

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

D.D., Appellant)	
)	
and)	Docket No. 22-0591
)	Issued: August 30, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Fort Worth, TX, Employer)	
)	

Appearances:
Diana Dawson, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 11, 2022 appellant, through his representative, filed a timely appeal from an October 15, 2021 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 his burden of proof to expand the acceptance of his claim to include additional medical conditions causally related to his accepted employment injuries.

FACTUAL HISTORY

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

On August 13, 1994 appellant, then a 37-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a lumbar strain as a result of standing for a prolonged periods while in the performance of duty.⁴ He stopped work on August 1, 1994. OWCP accepted the claim for right sacroiliac strain.⁵

By decision dated December 14, 2011, OWCP expanded acceptance of the claim to include displacement of lumbar intervertebral disc without myelopathy; venous embolism and thrombosis of deep vessels of the proximal lower extremity; pulmonary embolism and infarction.

On March 11, 2015 Dr. Ira O. Murchinson, an attending osteopathic family practitioner, requested expansion of the acceptance of appellant's claim to include left hip, right knee, right ankle, and right foot sprains due to weakness or impairment caused by his accepted work-related injury. He opined that the additional diagnosed conditions were secondary to appellant's overuse of his right knee, ankle, and foot and left hip while performing various activities to compensate for his accepted work-related lumbar condition. Dr. Murchison concluded that appellant's right knee and ankle and left hip injuries resulted from an abnormal gait pattern he had used since his original back injury.

In an April 22, 2015 medical report, Dr. Mohamed Hassan Yousef, a Board-certified physiatrist, opined that appellant sustained left hip, right knee, right ankle, and right foot sprains as a consequence of his accepted employment injury. He noted that appellant reported overuse of his right leg and left hip to compensate for his accepted lower back injury.

³ Docket No. 03-1263 (issued July 28, 2003).

⁴ Appellant has a prior claim for a January 28, 1993 traumatic injury accepted for right sacroiliac strain under OWCP File No. xxxxxx978.

⁵ By decision dated December 12, 2013, OWCP granted appellant a schedule award for six percent permanent impairment of the left lower extremity. In a September 30, 2014 decision, an OWCP hearing representative set aside the December 12, 2013 schedule award decision and remanded the case for further development of the medical evidence to determine permanent impairment to the lungs and issuance of a *de novo* decision. In a February 2, 2015 decision, OWCP granted appellant a schedule award for 17 percent permanent impairment of the lungs for the period December 12, 2014 through March 7, 2015. On February 6, 2015 it amended its February 2, 2015 decision and issued a corrected decision granting a schedule award for 17 percent permanent impairment of the lungs.

OWCP, in a development letter dated December 17, 2015, requested that appellant submit additional factual evidence explaining how he injured his left hip, right knee, right ankle, and right foot. It afforded him 30 days to submit the necessary evidence.

On February 25, 2016 OWCP referred appellant's case to Dr. Herbert White, Jr., a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA). It requested that Dr. White review the medical evidence of record, including Dr. Yousef's April 22, 2015 report, and provide an opinion regarding whether the acceptance of appellant's claim should be expanded to include left hip, right knee, right ankle, and right foot sprains.

In a March 20, 2016 report, Dr. White opined that appellant's left hip, right knee, right ankle, and right foot sprains were not due to overuse syndrome resulting in an abnormal gait due to lumbar back pain. He advised that it was more likely than not that his conditions were due to degenerative changes that occurred with aging and bilateral lumbar radiculopathy resulting from his lumbar disc disease.

By decision dated May 18, 2016, OWCP denied the expansion of the acceptance of appellant's claim, finding that the medical evidence of record was insufficient to establish that the additional diagnosed left hip and right knee, right ankle, and right foot sprains were causally related to the accepted employment injury.

On June 16, 2016 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a subsequent undated letter, appellant contended that his claimed additional conditions were causally related to the accepted employment injury. He submitted a series of medical reports and diagnostic test studies dated from August 3, 1994 through December 15, 2016, which addressed his right foot, right knee, left hip, lumbar spine, right pelvis, right leg conditions, work capacity, and work restrictions.

Following a preliminary review, by decision dated January 3, 2017, an OWCP hearing representative set aside the May 18, 2016 decision, finding that there was a conflict in the medical opinion evidence between Dr. Murchison and Dr. White regarding whether appellant had sustained left hip, right knee, right ankle, and/or right foot conditions as a consequence of his accepted employment injury.

On August 4, 2017 OWCP referred appellant to Dr. James S. Hood, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence. In a report dated May 15, 2017, Dr. Hood opined that appellant's original injury was a simple uncomplicated lumbar sprain, that in probability resolved uneventfully. Dr. Hood opined that all of appellant's original complaints had resolved and that he underwent an ill-advised discogram, which led to discitis and pulmonary embolism. He concluded that appellant's complaints of pain in the left hip, right knee, right ankle, and right foot were not related to his 1994 injury and subsequent treatments. These complaints were age-related, incidental, and coincidental. Dr. Hood also related that appellant had significant underlying medical issues. In a supplemental report dated June 9, 2017, he reiterated his prior findings and conclusions.

On February 22, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. John Sklar, a Board-certified physiatrist, for a second opinion examination.

In an April 5, 2018 report, Dr. Sklar noted that he examined appellant on April 3, 2018. He reported findings on his physical examination and diagnosed chronic lower back pain right side greater than left with degenerative change affecting both lower extremities consistent with appellant's age of 60 years old. Dr. Sklar saw no evidence that substantiated a diagnosis of hip, knee, ankle, or foot sprains affecting either lower extremity causally related to the accepted employment injury.

OWCP, by decision dated April 19, 2018, denied expansion of appellant's claim to include left hip, right knee, right ankle, and right foot sprains based on Dr. Sklar's second opinion report as the weight of the medical evidence.

On May 23, 2018 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on November 14, 2018.

By decision dated October 3, 2019, a second OWCP hearing representative set aside the April 19, 2018 decision, finding that there was an unresolved conflict of medical opinion between Drs. White and Sklar and Dr. Murchison regarding whether appellant sustained additional conditions causally related to his accepted employment injury. He noted that OWCP had failed to refer appellant to an impartial medical specialist as instructed by the prior OWCP hearing representative. The hearing representative remanded the case to OWCP for referral of the case record, including an updated SOAF that reflected all the accepted conditions, and appellant to an IME to resolve the outstanding conflict.

On February 26, 2021 OWCP referred appellant to Dr. Hood for an impartial medical examination, to resolve the conflict of medical opinion evidence.⁶

In a March 17, 2021 letter, Dr. Hood noted he had reviewed appellant's medical history and records. He also noted he had previously examined him on May 10, 2017. Dr. Hood related appellant's complaints of back pain, right greater than left; bilateral knee pain; and foot pain. He related extensive physical examination findings. Dr. Hood diagnosed degenerative disc disease in the lower back that was age related and opined that the diagnosed condition had absolutely nothing to do with the accepted 1994 employment injury. Based on all the information and his review of the records, he advised that appellant had nothing more than a lumbar sprain with no signs of radiculopathy. Dr. Hood again noted appellant's ill-advised discogram and resultant discitis, which required additional treatment, and two bouts of pulmonary embolism which occurred many

⁶ The Board notes that OWCP had previously referred appellant to Dr. Hood for an impartial medical examination on several occasions to resolve the conflict in medical opinion regarding whether the acceptance of appellant's claim should be expanded to include additional left hip, right knee, right foot, and right ankle conditions. On October 29, 2020 OWCP issued a notice of proposed suspension of compensation and medical benefits for failure to attend the impartial medical examination appointment on October 22, 2020 with Dr. Hood as directed. On January 8, 2021 appellant requested that OWCP reschedule his appointment with Dr. Hood. In an undated letter, appellant indicated that he would not be attending the scheduled appointment with Dr. Hood on January 17, 2021 due to inclement weather.

years ago. Regarding appellant's bilateral knee condition, he indicated that appellant had never sustained an injury (damage or harm) to either knee. Appellant did not fall or twist his knees or initially complained about kneepain. Dr. Hood found abundant clinical and radiographic evidence of age-related degenerative joint disease bilaterally, which was neither caused nor aggravated by the 1994 employment injury. Regarding the "sacroiliac shear," he indicated that this was none other than a sacroiliac sprain. Dr. Hood noted that the sacroiliac joint was not movable. He maintained that at times, there may be an injury to the ligaments with inflammation and pain, but nothing else. Dr. Hood maintained that with 100 percent certainty, the accepted sacroiliac joint sprain would have resolved in a short and finite time period. He further maintained with 100 percent certainty that the sacroiliac joint condition would not/could not produce leg length discrepancy. Dr. Hood confirmed that appellant had a congenitally short tibia but, related that the reason for this condition was unknown. Additionally, he saw no radiographs of the lower extremities to rule out tibial hemimelia. Dr. Hood advised that none of appellant's current conditions were related to his 1993 or 1994 employment injuries. He disagreed with Dr. Murchison's opinion that appellant sustained right knee, right ankle, and right foot strains, and left hip sprain as a consequence of his work-related injuries.

OWCP, by decision dated April 21, 2021, denied expansion of the acceptance of appellant's claim to include the additional diagnoses of sprain of the left hip and right knee, right ankle, and right foot. It found that the special weight of the medical evidence rested with the March 17, 2021 opinion of Dr. Hood, the IME.

On May 21, 2021 appellant requested a review of the written record and an oral hearing before an OWCP hearing representative.

Following a preliminary review, by decision dated July 26, 2021, a third OWCP hearing representative set aside the April 21, 2021 decision and remanded the case to OWCP to administratively combine the current case, OWCP File No. xxxxxx440, with OWCP File No. xxxxxx978. OWCP was instructed to update the SOAF and then refer the combined case record to Dr. Hood for a supplemental report and any other further development as deemed necessary, to be followed by a *de novo* decision.

On August 5, 2021 OWCP requested File No. xxxxxx978 from the Federal Records Center (FRC). In response, the FRC indicated that it had destroyed the requested case file. Thereafter, OWCP completed a revised SOAF that included File Nos. xxxxxx440 and xxxxxx978.

By letter dated August 27, 2021, OWCP requested that Dr. Hood review the updated SOAF and provide a supplemental report pertaining to expansion of the claim for any of the conditions of sprain of the left hip, right knee, right ankle, and right foot.

In a September 7, 2021 addendum letter, Dr. Hood opined that appellant's diagnosed conditions of left hip, right knee, right ankle, and right foot sprains were not causally related to the accepted employment injuries.

OWCP, by decision dated October 15, 2021, continued to deny expansion of the acceptance of appellant's claim. It found that the special weight of the medical evidence rested with Dr. Hood's September 7, 2021 addendum report.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁷

To establish causal relationship between a condition and the employment event or factors, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁸ 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.⁹

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.”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 When there exist opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (IME) 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.¹²

The Board notes that OWCP has been delegated authority under FECA in the selection of a medical referee physician through section 8123(a). Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the impartial medical referee. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system.¹³ OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹⁴ Physicians

⁷ See *S.L.*, Docket No. 19-0603 (issued January 28, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁸ See *S.L.*, *id.*; *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

⁹ See *M.M.*, Docket No. 19-0061 (issued November 21, 2019); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *D.H.*, Docket No. 19-0687 (issued March 31, 2021); *T.J.*, Docket No. 20-0721 (issued November 17, 2020).

¹² *S.T.*, Docket No. 16-1911 (issued September 7, 2017); *G.B.*, widow of *R.B.*, Docket No. 16-1363 (issued March 2, 2017); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

¹⁴ *Id.* at Chapter 3.500.4(b)(1).

who may not serve as impartial specialists include those employed by, under contract to, or regularly associated with federal agencies;¹⁵ physicians previously connected with the claim or claimant or physicians in partnership with those already so connected;¹⁶ and physicians who have acted as a medical consultant to OWCP.¹⁷

ANALYSIS

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

OWCP properly found that a conflict in the medical opinion evidence existed between Dr. Murchison and Drs. White and Sklar regarding whether appellant's left hip, right knee, right ankle, and right foot sprains were causally related to the accepted employment injury.

On February 26, 2021 OWCP referred appellant to Dr. Hood to resolve the conflict of medical opinion regarding expansion of appellant's claim. In a March 17, 2021 letter, Dr. Hood noted he had reviewed appellant's medical history and records. He also noted that he had previously examined him on May 10, 2017. The record reflects that OWCP had previously received reports from Dr. Hood, dated May 15 and June 9, 2017, wherein Dr. Hood addressed whether acceptance of appellant's claim should be expanded to include additional diagnoses related to appellant's left hip, right knee, and right foot. OWCP continued to develop the claim following receipt of these reports from Dr. Hood.

Pursuant to OWCP's procedures, physicians previously connected with the claim or claimant may not serve as an IME. As Dr. Hood had previously examined and evaluated appellant in 2017, he was not properly selected to serve as an IME in 2021 when appellant was referred to him for another IME examination. As Dr. Hood was improperly selected to serve as the IME in 2021, his report is insufficient to resolve the conflict in medical opinion.

The Board, therefore, finds that this case must be remanded for further development. On return of the case record, OWCP shall refer appellant for a new impartial medical evaluation, with a physician not previously connected to the claim. The IME shall resolve the conflict of medical opinion evidence as to whether appellant's claim should be expanded to include additional diagnoses related to appellant's left hip, right knee, and right foot. After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁵ *Id.* at Chapter 3.500.4(b)(3)(a).

¹⁶ *Id.* at Chapter 3.500.4(b)(3)(b).

¹⁷ *Id.* at Chapter 3.500.4(b)(3)(c).

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2021 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further development consistent with this decision of the Board.

Issued: August 30, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board