

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

P.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Texarkana, TX, Employer)
-----)

**Docket No. 22-1242
Issued: May 23, 2023**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 24, 2022 appellant, through counsel, filed a timely appeal from a July 27, 2022 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.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to expand the acceptance of his claim to include additional bilateral foot or ankle conditions; and (2) whether

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.*

he has met his burden of proof to establish a recurrence of disability, commencing November 19, 2010 causally related to his accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.³ 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 he sustained degenerative joint disease of both feet and hallux valgus (a bunion deformity) on the right due to factors of his federal employment. OWCP adjudicated this claim under OWCP File No. xxxxxx990 and accepted it for hallux valgus (acquired), bilateral, on March 31, 2008.

On November 28, 2009 appellant filed a second Form CA-2 alleging that he had developed bilateral ankle conditions due to factors of his federal employment. OWCP adjudicated this claim under OWCP File No. xxxxxx687 and on February 1, 2010 accepted it for other disorders of joint, ankle, and foot, bilateral. It administratively combined the claims in March 2010 with OWCP File No. xxxxxx990 serving as the master file.⁴

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 received 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.

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

³ Docket No. 19-1468 (issued September 9, 2020); Docket No. 18-0956 (issued February 8, 2019); and Docket No. 15-1013 (issued June 15, 2016).

⁴ On March 4, 2010 the Department of Veterans Affairs 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.

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. 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 appellant's claim to include aggravation of osteochondritis dissecans, bilateral, and 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 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 appellant's work duties, 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 series of questions. In a February 14, 2018 report, Dr. Sanderson 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. He 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, and that appellant's ankle/foot conditions occurred irrespective of work activities. Dr. Sanderson 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. As such, Dr. Sanderson's 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 appellant's 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

OWCP received additional medical evidence. In a November 7, 2018 report, 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 diagnosed chronic bilateral ankle osteoarthritis, bilateral hallux valgus, and chronic bilateral lichen planus, aggravated by employment activity. He advised that appellant's ankle osteoarthritis and bunion deformity were progressive, would worsen over time and appellant's disability was permanent.

On April 4, 2019 OWCP referred appellant, along with an updated SOAF, the medical record, and a series 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 diagnosed asymptomatic bilateral flat feet, hyperkeratosis of plantar surface of bilateral feet and possible mild degenerative arthritis of

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

bilateral ankles by history, minimally symptomatic. He 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. Dr. Valera indicated that his above-noted diagnoses were chronic or congenital in nature, and that there was no evidence to support that appellant's work activities would cause these 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. Valera concluded that appellant did not have a work-related injury or condition and only has congenital or age-related degenerative conditions, which were not related to 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.

Appellant, through counsel, appealed to the Board. By decision dated September 9, 2020, the Board found that a conflict of medical opinion remained between appellant's physicians and Dr. Varela because he 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. Accordingly, as Dr. Varela's report lacked a proper factual background, there remained an unresolved conflict in the medical evidence. The Board set aside the June 7, 2019 decision and remanded the case to OWCP.⁷

On January 11, 2021 OWCP referred appellant to Dr. Kenneth M. Rosenzweig, a Board-certified orthopedic surgeon, for an impartial medical evaluation to determine 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. It provided a SOAF and a series of questions.

In an April 9, 2021 report, Dr. Rosenzweig noted his review of the medical record and the SOAF. He described appellant's employment history and work injuries and diagnosed pes planus and pronating hindfoot with dermatologic hyperkeratosis to both feet. Dr. Rosenzweig noted the diagnosed conditions were preexisting, and predated appellant's military service. He indicated that there was a remote history of osteochondritis dissecans; however, this finding was not confirmed by his clinical examination or current radiographs. Dr. Rosenzweig further indicated that appellant was at risk for progression if he has osteochondritis dissecans or midfoot arthritis, but current clinical examination and radiographs did not support progression of pathology. In answers to OWCP questions, he opined that the duties of a mail handler and machine operator could temporarily aggravate appellant's preexisting condition and he suspected that appellant was symptomatic due to overuse of pes planus and pronating hindfoot. Dr. Rosenzweig further noted that appellant had repeated claims from 2007, 2009, and 2010 and the preexisting pes planus may have become so symptomatic that he required time off in order to

⁷ Docket No. 19-1468 (issued September 9, 2020).

obtain treatment. He agreed that appellant probably had some worsening of his symptoms, but “maybe not condition[s] from the claims of 2007, 2009, and 2010.”

On August 26, 2021 OWCP requested a supplemental report from Dr. Rosenzweig requesting that he provide an unequivocal opinion as to whether there was a worsening of the accepted conditions and whether the accepted conditions of the claim should be expanded.

In a supplemental report dated September 15, 2021, Dr. Rosenzweig indicated that he did not find severe hallux valgus, progression of arthritis, or osteochondritis dissecans. He noted that appellant may have been symptomatic with prolonged standing, but he did not find progression of arthritis. Dr. Rosenzweig advised that appellant did not have any profound worsening of his accepted conditions. He concluded that OWCP should not expand the acceptance of appellant’s claims to include additional conditions. Dr. Rosenzweig further noted that appellant had 100 percent service-connected disability and “standing working [on] machines more than likely caused foot and ankle pain, but did not necessarily create the structural progression or deformity.”

By decision dated February 9, 2022, OWCP denied appellant’s claim for a recurrence of disability commencing November 19, 2010 and denied expansion of the acceptance of his claim to include foot and ankle conditions, finding that the special weight of the medical evidence rested with the opinion of Dr. Rosenzweig.

On February 18, 2022 appellant requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review. The hearing was held on May 12, 2022.

By decision dated July 27, 2022, an OWCP hearing representative affirmed the February 9, 2022 decision.

LEGAL PRECEDENT -- ISSUES 1 & 2

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁹ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹⁰ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical

⁸ *Supra* note 2.

⁹ *See D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *See M.B.*, Docket No. 18-1455 (issued March 11, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

issues that must be proven by a preponderance of probative and reliable medical opinion evidence.¹¹

Under FECA, the term disability means an incapacity because of an employment injury, to earn the wages the employee was receiving at the time of the injury.¹² When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, prevent the employee from continuing in his or her employment and he or she is entitled to compensation for any loss of wages.¹³

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.¹⁴ The opinion of the physician 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.¹⁵

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.¹⁶

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.¹⁷ 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.¹⁸ For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹⁹ 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.²⁰

¹¹ See 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

¹² *Id.* at § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹³ See *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁴ See *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹⁵ *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁶ *C.H.*, Docket No. 20-0440 (issued August 3, 2020).

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

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

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

²⁰ See *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *Y.A.*, 59 ECAB 701 (2008).

ANALYSIS -- ISSUES 1 & 2

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 June 7, 2019 decision because the Board considered that evidence in its September 9, 2020 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.²¹

On remand from the Board's September 9, 2020 decision, OWCP properly referred appellant to Dr. Rosenzweig for an impartial medical evaluation.

Upon referral of the medical record to Dr. Rosenzweig, OWCP provided a SOAF dated April 2, 2020 and a series of questions. The questions for the impartial medical examiner focused on whether appellant sustained a recurrence of disability on November 19, 2020 causally related to the December 13, 2007 and September 29, 2009 employment injuries resulting from his work-related activities and, as a result, he was unable to work; and, whether appellant was unable to perform the duties of his employment as of November 19, 2010 due to a worsening of his already accepted conditions under one or both claims and/or due to any other foot/ankle condition that resulted due to his work-related activities.

In his April 9, 2021 report, Dr. Rosenzweig described appellant's employment history and work injuries and diagnosed pes planus and pronating hindfoot with dermatologic hyperkeratosis to both feet. He noted the diagnosed conditions were preexisting and predated appellant's military service. In answers to OWCP questions, Dr. Rosenzweig opined that the duties of a mail handler and machine operator could temporarily aggravate appellant's preexisting condition and he suspected that appellant was symptomatic due to overuse of pes planus and pronating hindfoot. He further noted that appellant had repeated claims from 2007, 2009, and 2010 and the preexisting pes planus may have become so symptomatic that he required time off in order to obtain treatment. Dr. Rosenzweig agreed that appellant probably had some worsening of his symptoms, but "maybe not condition[s] from the claims of 2007, 2009, and 2010."

The Board finds that Dr. Rosenzweig's opinion is speculative and equivocal in nature as to whether appellant sustained a recurrence of disability on November 19, 2010 stating that appellant "probably" had some worsening of his symptoms, but "maybe not condition from the claims of 2007, 2009, and 2010." The Board has held that medical opinions that suggest that a condition was "probably" caused by work activities are speculative or equivocal in character and have limited probative value.²² Dr. Rosenzweig failed to provide a well-rationalized opinion explaining whether appellant sustained a recurrence of disability on November 19, 2010 causally related to the accepted employment injuries. The Board has explained that medical rationale is

²¹ *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²² *J.W.*, Docket No. 18-0678 (issued March 3, 2020).

particularly necessary if appellant has a preexisting condition.²³ Accordingly, Dr. Rosenzweig's opinion is insufficient to resolve the conflict of opinion in this case.

With regard to whether appellant's service-related foot condition or any other foot or ankle condition was aggravated by his work duties, Dr. Rosenzweig's provides little rationale in support of his conclusion that the accepted claims should not be expanded. In the supplemental report dated September 15, 2021, he noted that appellant may have been symptomatic with prolonged standing, but he did not find progression of arthritis or profound worsening of appellant's accepted conditions and concluded that OWCP should not expand the acceptance of appellant's claims. The Board finds that Dr. Rosenzweig's opinion was conclusory in nature and did not contain sufficient medical reasoning to establish whether appellant's claim should be expanded to include additional bilateral foot or ankle conditions.²⁴

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.²⁵ As OWCP undertook development of the evidence by referring appellant to Dr. Rosenzweig, it had the duty to secure an appropriate report based on a proper factual and medical background, resolving the issues in the claim.²⁶

Accordingly, as Dr. Rosenzweig's report lacks sufficient rationale, 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 shall refer appellant, an updated SOAF, and an updated list of questions to a physician in the appropriate field of medicine to resolve the existing conflict. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

²³ *E.K.*, Docket No. 18-0835 (issued September 23, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018); *Del K. Rykert*, 40 ECAB 294-96 (1988).

²⁴ *See A.C.*, Docket No. 19-1522 (issued July 27, 2020); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.J.*, Docket No. 17-0543 (issued August 1, 2017).

²⁵ *C.H.*, *supra* note 16; *Jimmy A. Hammons*, 51 ECAB 219 (1999).

²⁶ *See A.M.*, Docket No. 19-1602 (issued April 24, 2020).

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2022 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: May 23, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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