United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 20-0674**
	)	**Issued: September 29, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
John L. DeGeneres, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 5, 2020 appellant, through counsel, filed a timely appeal from a January 9, 2020 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 January 9, 2020 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 his burden of proof to establish osteoarthritis causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On October 22, 2018 appellant, then a 63-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed osteoarthritis in his hips and left knee due to factors of his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on August 28, 2018. In an attached statement appellant explained that he had worked for the employing establishment for 25 years in which he performed various duties five days per week, including standing, walking, bending, stooping, twisting, squatting, and lifting and carrying packages.[4]

Appellant submitted operative reports dated December 27 and 28, 1985 in which Dr. Gerwin Neumann, a Board-certified neurosurgeon, performed a left microsurgical excision of the extruded disc at L5-S1 to treat a left-sided extruded L5-S1 disc.

In an October 18, 2016 disability benefits questionnaire Dr. Joseph Rafferty, Board-certified in family medicine, diagnosed left hip arthritis and noted that appellant had experienced left hip pain since a 1976 injury. Appellant explained that activities involving weight bearing and left hip range of motion caused him pain. Dr. Rafferty explained that there was not enough evidence to allow him to state, within a reasonable degree of medical certainty, a potential loss of range of motion as a consequence of repetitive use of appellant's hip over a period of time. He referred to a diagnostic report of even date in which appellant underwent an x-ray of his left hip in which his hip demonstrated mild degenerative changes. Dr. Rafferty checked a box marked "Yes" to indicate his opinion that appellant's diagnosis impacted appellant's ability to perform his occupational tasks as activities involving weight bearing and left hip range of motion caused him pain. He referenced appellant's treatment record dating from July 1, 1976 to March 30, 1979, which diagnosed left hip arthritis and opined that his left hip condition was at least 50 percent caused by his military service.

In an October 21, 2017 medical report Dr. Simona Retter, Board-certified in internal medicine, evaluated appellant for bilateral hip pain and pain in his left knee, and noted some of his employment duties as a letter carrier. She reviewed his care plan and noted that he declined further evaluation by physical therapy or rheumatology. In an October 31, 2017 addendum, Dr. Retter detailed the results of a diagnostic report of even date[5] in which Dr. Luis Diaz, a Board-certified radiologist, found that appellant's x-rays revealed moderate degenerative changes of the hip joints.

In a December 18, 2017 medical report, Dr. Justin Kung, a Board-certified radiologist, reviewed radiographs of appellant's hips and left knee dated from September 11 to October 31, 2017. On evaluation, he diagnosed moderate degenerate change in both

[4] Appellant retired as of December 29, 2017.

[5] Appellant also submitted diagnostic reports dated October 18, 2016 and October 23, 2017 in which Drs. Ajay Goud and Babak Khademi, Board-certified radiologists, performed x-rays of appellant's hips and diagnosed moderate bilateral hip osteoarthritic changes and moderate degenerate joint space narrowing in the left hip.

femoroacetabular compartments and moderate degenerative change in the left knee medial compartment.

In an August 28, 2018 narrative medical report, Dr. Suzanne Miller, a Board-certified orthopedic surgeon, recounted appellant's relevant history, including a 1976 hip injury he incurred while playing basketball, a left knee surgery he underwent in the 1990's due to a basketball injury and his 37 years of employment with the employing establishment. Appellant informed her that he estimated that he has stood for over 1,107 full calendar days and walked over 35,000 miles. Dr. Miller also reviewed past medical evidence, dating from October 18, 2016 to December 18, 2017, detailing his treatment for bilateral hip and left knee conditions. She diagnosed bilateral osteoarthritis of the hips and left knee osteoarthritis. Dr. Miller opined that, while appellant's work duties had not caused his conditions, the repetitive lifting, twisting, bending, walking, and climbing for 37 years was a contributing factor to the development and progression of his osteoarthritis. She explained that impact-loading activities caused repeated local stress to the hips and knee that accelerated arthritis through a process of chronic inflammation on the weight-bearing joints of the hips and knees. This resulted in a chemical change that caused the articular cartilage to become stiffer and less resilient. As the less-lubricated cartilage absorbed the stress from impact-loading activities, the articular cartilage deteriorated.

In a development letter dated November 9, 2018, OWCP informed appellant of the deficiencies of his claim and advised him of the type of factual and medical evidence necessary to establish his claim. It provided a questionnaire for his completion to provide further details regarding the circumstances of his claimed injury and requested a narrative medical report from appellant's treating physician containing a detailed description of any findings and diagnoses, and explaining how appellant's work activities caused, contributed to, or aggravated his medical conditions. In a separate development letter of even date, OWCP also requested additional information from the employing establishment. It afforded both parties 30 days to respond.

Appellant submitted an April 23, 1993 operative report in which Dr. Elliott Schiffman, a Board-certified orthopedic surgeon, detailed an arthroscopic left partial medial meniscectomy performed to treat appellant's torn medial meniscus in the left knee.

In response to OWCP's questionnaire, appellant submitted a December 4, 2018 statement in which he referred to medical evidence detailing his history of surgery and stated that he had received 10 percent Department of Veterans Affairs (VA) disability for his left hip condition. He provided that there was no need for an additional narrative medical report from his VA physician as his previous narrative medical report already addressed his specific federal employment duties that contributed to the aggravation of his condition. Appellant also detailed as much as he could about his 1976 hip injury and 1993 knee injury, but indicated that he did not remember the specific details due to the length of time that had passed.

By decision dated January 16, 2019, OWCP denied appellant's occupational disease claim finding that the evidence of record was insufficient to establish a medical condition causally related to the accepted employment factors.

On January 24, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

An oral hearing was held before an OWCP hearing representative on June 26, 2019. The hearing representative held the case record open for 30 days for the submission of additional evidence. No additional evidence was received.

By decision dated September 10, 2019, OWCP's hearing representative instructed the district office to prepare a statement of accepted facts (SOAF) and refer appellant to a second opinion orthopedic specialist to determine whether he developed osteoarthritis in any way causally related to the accepted employment factors.

On October 24, 2019 OWCP referred appellant to Dr. Christopher Rynne, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of appellant's alleged employment-related condition.

In his December 5, 2019 medical report, Dr. Rynne reviewed the SOAF, history of injury, and the medical evidence of record. Appellant informed him that his symptoms began approximately two years prior and had significantly worsened since his retirement. Dr. Rynne noted that the history of appellant's injury provided by the SOAF[6] and appellant was questionable and contradictory and, on evaluation, stated that he was an uncooperative examinee as he would not allow him to measure the range of motion in appellant's hips and would not allow him to flex either knee. He diagnosed osteoarthritis of both hips and knees and indicated that there were no objective findings on examination and no consistent physical findings. Dr. Rynne explained that the site of hip pain that appellant indicated was the posterolateral aspect and opined that this pain more likely than not originated in appellant's back and was related to his degenerative disc disease and originated in his spine. He further reasoned that the wear-and-tear of lower extremity joints is due in part to every step that appellant took and stated that every step that appellant has taken in the course of his life contributed to his arthritis. Dr. Rynne opined that once appellant took his first step into the employing establishment, any subsequent arthritis could be considered causally related. He concluded by opining that there was no causal relationship between appellant's conditions and his claimed August 28, 2018 employment injury as appellant had already been retired for eight months.

By decision dated January 9, 2020, OWCP denied appellant's occupational disease claim, finding that Dr. Rynne's medical report established that appellant's osteoarthritis was not causally related to the accepted factors of his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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,[7] 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

[6] The Board notes that the SOAF provided to Dr. Rynne indicated that appellant suffered an employment-related injury on August 28, 2018.

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

to the employment injury.[8] 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.[9]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee 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 employment factors identified by the employee.[10]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[11] 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.[12] 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.[13]

In a 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.[14]

ANALYSIS

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

The report of Dr. Rynne, serving as the second opinion examiner, is contradictory and therefore requires clarification. In his December 5, 2019 report, he diagnosed osteoarthritis of the hips and both knees and asserted that there were no objective findings and consistent physical findings on examination. On one hand, Dr. Rynne opined that the wear-and-tear of lower extremity joints is due in part to every step that appellant took and stated that every step that appellant has taken in the course of his life contributed to his arthritis. He further opined that once

[8] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[9] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[10] *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).

[11] *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[12] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[13] *Id.*; *Victor J. Woodhams*, *supra* note 10.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *V.W.*, Docket No. 19-1537 (issued May 13, 2020); *N.C.*, Docket No. 19-1191 (issued December 19, 2019); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

appellant took his first step into the employing establishment any subsequent arthritis could be considered causally related. However, on the other hand, Dr. Rynne also concluded that there was no causal relationship between appellant's conditions and his claimed August 28, 2018 employment injury as appellant had already been retired for eight months. As his opinion is contradictory, and because appellant need only establish that, the accepted factors of employment contributed to the development of his osteoarthritis,[15] OWCP was required to seek clarification from Dr. Rynne. As OWCP undertook development of the evidence by referring appellant to Dr. Rynne, it had the duty to secure an appropriate report based on an accurate factual and medical background and which is internally consistent.[16]

Accordingly, this case will be remanded to OWCP for further development of the medical evidence. On remand OWCP shall refer appellant along with an updated SOAF, a complete medical record, and a list of specific questions, to Dr. Rynne, and instruct him to clarify his opinion as to whether there was a new employment-related injury or an employment-related aggravation of appellant's preexisting condition. Alternatively, if Dr. Rynne is unavailable or unwilling, OWCP shall refer appellant to a new second opinion physician. After this and any such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2020 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: September 29, 2020
Washington, DC

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

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

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

[15] *Id*.

[16] *See A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Richard F. Williams*, 55 ECAB 343, 346 (2004).