated March 21, 2018, OWCP denied the claim. It found that the medical evidence did not demonstrate that the claimed medical condition was related to established work-related events.

On March 26, 2018 counsel for appellant requested a hearing before an OWCP hearing representative, which was held on July 10, 2018.

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<sup>3</sup> The hearing representative incorrectly identified the August 8, 2017 report as that of Dr. Zucconi; however, this report was signed by Dr. Wu.

By decision dated August 13, 2018, OWCP's hearing representative affirmed the March 21, 2018 decision.

On October 15, 2018 counsel for appellant requested reconsideration and submitted additional medical evidence.

In a September 7, 2018 report, Dr. Wu provided a response to Dr. Newman's second opinion. He explained that there was no question that appellant's right hip osteoarthritis was a preexisting condition and concluded that appellant's employment activities "exacerbated" his current condition. Dr. Wu explained that appellant's increased hip/groin pain from his osteoarthritis was due to increased frictional forces throughout the joint. He noted that appellant's job duties included walking up to 10 miles per day on concrete floors and going up and down steps which certainly increased friction and joint reaction forces more than two to four times his body weight. Dr. Wu explained that, "[i]ncreased irritation of the synovium and joint reaction forces, as well as increased friction secondary to degenerative joint disease increases the release of pro-inflammatory markers which directly causes and increases [appellant's] pain."

On January 2, 2019 OWCP determined that a conflict in medical evidence had arisen between Dr. Wu and Dr. Newman regarding whether appellant's preexisting degenerative joint disease was aggravated by appellant's employment duties. It referred appellant to Dr. Roy B. Friedenthal, a Board-certified orthopedic surgeon, to resolve the conflict.

In a March 18, 2019 report, Dr. Friedenthal noted appellant's history of injury and medical treatment. He advised that diagnostic images, including x-rays of the pelvis and no status of the left hip, were not submitted for review, and that he did not have the benefit of prior medical records. Dr. Friedenthal explained that in considering the etiology of appellant's right hip condition, based on the history provided, appellant had no trauma related to work; however, he noted that he did not have the benefit of prior medical records, and the possibility of remote trauma could not be excluded. He noted that review of any additional records that became available would be appropriate to confirm the history as provided. Dr. Friedenthal examined appellant and diagnosed osteoarthritis of the hip, status post right total hip replacement, and osteoarthritis of the left hand. He indicated that degenerative arthritis of the hip could develop without specific traumatic etiology and there might be multiple contributory factors to the development of hip osteoarthritis. Dr. Friedenthal advised that degeneration could follow specific developmental or acquired conditions, such as Perthes disease or undiagnosable mild congenital hip dysplasia. Regarding wear and tear related to work activities, he explained that it was "estimated with good support of clinical evidence, that symptomatic osteoarthritis of the hip was present in nearly 10 percent of individuals over the age of 45 with radiographic appearance of osteoarthritis present in 28 percent of individuals." Dr. Friedenthal noted that he did not have specific statistics, but there were excellent studies of the association between various levels of activity and the incidence of osteoarthritis. He advised that, while there was an association with certain heavy labor, there was no association with sitting or walking on the job. Dr. Friedenthal opined that the workload outlined in the record did not suggest significant workplace exposure. He further noted that appellant's work activities required similar usage of both lower extremities and the development of osteoarthritis in one hip with no involvement in the other hip "would speak against this being the routine wear and tear of his work activities." Dr. Friedenthal concluded that based on the history and accepted medical literature, there was no relationship between the development of

osteoarthritis of the right hip and appellant's work activities. He also advised that on a statistical basis, right hip replacement was not causally related to employment in this case. Dr. Friedenthal indicated that personal review of diagnostic studies was requested, if confirmation of his opinion was required.

Dr. Friedenthal provided a supplemental report on May 6, 2019. He again noted that he had not received all of appellant's diagnostic studies and prior medical records.

By decision dated May 16, 2019, OWCP denied modification of its prior decision. It found that Dr. Friedenthal's opinion was sufficiently rationalized and constituted the special weight of the medical opinion evidence.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish 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 timely filed within the applicable time limitation period of FECA,<sup>5</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.<sup>8</sup>

Rationalized medical opinion evidence is required to establish causal relationship.<sup>9</sup> A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.<sup>10</sup>

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *See G.B.*, Docket No. 19-1510 (issued February 12, 2020); *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *K.V. and M.E., id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>8</sup> *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> *L.G.*, Docket No. 20-0433 (issued August 6, 2020); *J.L.*, Docket No. 18-1804 (issued April 12, 2019).

<sup>10</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors.<sup>11</sup>

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."<sup>12</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the 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 upon a proper factual background, must be given special weight.<sup>13</sup>

### ANALYSIS

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

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Wu and Dr. Newman regarding whether appellant's preexisting degenerative joint disease was aggravated by his accepted employment factors. In order to resolve the conflict, OWCP properly referred appellant to Dr. Friedenthal for an impartial medical examination and an opinion on the matter, pursuant to 5 U.S.C. § 8123(a).

In his March 18 and May 6, 2019 reports, Dr. Friedenthal opined that based on the medical history of appellant's injury that he was provided, there was no relationship between the development of appellant's right hip osteoarthritis of the right hip and his work activities. However, he also noted that diagnostic images, including x-rays of the pelvis and no statue of the left hip, were not submitted for review, and that he did not have the benefit of appellant's prior medical records. Dr. Friedenthal explained that if additional medical records became available it would be appropriate to confirm the history provided. He also advised that appellant's diagnostic studies were requested, if confirmation of his opinion was required.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>14</sup> Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>15</sup>

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<sup>11</sup> *Id.*; *Victor J. Woodhams*, *supra* note 8.

<sup>12</sup> 5 U.S.C. § 8123(a).

<sup>13</sup> *Id.*

<sup>14</sup> *See L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>15</sup> *Id.*; *see also S.A.*, Docket No. 18-1024 (issued March 12, 2020).

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, it has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>16</sup>

The Board finds that as Dr. Friedenthal clearly noted that appellant's entire medical record, from which he could properly discern appellant's history of injury -- including the accepted employment factors -- a was not provided for his review, OWCP should have referred the entire medical record to Dr. Friedenthal, once he noted this discrepancy. On remand OWCP shall refer appellant's entire medical record to Dr. Friedenthal and request that he provide a supplemental opinion. After such further development as necessary, it shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>16</sup> *G.B.*, *supra* note 6; *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 16, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 4, 2020  
Washington, DC

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

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

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