United States Department of Labor
Employees' Compensation Appeals Board

O.Y., Appellant	)	
and	)	**Docket No. 10-1275**
	)	**Issued: April 11, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Stamford, CT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2010 appellant filed a timely appeal from a December 11, 2009 merit decision of the Office of Workers' Compensation Programs which denied her claim for a recurrence and a January 29, 2010 decision, which denied her request for a review of the written record. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.[2]

ISSUES

The issues are: (1) whether appellant has established a recurrence of disability commencing July 6, 2009 causally related to her September 6, 2000 employment injuries; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the December 11, 2009 Office decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence, together with a formal written request for reconsideration to the Office, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

(2) whether the Office properly denied appellant's request for a review of the written record as untimely.

FACTUAL HISTORY

On October 26, 2009 appellant, then a 59-year-old clerk, filed a recurrence (Form CA-2a). She identified the date of recurrence as July 6, 2009. Appellant indicated that her toe hurt and it had been uncomfortable since the September 6, 2000 employment injury. She did not stop work.

Appellant submitted a September 18, 2009 report by Dr. Jeremy Bier, a podiatrist, who reported that he saw appellant on July 6, 2009 "after a heavy metal object landed on her right big toe joint." Dr. Bier reported that on July 6, 2009 he took x-rays and diagnosed degenerative joint disease changes at the first metatarsophalangeal (MP) joint of the right foot, subchondral sclerosis and osteophytic bone production over the lateral aspect of the first MP joint and over the dorsal aspect of the first metatarsal with joint space narrowing appreciated. He stated that this "type of arthritis is an insidious process which takes years to develop typically overtime, which can be caused by trauma, biomechanical imbalances, improper shoe gear or ill-fitting shoes, hereditary and neuromuscular conditions." Dr. Bier further noted that "it is possible that the arthritic development in [appellant's] first [MP] joint of the right foot very well, may have been caused by the trauma she suffered [nine] years ago over this area" and that the condition tends to be chronic and progressive. He recommended treatments and surgery should more conservative measures fail to relieve her pain.

In a November 3, 2009 letter, the Office advised appellant that it had received the August 28, 2009 notice of recurrence but could not render a decision at that time because a decision had not yet been reached on her original claim. The original September 6, 2000 claim was categorized as a "Short Form Closure" on the grounds that it was deemed to be a minor injury, she did not miss time from work and the medical expenses did not exceed $1,500.00. The Office advised that, if the original claim was accepted, it would then review appellant's claim for recurrence.

On November 4, 2009 the Office scheduled an appointment for a second opinion evaluation of appellant's work-related condition in order to obtain additional evidence on the nature of her condition, the extent of disability and appropriate treatment. The statement of accepted facts indicated that on September 6, 2000 appellant filed a claim for a right big toe injury after a postcon lower gate fell on her toe. Appellant's claim was accepted for a right foot contusion and she did not miss any time from work due to the injury.

On November 6, 2009 the Office accepted that on September 6, 2000 appellant sustained a right foot contusion.

On November 19, 2009 appellant was examined by a second opinion physician, Dr. Wayne J. Altman, a Board-certified orthopedic surgeon. In a November 23, 2009 report, Dr. Altman noted that the MP joint of the foot was "the most common joint in the foot to develop arthritic changes," but he could not definitely ascribe these degenerative changes to an injury that occurred more than nine years ago or that any physician would be able to assuredly correlate

appellant 2000 injury with the bilateral degenerative changes in her feet. He noted that the medical evidence from the period immediately following her injury in 2000 was not made available to him. Dr. Altman opined that appellant's condition was not severe enough to warrant aggressive orthopedic treatment and recommended oral anti-inflammatory medication and a shoe with a wide toe box and metatarsal bar.

By decision dated December 11, 2009, the Office denied appellant's claim for recurrence on the grounds that she did not submit sufficient medical evidence to establish that her right toe condition was due to the accepted work injury. It found that Dr. Altman's medical report constituted the weight of the medical evidence and that Dr. Bier's report was of diminished probative value and insufficient to support her claim because of the speculative nature of his opinion.

On January 13, 2010 appellant requested a review of the written record of the Office's December 11, 2009 decision by an Office hearing representative. She submitted additional evidence.

By decision dated January 29, 2010, the Office's Branch of Hearings and Review denied appellant's January 13, 2010 request for a review of the written record on the grounds that it was untimely. The Office further denied the request finding that the issue could be resolved through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3] A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[4]

The Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation to see that its administrative processes are impartially and fairly conducted.[5] Although the employee has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.[6] Once the Office starts to

[3] 20 C.F.R. § 10.5(x). *See T.S.*, Docket No. 09-1256 (issued April 15, 2010).

[4] *See Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992); *see also B.B.*, Docket No. 09-1858 (issued April 16, 2010).

[5] *Richard F. Williams,* 55 ECAB 343, 346 (2004).

[6] *See D.N.,* 59 ECAB 576, 580 (2008).

procure medical opinion, it must do a complete job.[7] It has the responsibility to obtain an evaluation that will resolve the issue involved in the case.[8]

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision. The November 23, 2009 medical report of Dr. Altman, the second opinion physician to whom the Office referred appellant, advised that the MP joint of the foot was the most common joint in the foot to develop arthritic changes. Dr. Altman could not definitely ascribe appellant's degenerative changes to an injury that occurred more than nine years ago. He commented that no physician would be able to assuredly correlate her 2000 injury with the bilateral degenerative changes in her feet. Dr. Altman concluded that appellant's condition was not severe enough to warrant aggressive medical treatment of an orthopedic nature; however; he noted that he did not review the medical reports from the period immediately following her injury in 2000 because they were not provided to him. The Board noted that he did not fully address the issue of whether appellant's foot condition commencing July 6, 2009 was causally related to her September 6, 2000 employment injury.

The Office referred appellant to Dr. Altman. It has the responsibility to obtain an evaluation which will resolve the issue involved in the case.[9] On remand, the Office should obtain the case record related to the September 6, 2000 claim, combine it with the instant claim and refer the case back to Dr. Altman with a request for a detailed opinion on whether her right foot contusion commencing July 6, 2009 was causally related to her September 6, 2000 employment injury. Following any necessary further development, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision on whether appellant has established a recurrence of disability commencing July 6, 2009 causally related to her September 6, 2000 employment injuries.[10]

[7] *Richard F. Williams, supra* note 5.

[8] *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

[9] *Id.*

[10] In light of the Board's disposition of the recurrence issue, the second issue of whether the Office properly denied appellant's request for a review of the written record is rendered moot. *See Sharon Edwards*, 56 ECAB 749 (2005).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2010 and December 11, 2009 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: April 11, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board