

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

C.N., Appellant)	
)	
and)	Docket No. 19-0621
)	Issued: September 10, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Oakland, CA,)	
Employer)	
)	

Appearances:
Denise Eaton-May, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 17, 2019 appellant, through counsel, filed a timely appeal from an August 30, 2018 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a back condition causally related to or as a consequence of his May 5, 2013 employment injury; (2) whether OWCP properly denied authorization for back surgery; and (3) whether appellant has met his burden of proof to establish an employment-related recurrence of disability beginning November 2, 2013.

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 May 8, 2013 appellant, then a 59-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on May 5, 2013 he strained his left ankle in the performance of duty when a cart rolled over his foot. OWCP accepted the claim for left ankle sprain and a contusion of the left foot. Appellant stopped work on May 9, 2013 and returned to work on May 17, 2013. He stopped work again on July 23, 2013.

On May 13, 2013 Dr. Christopher Harold LeMaster, Board-certified in emergency medicine, advised that appellant was unable to work until May 13, 2013. In an accompanying report, he noted that appellant denied experiencing pain in his neck or back.

Appellant received treatment from May to August 2013 for a left foot contusion and gout of the big toe. In a report dated August 19, 2013, Dr. Roman P. Kownacki, who specializes in occupational medicine, related that appellant had "experienced nonindustrial back pain which has required [appellant] to bear more weigh[t] on his [left] foot because of his [right] leg pain." He diagnosed a left foot contusion and gout of the big toe, and found that appellant could work with restrictions.

On October 7, 2013 Dr. Richard C. Lavigna, a podiatrist, reviewed appellant's history of a May 5, 2013 employment injury. He related:

"[Appellant] states that his back also hurt that night, but the pain in his left foot and ankle was so severe and the swelling so severe, he felt that it was just aggravation of a sciatic condition that he had been suffering from. He states that, one week later, his back symptoms started to intensify to the point where he could not even go up steps because of the pain in his back and hips that radiated down into his thigh [and] the constant throbbing and swelling of his left foot and ankle."

³ Docket No. 17-1751 (issued May 3, 2018).

Dr. Lavigna opined that appellant's left foot injury resulted in an aggravation of his sciatica or a back strain.⁴

In an October 30, 2013 report, Dr. Michael Hebrard, a Board-certified physiatrist, found that appellant was disabled for work from October 30 to November 4, 2013. Electrodiagnostic testing performed October 30, 2013 revealed left L5 radiculopathy or probable bilateral sciatic neuropathy.

On December 3, 2013 appellant telephoned OWCP and requested approval for scheduled back surgery. OWCP advised him to submit a comprehensive medical report explaining the need for surgery and its relationship to his accepted work injury, and the cause of any claimed disability.

On December 11, 2013 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation beginning November 2, 2013.

In a December 12, 2013 progress report, Dr. Lavigna related that appellant had low back pain causally related to his employment injury, noting that appellant favored his left foot and ankle when he walked.

By decision dated February 20, 2013, OWCP denied appellant's claim for wage-loss compensation from November 2 to December 13, 2013. It found that the medical evidence was insufficient to establish that he was totally disabled due to his May 5, 2013 employment injury.

In January 2014, appellant underwent a decompression laminectomy and a posterior lumbar fusion.

In a February 24, 2014 report, Dr. Hebrard discussed appellant's May 5, 2013 employment injury, noting that appellant experienced pain across the low back radiating into the left foot. He diagnosed left L5 radiculopathy, bilateral sciatic neuropathy, and a left foot contusion. Dr. Hebrard opined that appellant's left L5 radiculopathy and bilateral sciatic neuropathy was causally related to his May 5, 2013 employment injury. He related:

“As the cart rolled over [appellant's] foot, [he] retropulsed, that is, hyperextension of the lumbar spine followed by a recovery trying to prevent a fall. This initial extension caused traction along the sciatic nerve bilaterally leading to inflammatory changes. An altered gait resulted from the injury to the left foot and ankle and caused a toggling of the pelvis which put stress along the lower lumbosacral spine segments leading to posterior bulging of the disc which pressed against the adjacent nerve roots, leading to paresthesias, numbness, weakness, and pain, primarily on the left side *versus* the right.”

Dr. Hebrard opined that appellant's antalgic gait caused the piriformis muscle to be in a “state of constant contraction” resulting in compression of the sciatic nerve. He attributed

⁴ In an October 17, 2013 progress report, Dr. Lavigna advised that appellant had strained his low back and hip on May 5, 2013 trying to hold back three other carts. He diagnosed a foot contusion, ankle sprain, lumbosacral strain, and sciatica and found that appellant could perform sedentary employment.

appellant's back condition to "the initial aggravation with retropulsion and flexion of the lumbar spine leading to entrapment of the L5 nerve root, and a compensatory altered gait from the left swollen foot leading to stress and strain along the sciatic nerve complex bilaterally."

On March 20, 2014 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.⁵

On May 5, 2014 Dr. Hebrard evaluated appellant for back pain with lower extremity weakness and bilateral ankle pain, and noted that appellant had undergone thoracic and lumbar surgery on January 20, 2014. He diagnosed thoracic myelopathy, lumbar myelopathy, and sciatica. Dr. Hebrard advised that "ongoing mechanical instability, particularly involving [appellant's] left foot and ankle, led to a compensatory lumbar aggravation thereby causing his preexisting spinal disc disease to undergo torsional and rotation stress and aggravating and accelerating damage to the intervertebral discs, as well as impingement of the adjacent nerve roots." He again described how the spinal injury occurred and opined that the thoracic and lumbar myelopathy with sciatica were both directly related to and a consequence of the accepted work injury.⁶

A hearing was held on June 18, 2014. Appellant described his injury and noted that he had undergone back surgery on January 28, 2014.⁷

On June 30, 2014 Dr. Hebrard diagnosed a foot contusion, ankle sprains and strains, sacroiliac ligament sprains and strains, and sciatica. He advised that appellant's altered gait had aggravated his spinal nerve root and resulted in "contraction of the lumbar paraspinal muscles which are significantly weakened and denervated from the previous lumbar surgery." Dr. Hebrard opined that appellant's employment injury caused a consequential injury to the lumbar spine due to his altered gait and requested that OWCP expand acceptance of his claim to include lumbar radiculitis and sacral sprain.

By decision dated August 5, 2014, OWCP's hearing representative vacated the February 20, 2014 decision. She found that the reports from Dr. Hebrard, while not completely rationalized, were sufficient to require further development of the medical evidence. The hearing representative instructed OWCP to obtain reports associated with appellant's January 28, 2014 surgery and refer him for a second opinion examination to determine whether he sustained a back condition either directly related to, or as a consequence of, his May 5, 2013 employment injury. She further determined that the physician should address whether appellant sustained any periods of disability due to the work injury and whether OWCP should authorize the January 28, 2014 surgery.

In a January 26, 2015 progress report, Dr. Hebrard opined that appellant had sustained a consequential injury to his low back due to his work injury of lumbar radiculitis, an aggravation of lumbar disc degeneration, and sciatica. He described the mechanism by which a change in gait

⁵ Dr. Lavigna provided progress reports from April through July 2014 describing his treatment of appellant for his left ankle symptoms.

⁶ Dr. Hebrard provided a similar report on June 2, 2014 and opined that appellant was totally disabled.

⁷ Appellant also indicated that he had a psychiatric condition.

resulted in the low back condition. Dr. Hebrard also recommended a psychiatric evaluation and expansion of his claim to include a “mood adjustment secondary to this chronic pain syndrome...” He opined that appellant was totally disabled.

On May 26, 2015 OWCP referred appellant to Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he advise whether appellant had sustained a back condition either directly due to or aggravated by his May 5, 2013 work injury and, if so, whether it should authorize the January 2014 back surgery. OWCP also requested that Dr. Fong address any periods of disability.

In a report dated September 2, 2015, Dr. Fong discussed appellant’s history of injury and the medical reports of record. On examination he found bilateral muscle spasms of the paralumbar muscles and a reduced left ankle motion. Dr. Fong diagnosed a left foot contusion, left ankle sprain, postlaminectomy syndrome, and obesity. He attributed the ankle and foot diagnoses to the work injury. Dr. Fong related:

“One cannot say with any degree of reasonable medical certainty whether the incident directly caused, aggravated, precipitated, or accelerated the back problem. While, again, [appellant] was severely overweight adding to the force of trauma, [two] separate levels of spine injury severe enough to require ‘immediate’ surgery is very rare except under very unusual circumstances. His injury was not that traumatic to have led to that much damage. It is more likely that [appellant] had preexistent spinal pathology and the incident either accelerated or precipitated the pathology. He states that he had sciatica before, but was not under treatment so aggravation does [not] appear to be an issue. [Appellant], though, was not a cogent historian so it may turn out that he was under treatment in which case permanent aggravation would have to have been the case since it led to myelopathy and surgery. [His] history and the current medical records are insufficient to make this decision.”

Dr. Fong indicated that he was unable to determine the periods of employment-related disability based on the current medical evidence. He opined that appellant was currently totally disabled.

In a progress report dated July 8, 2016, Dr. Hebrard found severe swelling of the left ankle at the medial and lateral aspect. He diagnosed a left foot contusion and left ankle sprain and opined that appellant was disabled due to his left ankle and foot condition. Dr. Hebrard further opined that appellant’s altered gait caused increased pressure on his intervertebral disc and lower lumbar spine aggravating a preexisting lumbar condition.

On July 14, 2016 OWCP requested a copy of appellant’s medical records for the past 10 years. On September 12, 2016 it received his medical records from 2007 onward. On June 29, 2010 a physician noted that appellant had a history of lumbar radiculopathy and stable chronic low back pain. Appellant also received treatment for low back pain on various dates, including February 15, 2011 and July 10, 2012.

By decision dated September 14, 2016, OWCP denied appellant's request to expand the acceptance of his claim to include an employment-related back condition and his claim for disability compensation. It further denied authorization for back surgery.

On October 14, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A hearing was held on January 3, 2017. Counsel argued that appellant's ankle condition had aggravated his sciatica and that his ankle problems also resulted in disability.⁸

By decision dated February 13, 2017, OWCP's hearing representative affirmed the September 14, 2016 decision. She found that the weight of the medical evidence was insufficient to support claim expansion or disability compensation. The hearing representative further determined that OWCP had properly denied authorization for surgery.

Appellant appealed to the Board. By decision dated May 3, 2018, the Board set aside OWCP's February 13, 2017 decision. The Board discussed Dr. Fong's opinion that if appellant had a preexisting back condition then the employment injury may have caused a permanent aggravation. The Board noted that OWCP had obtained treatment notes indicating that appellant had received treatment for his back from 2010 to 2012, but did not provide the treatment notes to Dr. Fong for his review. The Board remanded the case for OWCP to submit the relevant treatment notes to Dr. Fong and request clarification regarding whether the May 5, 2013 employment injury either caused or aggravated a back condition, and if so, to address any periods of disability and whether OWCP should authorize the January 2014 surgery.

In a supplemental report dated August 15, 2018, Dr. Fong reviewed the medical evidence of record, noting that appellant had received treatment for his back beginning in March 2010. He advised that appellant's spine had worsened in a "nonlinear fashion starting back before 2010 with temporary infrequent exacerbations that became more sustained in mid-2013." Dr. Fong noted that appellant had not complained of back pain after his May 2013 employment injury until August 23, 2013. He found that there was "no evidence to substantiate" a relationship between appellant's back condition and the May 5, 2013 employment injury. Dr. Fong advised that appellant could perform sedentary work beginning September 2, 2015 due to his foot injury, but was totally disabled as a result of his back condition.

By decision dated August 30, 2018, OWCP found that appellant had not established that he sustained a back condition as a consequence of his May 5, 2013 employment injury. It thus denied retroactive authorization for back surgery and his claim that he had sustained an employment-related recurrence of disability beginning November 2, 2013.

⁸ On February 1, 2017 counsel contended that the reports from Dr. Hebrard were of sufficient probative value to show that appellant's back condition resulted from his work injury. She further argued that a conflict existed between appellant's physicians, Dr. Hebrard and Dr. Lavigna, and Dr. Fong, OWCP's referral physician.

LEGAL PRECEDENT -- ISSUE 1

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.⁹ 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.¹⁰

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. 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.¹¹

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."¹² 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.¹³ Where a 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.¹⁴

ANALYSIS

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

The record reflects an unresolved conflict of the medical opinion evidence between Dr. Hebrard, appellant's attending physician, and Dr. Fong, OWCP's second opinion examiner, regarding whether appellant sustained a back condition causally related to or as a consequence of his accepted May 5, 2013 employment injury.¹⁵

⁹ *G.R.*, Docket No. 18-0735 (issued November 15, 2018).

¹⁰ *Id.*

¹¹ *K.S.*, Docket No. 17-1583 (issued May 10, 2018); Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 3.05 (2014).

¹² 5 U.S.C. § 8123(a).

¹³ *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

¹⁴ *V.K.*, Docket No. 18-1005 (issued February 1, 2019).

¹⁵ *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

In a report dated February 24, 2014, Dr. Hebrard reviewed appellant's history of an employment injury on May 5, 2013. He found that he had sustained radiculopathy at L5 and bilateral sciatic neuropathy casually related to the accepted employment injury. Dr. Hebrard advised that appellant had hyperextended his lumbar spine in an effort to prevent falling such that he inflamed his sciatic nerve. Due to his left foot and ankle injury, appellant walked with an altered gait causing stress in the lower spine and pressure on the nerve roots. Dr. Hebrard provided similar findings in reports dated June 30, 2014, January 26, 2015, and July 8, 2016.

In a report dated September 2, 2015, Dr. Fong diagnosed a left foot contusion, left ankle sprain, postlaminectomy syndrome, and obesity. He advised that it was not possible to determine with certainty whether the incident aggravated appellant's back condition. Dr. Fong indicated that if appellant had previously received treatment for spinal pathology and sciatica then he may have experienced a permanent aggravation of his condition. In a supplemental report dated August 15, 2018, he noted that appellant had received treatment for a back condition since March 2010, with exacerbations that increased in the middle of 2013. Dr. Fong advised that appellant had not related symptoms of back pain after his employment injury until August 23, 2013. He found no relationship between appellant's back condition and his accepted May 5, 2013 employment injury. Dr. Fong found that appellant could perform sedentary employment beginning September 2, 2015 as a result of his foot injury, but remained totally disabled due to his back condition.

Both Dr. Hebrard and Dr. Fong provided a description of appellant's employment injury and both provided rationale for their respective findings based on their review of the medical evidence and findings on examination. The Board, therefore, finds a conflict in medical opinion regarding whether appellant sustained a back condition causally related to or as a consequence of his May 5, 2013 employment injury.¹⁶ Under section 8123(a) of FECA, OWCP must resolve this conflict by referring him, together with the case record and a statement of accepted facts, to an impartial medical specialist.¹⁷ If the impartial medical specialist finds that appellant sustained a back condition causally related to or as a consequence of his accepted employment injury, the specialist should address whether his employment injury necessitated his lumbar surgery and/or caused any periods of disability. After such further development as deemed necessary, it shall issue a *de novo* decision.¹⁸

CONCLUSION

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

¹⁶ See *A.T.*, Docket No. 19-0294 (issued May 29, 2019).

¹⁷ 5 U.S.C. 8123(a); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

¹⁸ In light of the Board's disposition of the issue of whether appellant sustained a back condition causally related to or as a consequence of his employment injury, it is premature to address the issues of disability and surgical authorization.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 10, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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