United States Department of Labor
Employees' Compensation Appeals Board

P.R., Appellant	)	
and	)	**Docket No. 16-0146**
	)	**Issued: September 9, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Needham, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 2, 2015 appellant, through counsel, filed a timely appeal from an October 14, 2015 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.

ISSUE

The issue is whether appellant met his burden of proof to establish an aggravation of his preexisting back condition consequential to his accepted employment injury.

[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.*

On appeal counsel contends that OWCP erroneously found that the medical reports of Dr. Stanley Hom, a Board-certified orthopedic surgeon, constituted the weight of the medical evidence as his reports were speculative, conclusory, and unrationalized.

FACTUAL HISTORY

On May 17, 2010 appellant, then a 51-year-old custodian, filed a traumatic injury claim (Form CA-1) claiming that on that date while climbing a ladder, he felt a sharp pain from his heel to his ankle. He stopped work on the date of injury. On August 23, 2010 OWCP accepted appellant's claim for a small plantar calcaneal spur of the left heel. On September 20, 2010 it expanded the claim to include acceptance for tibialis tendinitis. Appellant received compensation benefits on the periodic rolls commencing July 2, 2010 until June 3, 2011.

In an August 25, 2010 report, Dr. Eric J. Woodard, appellant's treating Board-certified neurosurgeon, noted back pain status post foot injury causing strain on his back. In a September 1, 2010 medical report, he noted that he has been following appellant for many years for his lumbar spine disease and subsequent surgery. Dr. Woodard indicated that appellant recently injured his foot at work and that this had dramatically altered his gait and that due to the change in gait and balance he was experiencing an exacerbation of his lumbar symptoms. He recommended physical therapy to treat appellant's lumbar spine symptoms and opined that these symptoms were directly related to his foot injury.

On December 1, 2010 OWCP referred appellant to Dr. Stanley Hom, Board-certified in orthopedic and hand surgery, for a second opinion. In a December 22, 2010 report, Dr. Hom diagnosed left foot plantar fasciitis. He also noted magnetic resonance imaging (MRI) scan findings consistent with peroneus longus and posterior tibial tendinopathy (chronic tendinitis). Dr. Hom further diagnosed chronic low back condition, by history and lumbar degenerative disc disease, status post failed disc implant, and subsequent lower lumbar fusion. He explained that he would not consider the history of injury a major or predominant cause of appellant's current left foot and ankle symptoms. Dr. Hom further found that the history of injury was unrelated to appellant's current low back condition, which he believed that was more related to his chronic underlying low back condition. He opined that, based on appellant's diagnosis of left foot chronic plantar fasciitis and his chronic low back condition, he could return to work in a modified capacity. In conclusion, Dr. Hom related that appellant's left foot plantar fasciitis reached maximum medical improvement seven months following his injury. In a January 25, 2011 supplemental report, he opined that appellant's left foot plantar fasciitis and the MRI scan findings suggestive of peroneus longus and posterior tibial tendinopathy were not currently related to the history of injury dated May 17, 2010.

In a May 16, 2011 decision, OWCP terminated appellant's compensation and medical benefits because the medical evidence established that he no longer had any residuals or disability due to his accepted work injury.

On June 9, 2011 appellant requested a hearing before an OWCP hearing representative. At the hearing held on September 20, 2011 he testified that on May 17, 2010 he was climbing an unstable ladder to let the air conditioning repairman on the roof when his left foot slipped and he felt a sharp pain shoot from this left heel up to his left ankle and back to his heel. Appellant

noted that once he got to the roof he could not put any weight on his left foot. He indicated that he first sought medical treatment with his primary care physician on May 19, 2010. Appellant noted that he saw a podiatrist on May 20, 2010 and that she told him to stay off the foot, stay off work for 12 weeks, and to wear a boot at all times. He indicated that he wore the boot in June, July, and maybe into August 2010. Appellant noted that he had lumbar fusion surgery in 2009 and that his physicians told him that the foot injury worsened his back injury. He further noted that he tried to return to work on September 1, 2011, but his supervisor told him he needed a note from his physicians to return to work. Appellant obtained releases to return to work, but after working for two days he could not continue because of back pain. He noted that he did not perform heavy work those days, but still he aggravated his back and leg pain. Appellant stated that he worked full time before the injury, but since had been unable to perform his work duties.

OWCP continued to receive medical evidence. In a September 1, 2010 note, Dr. Woodard indicated that he has followed appellant for many years for his lumbar spine disease and subsequent surgery. He noted that recently appellant injured his foot at work and that this dramatically altered his gait. Dr. Woodard opined that due to the change in gait and balance appellant was experiencing an exacerbation in his lumbar symptoms. He recommended physical therapy to treat appellant's lumbar spine symptoms and further opined that these symptoms were directly related to appellant's foot injury. In October 13, 2010 progress notes, Dr. Woodard diagnosed lumbosacral spondylosis without myelopathy. He noted that appellant was 21 months following his L4-5 posterior fusion and fixation for a failed L4-5 disc arthroplasty. Dr. Woodard noted that appellant had improved since the surgery, but still experienced recurrent low back pain. In an October 6, 2011 note, he noted that on May 5, 2014 appellant underwent a L4-5 disc arthroplasty and a subsequent L4-5 interbody lumbar fusion and hardware fixation on January 26, 2009. Dr. Woodard noted that appellant was doing well and returned to work, but that while working in May 2010 he injured his foot and was placed in a foot orthotic. He indicated that while appellant wore this foot orthotic subsequent to a work-related injury, he aggravated his preexisting lumbar degenerative disc disease for which he had undergone two surgical procedures. Dr. Woodard noted that since wearing the foot orthotic appellant experienced progressive worsening back pain. He indicated that the foot injury altered appellant's gait and put additional strain on his lumbar spine. Dr. Woodard recommended lumbar spine physical therapy as an initial treatment option. He opined that appellant had a consequential injury to his lumbar spine that was essentially an exacerbation of his preexisting condition. Dr. Woodard further opined that this was directly caused by the foot orthotic appellant was wearing to treat a work-related injury.

By decision dated December 15, 2011, OWCP's hearing representative affirmed the termination of benefits based on the opinion of Dr. Hom. However, he remanded the case for OWCP to further develop the medical evidence with regard to whether appellant developed an aggravation of a prior back condition causally related to his accepted foot condition. The hearing representative determined that, although Dr. Woodard had not provided detailed rationale in support of his medical opinion with regard to the back injury being related to appellant's accepted medical condition, his opinion was sufficient to compel additional development of the evidence.

In response to questions posed by OWCP on February 24, 2012, Dr. Hom wrote a supplemental report dated April 9, 2012 wherein he opined that there was sufficient evidence to

support of the use of an orthotic boot on appellant's left foot for eight weeks during the period June to August 2010 for his suspected diagnosis of plantar fasciitis. However, he further opined that the use of the prefabricated walking cast did not cause or contribute to a worsening of the examinees preexisting lumbar degenerative disease and what is described in a computerized tomography (CT) scan as a nonunion of his L4-5 attempted fusion, or any other condition affecting the lumbar spine. Dr. Hom also noted that he was unaware of any widely held studies that correlate use of a prefabricated walking cast with the development of low back symptoms or worsening of lumbar degenerative disc disease.

In a May 21, 2012 report, Dr. Michael A. Marciello, a Board-certified physiatrist, listed his impression as chronic lower back pain and combination of stenosis, facet arthropathy, deconditioning, and a compensatory altered gait pattern and limited mobility. He reviewed a lumbar MRI scan study from July 2011 and indicated that it revealed extensive degenerative facet arthropathy and marked L5-S1 disc space narrowing, stenosis at L3-4, with fusion at L4-5, and multilevel facet arthropathy greatest at the lower lumbar segment. In a July 2, 2012 progress note, Dr. Marciello listed impressions of discogenic lower back pain, and lumbar stenosis with diffuse degeneration of the lumbar spine.

By decision dated July 13, 2012, OWCP denied expansion of appellant's claim as it determined that the medical evidence of record did not establish that he sustained an injury to his back as a direct result of his accepted employment injury. It determined that the weight of the medical evidence was represented by the well-rationalized opinions of Dr. Hom, who as a Board-certified orthopedic surgeon, possessed expertise and training in a more pertinent medical field with respect to the appellant's back condition.

In a June 30, 2013 report, Dr. Woodard noted that appellant was under his care. He noted that appellant underwent two previous lumbar surgeries for his debilitating mechanical back pain secondary-to-severe lumbar degenerative disc disease. Dr. Woodard noted that his first surgery in 2004 was a L4-5 disc arthroplasty, and the second surgery in 2009 was an L4-5 interbody lumbar fusion with hardware fixation. He noted that, at his subsequent appointment, appellant had improved and had returned to work full time. Dr. Woodward related appellant's history of his employment injury. He noted that subsequently appellant was evaluated by his primary care physician as well as his podiatrist and asked to remain off his foot. Dr. Woodward noted that appellant wore a foot orthotic for approximately 12 weeks. He opined that during this time frame appellant's gait was completely altered because he was straining his lumbar spine on a daily basis in favor of the foot injury and boot. Dr. Woodward noted that, in August 2010, appellant contacted his office with the complaint of increasing leg pain, weakness, and lower back pain with trouble standing for any length of time. He noted that by this time he had removed the foot orthotic due to the pain. At the time, Dr. Woodward recommended physical therapy and foot therapy. He noted that this request was denied by workers' compensation for the reason that the lumbar spine issues were not related to his foot injury, and that this was inaccurate as his symptoms progressively got worse following his foot injury.

Dr. Woodard related that repeat MRI and CT scans were performed on April 9, 2012 and showed a solid L4-5 fusion and some significant facet arthroscopic subacromial decompression at L3-4, L5-S1. He noted that appellant had been unable to complete the recommended treatment due to the denial of his workers' compensation claim. Dr. Woodard opined that

appellant's continued pain in his lumbar spine as well as his groin pain that radiates into his left leg was all related to his work injury from May 2010. He noted that appellant was medically disabled for an appropriate period of time while recovering from both surgeries in 2004 and 2009, and that he was disabled again when injured in May 2010 despite trying to return to work a few times. Dr. Woodard concluded that appellant's recovery was hindered due to the denial from workers' compensation for continued physical therapy for his spine.

On July 15, 2013 appellant requested reconsideration of the July 13, 2012 decision.

Appellant continued to seek treatment from Dr. Marciello, who continued to submit progress reports. In a September 19, 2013 report, Dr. Marciello noted that appellant had chronic discogenic mechanical lower back pain, cervical spondylosis, generalized degenerative joint disease and focal axial spine degeneration, ongoing deconditioning, and medication dependency. He noted that appellant got through the workday with frequent rests and activity modification.

By decision dated October 3, 2013, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demontrate clear evidence of error. Appellant appealed to the Board. However, by decision dated May 12, 2014, the Board set aside the October 3, 2013 decision and remanded the case, finding that appellant's request for reconsideration was timely filed and ordered that OWCP review appellant's request under the proper standard of review for timely requests for reconsideration.[3]

By decision dated July 9, 2014, OWCP reviewed the merits of appellant's case and denied modification of the July 13, 2012 decision, finding that the additional evidence submitted on reconsideration was not of sufficient probative value to alter the July 13, 2012 decision. It determined that the reports of Drs. Woodard and Marciello lacked probative value to establish causal relationship.

On July 2, 2015 appellant, through counsel, requested reconsideration of OWCP's July 9, 2014 decision. Counsel listed several studies and articles in support of the proposition that appellant's back condition was causally related to his altered gait. He contended that appellant's physicians related appellant's back pathology to the effects of an altered gait due to ambulation with a walking boot and that there was no contrary competent medical evidence.

In support of the reconsideration request, appellant submitted a May 17, 2015 report wherein Dr. Sung K. Anderson, a Board-certified internist, noted that appellant has lumbar degenerative disc disease. Dr. Anderson related that appellant had undergone L4-5 disc arthroplasty in 2004 and an interbody fusion and hardware fixation at the same level in 2009. He noted that, after an appropriate recovery, appellant returned to work full time. Dr. Anderson discussed the May 17, 2015 employment injury, noting that on that date appellant had severe and sharp pain to the left heel and into the ankle while climbing the rungs of the metal ladder at work. He noted that appellant was placed in an orthotic cast, which completely altered his gait, his pelvis, and back resulting in increased back and leg pain. Dr. Anderson further noted that appellant had mild arthropathy at L3-4 and L5-S1, which never caused him any problems. Due to appellant's injury on his left foot, heel, and ankle, these areas on his spine were inflamed and

[3] Docket No. 14-0300 (issued May 12, 2014).

irritated causing severe back pain. Dr. Anderson explained that, prior to his left heel, foot, and ankle injury in 2010, appellant had been without any back problems. He noted that the orthotic boot immobilized appellant's foot, locking the foot and ankle at a neutral position in the dorsiflexion/plantar flexion and inversion/eversion planes. Dr. Anderson noted that such immobility significantly altered appellant's gait patterns and cadence as well as his knee, hip, pelvic, and lumbar kinematics. He explained that as appellant's lumbar spine was already compromised, he was susceptible to injury and irritation due to use of the orthotic boot on his left foot and ankle. Dr. Anderson opined, to a reasonable degree of medical certainty, that appellant's lumbar spine arthropathy was inflamed and irritated causing severe back pains for him, and that this was directly due to ambulating with an orthotic boot following his injury of left foot and ankle on May 17, 2010.

By decision dated October 14, 2015, OWCP denied modification of its prior decisions. It determined that the weight of the medical evidence was represented by the opinion of Dr. Hom as he was a Board-certified orthopedic surgeon. It also noted that Dr. Anderson did not provide a well-rationalized report.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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.[4] With respect to consequential injuries, it is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to employee's own intentional conduct.[5] The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[6]

A claimant bears the burden of proof to establish a claim for a consequential injury.[7] As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates to a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of

[4] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Albert F. Ranieri*, 55 ECAB 598 (2004).

[6] *See* A. Larson, *The Law of Workers' Compensation* § 10.01 (November 2000).

[7] *R.H.*, Docket No. 15-1785 (issued January 29, 2016).

the diagnosed condition and the special employment factors or employment injury.[8] Medical rationale is a medically-sound explanation for the opinion offered.[9]

Section 8123(a) of FECA provides that, 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] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[11]

ANALYSIS

In the present case, appellant seeks to expand the conditions accepted as a result of a May 17, 2010 employment injury. OWCP previously accepted small plantar calcaneal spur of the left heel and tibialis tendinitis. Appellant alleges an aggravation of a prior back injury as a result of wearing an orthotic boot for 8 to 12 weeks in the summer of 2010. The Board finds that the case is not in posture for decision as a conflict exists in the medical opinion evidence.

Dr. Woodard, appellant's treating Board-certified neurosurgeon, noted that he had followed appellant for many years with regard to his lumbar spine disease and subsequent surgery. He indicated that appellant was doing well following his back surgeries until May 2010 when he injured his foot and was placed in a foot orthotic. Dr. Woodard noted that while appellant wore this foot orthotic his gait was altered and that this aggravated his preexisting lumbar degenerative disc disease, for which he had two surgical procedures.

Dr. Anderson, appellant's treating Board-certified internist, explained that when appellant was placed in an orthotic cast due to his left heel injury on May 17, 2010, the boot immobilized appellant's foot, locking the foot and ankle at a neutral position in the dorsiflexion/plantar flexion and inversion/eversion planes. He further explained that this immobility significantly altered appellant's gait patterns, cadence, and his knee, hip, pelvic, and lumbar kinematics. Since appellant's lumbar spine was already compromised, he explained that appellant's spine was inflamed and irritated.

OWCP determined that the weight of the medical evidence was represented by the opinion of Dr. Hom, the second opinion physician who is Board-certified in orthopedic surgery. Dr. Hom opined that appellant's issues with his back were causally related to his preexisting low back condition. In his report of April 9, 2012, he noted that the use of the prefabricated walking cast did not cause or contribute to a worsening of appellant's preexisting lumbar degenerative

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[9] *See Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003).

[10] 5 U.S.C. § 8123(a); *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

[11] *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

disease or a nonunion of his L4-5 attempted fusion or any other condition affecting the lumbar spine, but he provided no rationale in support of his opinion. Dr. Hom noted that he was unaware of any widely held studies that correlate the use of a prefabricated walking cast with the development of low back symptoms or worsening of lumbar degenerative disc disease.

It is well established that when there are opposing medical reports of virtually equal probative value between an attending physician and a second opinion physician, 5 U.S.C. § 8123(a) requires OWCP refer the case to a referee physician to resolve the conflict.[12] The Board finds that the medical reports of Drs. Woodward and Anderson are in equipoise with the opinion of Dr. Hom as to whether appellant sustained an aggravation of his preexisting back condition consequential to his accepted left heel and tibialis injury. Appellant's treating physicians provided long-standing medical care for the accepted conditions in this claim and set forth medical opinions on the relevant issue with equal rationale and clarity as the opinion of the second opinion physician, Dr. Hom.[13] As the opposing medical reports are of virtually equal weight and rationale, the Board finds that there is an unresolved conflict as to whether appellant sustained a consequential aggravation of his preexisting back condition.[14] On remand OWCP shall prepare a statement of accepted facts and refer appellant to an impartial medical specialist for examination and evaluation. After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[12] *See P.C.*, Docket No. 15-1013 (issued June 15, 2016).

[13] *See D.E.*, Docket No. 15-0712 (issued June 23, 2016).

[14] *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 14, 2015 is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: September 9, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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