

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

M.C., Appellant)	
)	
and)	Docket No. 20-1558
)	Issued: July 15, 2021
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISONS, Pine Knot, KY,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 27, 2020 appellant, through counsel, filed a timely appeal from a June 23, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUE

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

FACTUAL HISTORY

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

On March 1, 2018 appellant, then a 39-year-old medical records technician, filed a traumatic injury claim (Form CA-1) alleging that on November 27, 2017 she experienced the onset of severe right foot pain when escorting inmates to and from a mobile truck while in the performance of duty. In a March 7, 2018 statement, she noted that she had initially attributed her right foot pain to gout, a possible side effect of a recently prescribed diuretic.

In support of her claim, appellant submitted chart notes signed by Jennifer West, a nurse practitioner, dated November 27, 2017 to February 9, 2018. Ms. West noted that November 27, 2017 x-rays had been negative for fracture, while x-rays reviewed on December 11, 2017 demonstrated a displaced second metatarsal fracture.

In reports dated February 6 and March 8, 2018, Dr. Tracy A. Pesut, a Board-certified orthopedic surgeon, noted that x-rays of appellant's right foot demonstrated a mildly angulated stress fracture of the second metatarsal neck, hammering of the second and third toes, and a hallux valgus deformity. She diagnosed a right second metatarsal stress fracture with malunion, and right metatarsalgia.

OWCP received December 11, 2017 and January 30, 2018 x-ray reports, which demonstrated an angulated fracture of the right second metatarsal.

By decision dated May 4, 2018, OWCP denied the traumatic injury claim, finding that the evidence of record was insufficient to establish that the November 27, 2017 incident occurred as alleged.

On May 18, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on October 19, 2018. Counsel argued that appellant sustained an occupational condition due to frequent prolonged walking in the performance of duty, rather than a traumatic injury caused by a single incident on November 27, 2017. Appellant testified that she returned to work intermittently in July 2018, but could not continue as fixation screws had bent or broken. She related that she underwent revision surgery on September 26, 2018 and submitted additional medical evidence.

On April 18, 2018 Dr. Pesut performed a right second metatarsal osteotomy with plate and screw fixation, a right third metatarsal Weil osteotomy, a right Lapidus bunion correction with

³ Docket No. 19-0673 (issued September 6, 2019).

screw fixation, and right calcaneal autograft. In a May 3, 2018 report, she noted that appellant had progressed well postsurgery.

In a report dated May 31, 2018, Dr. Pesut opined that the second metatarsal fracture and surgical correction were “related to [appellant’s] work activities,” but the bunionectomy and third metatarsal procedures were not occupationally related. In a July 5, 2018 report, she opined that the second metatarsal fracture “occurred at work.” In an August 16, 2018 report, Dr. Pesut advised that x-rays demonstrated broken fixation screws. She opined that appellant sustained a second metatarsal fracture at work from the second metatarsal malunion.

In a letter dated August 27, 2018, Dr. Pesut opined that appellant sustained a right second metatarsal stress fracture at work due to prolonged walking and standing in required footwear. She noted that the malunion increased pressure on the great toe and third toe, which caused pain with weight bearing and necessitated an osteotomy. Dr. Pesut explained that she corrected the nonoccupational hallux valgus deformity to prevent “impingement on the second toe and difficulty with healing.”

In a November 1, 2018 statement, the employing establishment noted that it was not disputing appellant’s claim. It explained that appellant had been required to escort inmates “many miles,” up to 8 to 10 times a shift, to and from medical units during lockdown incidents.

By decision dated January 2, 2019, the hearing representative modified the May 4, 2018 decision to find that appellant had established that her accepted factors of employment of a period of time constituted a claim for occupational disease. However, the claim remained denied because the medical evidence of record was insufficient to establish that the accepted employment factors caused appellant’s diagnosed stress fracture or other right foot conditions.

On February 5, 2019 appellant, through counsel, filed a timely appeal with the Board from the January 2, 2019 merit decision. In a September 6, 2019 decision, the Board affirmed the January 2, 2019 decision. The Board found that appellant had not met her burden of proof to establish a right foot fracture causally related to the accepted factors of her federal employment.

On September 19, 2019 appellant, through counsel, requested reconsideration and submitted new evidence.

In a March 15, 2019 report, Dr. H.A. Perry, a family medicine specialist, noted that appellant presented with right foot pain on November 27, 2017. He explained that onsite radiographic images were initially negative and conservative treatment was rendered until December 8, 2017, when additional imaging revealed a minimally displaced fracture/stress fracture to the right second metatarsal. Dr. Perry advised that appellant was placed in a walking boot and instructed to take time off from work; however, she had previously continued to work full time. Appellant returned to work with the walking boot. Dr. Perry indicated that imaging studies on January 31, 2018 identified a non-healing fracture and that appellant underwent surgery. He also noted that appellant had two other surgeries due to complications to the right foot in April and September 2018 and that, in January 2019, appellant had a fall at home and sustained a broken right ankle. Dr. Perry advised that appellant was unable to perform the tasks required of her job

such as climbing stairs, walking, or standing for one hour, running, responding rapidly to emergency situations, or carrying a stretcher even with help.

In a May 1, 2019 report, Dr. Pesut noted that she evaluated appellant for a right second metatarsal fracture with malunion. She explained that appellant initially sustained an injury while at work and was diagnosed with a stress fracture that healed. Dr. Pesut opined that the stress fracture was due to appellant's work environment and the amount of time she spent walking and standing in the required footwear. However, appellant developed a malunion, which increased the pressure on the great toe and third toe, which caused pain with weight-bearing activities. While appellant attempted to utilize accommodative orthotics to offload that area during ambulation, she continued to experience pain. Dr. Pesut explained that appellant underwent an osteotomy to correct the malposition of the second metatarsal and she also had a hallux valgus deformity, which was not work related, fixed at the same time, to prevent impingement on the second toe and difficulty with healing. She further noted that appellant had an osteotomy of the third metatarsal to offload the prominent metatarsal head; however, she developed a nonunion of her Lapidus bunion correction site. Dr. Pesut explained that appellant underwent a second surgery, which kept her non-weight bearing for an additional three months, and sustained a bimalleolar ankle fracture which led to another three months of non-weight bearing. She advised that appellant's ankle had healed; however, she continued to have stiffness and arthrofibrosis in her joints, which was changing her gait. Dr. Pesut noted that appellant was working with physical therapy to try to normalize her gait and that, if she did not mobilize the joints and get better range of motion, she would continue to have difficulty with her gait, which would make her prone to stress fractures.

OWCP received a copy of Dr. Pesut's previously submitted August 27, 2018 report and the November 1, 2018 memorandum from the employing establishment.

By decision dated December 18, 2019, OWCP denied modification of the January 2, 2019 decision.

On March 26, 2020 appellant, through counsel, requested reconsideration and submitted additional evidence.

In January 29, 2020 reports, Dr. Pesut noted that appellant was seen for follow up and again concluded that appellant had a right second metatarsal stress fracture as a result of an occupational injury and a malunion. She explained that appellant's job required her to walk and stand for extended periods of time, and to wear specific shoes. Due to appellant's repetitive injury and the actual injury when she reported pain, Dr. Pesut related that there was greater than 51 percent chance that the stress fracture was due to her work environment. She explained that the original injury involved the second metatarsal stress fracture, which was not initially recognized, and that appellant continued with weight-bearing activity, which led to a malunion, and increased pressure on the great toe and third toe. The malunion and increased pressure led to the osteotomy to correct the malposition of the second metatarsal.

By decision dated June 23, 2020, OWCP denied modification of its December 18, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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,⁵ 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.⁶ 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.⁷

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.⁸

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁹ 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 claimant.¹⁰ 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.¹¹

⁴ *Supra* note 2.

⁵ *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ 20 C.F.R. § 10.115; *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Elliott*, 41 ECAB 992 (1990).

⁸ *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁹ *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹¹ *E.W.*, *supra* note 5; *Gary L. Fowler*, 45 ECAB 365 (1994).

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's January 2, 2019 decision. The Board considered that evidence in its September 6, 2019 decision and found it insufficient for purposes of establishing causal relationship.¹² Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

Following the Board's decision, appellant submitted additional reports from Dr. Pesut to explain the cause of her diagnosed conditions. In a May 1, 2019 report, Dr. Pesut noted that appellant sustained a stress fracture due to the amount of time she spent walking and standing in the required footwear. She developed a malunion, which increased the pressure on the great and third toes and caused pain with weight-bearing activities. Dr. Pesut noted that appellant tried orthotics to offload that area, but continued to have pain and difficulty with ambulation. She indicated that appellant underwent an osteotomy to correct the malposition of the second metatarsal. In her January 29, 2020 report, Dr. Pesut noted that appellant had a second metatarsal stress fracture as a result of an occupational injury, which was initially overlooked and, thereafter, with continued weight bearing developed a malunion. She opined, "it is my professional opinion that it is greater than 51 percent that the injury initially as well as the subsequent stress fracture were a result of her work environment." Dr. Pesut also noted that the malunion caused increased pressure on the great toe and third toe with weight bearing, which led to the osteotomy to correct the malposition of the second metatarsal.

The Board finds that these reports from Dr. Pesut are sufficient to require further development of the medical evidence. Dr. Pesut is a Board-certified physician in orthopedics who is qualified in her field of medicine to render rationalized opinions on the issue of causal relationship. She reviewed the medical record and case history and provided a pathophysiological explanation as to how appellant developed right foot conditions due to factors of her federal employment. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.¹⁴ Dr. Pesut's medical opinion is well rationalized and logical and is, therefore, sufficient to require further development of appellant's claim.¹⁵

¹² Docket No. 19-0673 (issued September 6, 2019).

¹³ See *L.S.*, Docket No. 20-0505 (issued November 24, 2020); *E.S.*, Docket 18-1580 (January 23, 2020); *B.R.*, Docket No. 17-0294 (issued May 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁴ *A.P.*, Docket No. 20-0803 (issued November 4, 2020); *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983).

¹⁵ *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ It has an obligation to see that justice is done.¹⁷

On remand, OWCP shall refer appellant, a statement of accepted facts (SOAF), and the medical record to a specialist in the appropriate field of medicine. The chosen physician shall provide a rationalized opinion as to whether appellant's right foot condition is causally related to the accepted factors of appellant's federal employment. If the physician opines that the diagnosed condition is not causally related, he or she must explain, with rationale, how or why the opinion differs from that of Dr. Pesut. Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

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

¹⁶ *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

¹⁷ *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2020 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: July 15, 2021
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