United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 19-0688**
	)	**Issued: January 24, 2020**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Buffalo, NY, Employer	)	

Appearances:
Alan J. Shapiro, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 11, 2019 appellant, through counsel, filed a timely appeal from a December 27, 2018 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.

[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 her burden of proof to establish a right foot injury causally related to the accepted June 3, 2010 employment incident.

FACTUAL HISTORY

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

On June 4, 2010 appellant, then a 37-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on June 3, 2010 she developed a bump on the bottom of her right foot and experienced pain when walking and when putting pressure on her big toe while in the performance of duty. She noted that the cause of the injury was unknown, but indicated that she was working in the vehicle export office and was walking up and down stairs. Appellant did not stop work.

By decision dated September 10, 2010, OWCP denied appellant's claim finding that she had failed to establish fact of injury. By decision dated April 14, 2011, OWCP's hearing representative affirmed the September 10, 2010 decision finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed condition and the June 3, 2010 employment incident. By decision dated April 4, 2012, the Board affirmed OWCP's April 14, 2011 decision, finding that the medical evidence of record was insufficient to establish that the June 3, 2010 incident caused or aggravated a diagnosed medical condition.[4]

On April 2, 2013 appellant requested reconsideration with OWCP. By decision dated June 18, 2013, OWCP denied modification. Appellant appealed to the Board and, by decision dated April 16, 2014, the Board affirmed the June 18, 2013 decision, finding that appellant had not met her burden of proof to establish a right foot injury causally related to the June 3, 2010 employment incident.[5]

Appellant timely requested reconsideration with OWCP and, by decision dated May 13, 2016, OWCP denied modification. By decision dated June 6, 2016, a representative of OWCP's Branch of Hearings and Review denied appellant's request for a hearing. On appeal the Board affirmed both the May 13, 2016 merit decision and the June 6, 2016 nonmerit decision. In its August 8, 2017 decision, the Board found that the medical evidence of record was insufficient to

[3] Docket No. 16-1436 (issued August 8, 2017); Docket No. 14-0023 (issued April 16, 2014); Docket No. 12-1203 (issued January 24, 2013); Docket No. 11-1885 (issued April 4, 2012).

[4] Docket No. 11-1885 (issued April 4, 2012). On May 9, 2012 appellant's then counsel appealed the April 4, 2012 decision. By order dated January 24, 2013, the Board dismissed the appeal because OWCP had not issued a decision within 180 days of the May 9, 2012 application for review. The Board further noted that, to the extent counsel was seeking reconsideration of the Board's April 4, 2012 decision, the May 9, 2012 filing postdated the Board's decision by more than 30 days and, thus, was untimely. Docket No. 12-1203 (issued January 24, 2013).

[5] Docket No. 14-0023 (issued April 16, 2014).

establish that appellant sustained a right foot injury causally related to the accepted June 3, 2010 employment incident. The Board further found that OWCP had not abused its discretion in denying appellant's request for an oral hearing.[6]

On June 1, 2018 appellant, through counsel, requested reconsideration with OWCP.

In a May 30, 2018 report, Dr. Neil Allen, a Board-certified internist and neurologist, indicated that he reviewed appellant's medical records to opine as to whether there was a causal relationship between her diagnosed right foot condition and the accepted employment incident of June 3, 2010. He noted appellant's medical history and history of injury, and documented his review of the medical case record. Dr. Allen reported that appellant's 2010 and 2012 magnetic resonance imaging (MRI) scans of the right foot revealed tibial sesamoiditis associated with a stress fracture. He described her employment duties as a Custom & Border Protection officer as climbing and descending a flight of concrete steps over 70 times (more than two times that required on an average workday) while working her entire shift on her feet. He noted that the record reflected that appellant related complaints of worsening right foot pain and was diagnosed with dipartite fracture of the medial sesamoid and underwent resection of the tibial sesamoid bone due to complications from avascular necrosis. Dr. Allen cited to medical literature regarding causes of stress fractures which include "fatigue and insufficiency." Having explained the known causes of stress fractures, he opined that appellant's claim should be accepted for stress fracture of the right foot. Dr. Allen explained that appellant's history of repetitive stress at the first metatarso-phalangeal joint, repetitively climbing and descending concrete stairs (more than two times than required on an average workday) combined with constant standing had resulted in fatigue and a resultant stress fracture. He further explained that the abnormal stress from the climbing and descending concrete stairs and standing for the entire workday caused increased force through the first ray due to compression which increased pain and could complicate healing. According to Dr. Allen, appellant's right foot injury was directly caused by occupational trauma sustained due to her employment duties on June 3, 2010. In support of his opinion, he noted that the MRI scans confirmed the presence of the fracture and associated inflammatory changes and that the medical record reflected tenderness in the region of the fracture, bruising, and painful dorsiflexion and plantar flexion of the foot contemporaneously to the date of injury.

By decision dated December 27, 2018, OWCP denied modification of its May 13, 2016 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,[8] that an injury was sustained in the performance of duty as alleged, and

[6] Docket No. 16-1436 (issued August 8, 2017).

[7] *Supra* note 2.

[8] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[9] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[10]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[11] Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[12] The second component is whether the employment incident caused a personal injury.[13] An employee may establish that an injury occurred in the performance of duty, as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[14]

The medical evidence required to establish a causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence. 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.[15] The absence of a physical examination by a physician may affect the weight to be a given medical report, but does not necessarily render it incompetent as medical evidence.[16] In cases where the sole issue is one of causal relationship, a physical examination is unnecessary as it would be of no consequence and would only result in additional delay and cost.[17]

[9] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[10] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[11] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[12] *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[13] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[14] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[15] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[16] *See W.C.*, Docket No. 18-1386 (issued January 22, 2019); *M.M.*, Docket No. 17-0438 (issued March 13, 2018); *C.B.*, Docket No. 17-0726 (issued July 3, 2017); *Melvina Jackson*, 38 ECAB 443, 447-52 (1987).

[17] *See T.H.*, Docket No. 18-1585 (issued March 22, 2019); *Sherry Shreiber*, Docket No. 04-1966 (issued January 24, 2005) (the Board held that the fact that an OWCP-selected second opinion physician had not physically examined the claimant was of no consequence as the diagnosis had already been established, and thus the only question was causal relationship).

ANALYSIS

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

Preliminarily, it is unnecessary for the Board to reconsider the evidence appellant submitted prior to the issuance of OWCP's May 13, 2016 decision because the Board evaluated that evidence in its August 8, 2017 decision and found that it was insufficient to establish her claim.[18]

In support of her claim, appellant submitted a May 30, 2018 report by Dr. Allen who indicated that he reviewed her medical records to opine as to whether there was a causal relationship between her right foot injury and the accepted employment trauma on June 3, 2010. The report establishes that Dr. Allen reviewed the medical record, including diagnostic test results, and it contains an accurate medical history and history of injury. The report also establishes that he had had a correct understanding of appellant's employment duties as a Custom & Border Protection officer, including climbing and descending a flight of concrete steps over 70 times (more than two times that required on an average work day) while working her entire shift on her feet. Dr. Allen reported the correct medical diagnosis and cited to and explained medical literature regarding causes of the diagnosis of a stress fractures which includes "fatigue and insufficiency." With that foundation set forth in his report, he opined that appellant's claim should be accepted for stress fracture of the right foot. Dr. Allen explained that appellant's history of repetitive stress at the first metatarsophalangeal joint, repetitively climbing and descending concrete stairs (specifically excessive climbing and descending stairs on the date of the accepted incident) combined with constant standing on concrete had resulted in fatigue and a resultant stress fracture. He opined that appellant's right foot injury was directly caused by occupational trauma sustained due to her employment duties on June 3, 2010. In support of his opinion, Dr. Allen noted that the MRI scans of record confirmed the presence of the fracture and associated inflammatory changes, and that the medical record reflected tenderness in the region of the fracture, bruising, and painful dorsiflexion and plantar flexion of the foot contemporaneous to the date of injury.

The Board finds that the report of Dr. Allen is sufficient to require further development of the medical evidence to see that justice is done.[19] Dr. Allen is a Board-certified physician who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship and he provided a comprehensive review of the medical record and case history. It is further found that he provided a comprehensive pathophysiological explanation as to how the mechanism of the accepted employment incident was sufficient to cause the diagnosed condition and his opinion was supported by medical literature, the contemporaneous diagnostic testing, and the examination findings of attending physicians.

It is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to

[18] *See L.E.*, Docket No. 18-1138 (issued February 1, 2019); *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

[19] *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

convince the adjudicator that the conclusion drawn is rational, sound, and logical.[20] Following review of Dr. Allen's May 30, 2018 report, it is found that his medical opinion is sufficient to require further development of appellant's claim.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[21] OWCP has an obligation to see that justice is done.[22]

On remand OWCP shall refer appellant to an appropriate specialist, along with the case record and a statement of accepted facts. Its referral physician shall provide a well-rationalized opinion as to whether appellant's diagnosed condition was causally related to the accepted June 3, 2010 employment incident, including an explanation if the opinion conflicts with Dr. Allen's explanation of causal relationship. After such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[20] *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein).

[21] *See supra* note 19. *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

[22] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016).

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the decision of the Board.

Issued: January 24, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge, dissenting,

The majority opinion finds that, although the medical report of Dr. Neil Allen was insufficient to meet appellant's burden of proof to establish their claim, it was sufficient to require the Office of Workers' Compensation Programs to further develop the medical evidence. I disagree.

As a standard proposition, the Board has long held that the weight of medical opinion is determined by the opportunity for thoroughness of examination, the accuracy, and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the medical rationale expressed in support of stated conclusions.[1]

The Federal (FECA) Procedural Manual also sets out parameters for the weighing of medical evidence.[2] It describes a comprehensive report as one which reflects that all testing and analysis necessary to support the physician's final conclusions were performed. OWCP's procedures provide that, in general, greater probative value is given to a medical opinion based on

[1] *R.C.*, Docket No 14-1964 (issued January 22, 2015); *Anna C. Leanza*, 48 ECAB 115 (1996)

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.810.6(a)(4) (September 2010).

an actual examination. An opinion based on a cursory or incomplete examination will have less value compared to an opinion based on a more complete evaluation.[3]

The case at bar raises a novel constellation of facts where the appellant's physician is providing a causal opinion without examining the appellant. While arguably considered a treating physician, Dr. Allen never saw in person nor physically examined appellant. He premised his opinion solely on what he characterized as medical records that he had reviewed. Dr. Allen did not, however, identify the records provided for his review and only referenced two MRI scans with regard to the reports on which he relied.

It is an important distinction that the medical report of Dr. Allen in this case is being used to remand the case for further development.[4] The majority finds that, although his opinion contains insufficient medical rationale to establish the claim, it is sufficient to remand for OWCP to further develop the claim. This is effectuated by the 30-year-old Board-created standard, which provides that "when there is sufficient evidence to establish that the incident occurred, as alleged, but the medical evidence was insufficiently developed to establish the component of fact of injury, evidence submitted by appellant, which contains a history of injury, an absence of any other noted trauma, and an opinion that the condition found was consistent with the original injury is sufficient, given the absence of any opposing medical evidence, to require further development of the record."[5] It could be characterized as a reduced subjective standard, which effectively shifts the burden of proof to OWCP. This case was previously denied by OWCP based on in-person physical examination(s), which were found to be insufficient under the same reduced standard.

Especially in this posture, I believe certain basic medical examination parameters must be met. Dr. Allen espoused an opinion on causal relationship without the benefit of direct physical examination or observations and based his findings on the second-hand opinion(s) of what we believe to be other physicians. This is the type of injury that lends itself to physical examination for the purposes of diagnosis and causation, where the physician is able to palpate the patient, question and receive a first-hand account of the injury and compare same. This remains critical even when the only issue is causation. I do not agree that words of causation in the ordinary course alone can be separated from an examination of appellant by appellant's physician.

Of course, there are occasions where a physical examination cannot be conducted, such as when appellant is deceased. In that situation, record reviews are required and the weight of medical reports in the first instance are weighed using the above-mentioned criteria. But those circumstances are rare and that is inapplicable in the present case.

One could argue that this type of situation is similar to the use by OWCP of a district medical adviser (DMA). The Board has found that the unique status of the DMA, which allows for an advisory medical opinion without a physical examination, can be of sufficient probative

[3] *Id*.

[4] *R.H.*, Docket No. 17-1966 (issued March 6, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id*.

value in certain circumstances.[6] I believe that there is an important distinction between a DMA as described in *Jackson* and a treating physician such as Dr. Allen in this case. A treating physician and DMA do not share the same status. DMAs have a much more defined and narrow purpose. They are generally charged with the computations of schedule awards, the medical necessity of requested surgeries, and other such issues that do not require an in-person examination. As well, they operate under parameters that ensure appropriate review of the evidence, as they have the benefit of the complete OWCP record, as well as a statement of accepted facts created by OWCP, which they must follow for the purposes of history, knowledge, and analysis. In Dr. Allen's situation, there are no such safeguards.

If Dr. Allen had physically examined appellant, noted an in-person history, reviewed the entire record, and made his own conclusions, I would be inclined to perhaps be satisfied with his knowledge and understanding of the matter and agree with the majority that his opinion would be sufficient to remand for OWCP to pay for a second opinion physician to further develop the medical evidence. However, the majority finding in my view, without the benefit of in-person physical examination, effectively shifts the burden of proof to OWCP to disprove the claim based on a medical report that is of questionable probative value, leading to what I fear will be the advent of mail order medicine.

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

[6] *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).