United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 08-2482**
	)	**Issued: May 18, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Roseburg, OR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 17, 2008 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated August 12, 2008 and a merit decision dated June 27, 2008. Pursuant to 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 sustained a right ankle injury in the performance of duty on March 7, 2008; and (2) whether the Office properly refused to reopen appellant's case for reconsideration of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

Appellant, a 39-year-old nursing assistant, filed a claim for benefits on March 13, 2008, alleging that she experienced pain in her right ankle on March 7, 2008 while lifting a patient who

had fallen from his wheelchair into a Hoyer lift. She submitted a March 8, 2008 report from Dr. James Daskalos, an osteopath, stated:

> "[Appellant] apparently was at work last night at [the employing establishment] when she was squatting doing some type of lifting and felt and heard a sudden severe popping in her right ankle and foot area. She had immediate onset of acute pain. [Appellant] is unable to bear weight. She initially was seen at [the employing establishment] [e]mergency [r]oom. Per patient's report, x-rays were taken at that time, but [appellant] is uncertain of the outcome. She is here today because she is having marked increase in pain. [Appellant] is unable to sleep. She is unable to place any weight on the ankle.
>
> "On exam[ination] today [appellant] is alert, cooperative. She did appear in moderate distress. Initially [appellant] was in a right ankle air cast splint. She is having a lot of pain in the splint. The splint was removed. [Appellant] was found to have significant lateral foot swelling without obvious evidence of ecchymosis as yet. She had a lot of tenderness over the lateral malleolus as well as into the joint line medially. [Appellant] had no gross instability, but her ankle was painful and was difficult to do a full and adequate evaluation. There was no forefoot tenderness. There was no tenderness of the knee region or upper leg.
>
> After an initial evaluation it was felt that x-rays were indicated. These were done. I found no evidence of acute fracture, however there was evidence of some old calcific deposits, particularly medial. There did not appear to be any acute ligamentous tear or signs of any bony disease."

Dr. Daskalos diagnosed acute ankle sprain with significant ligamentous stretching. He advised that appellant was unable to work due to the significance of her pain and her inability to bear weight.

In a March 8, 2008 report from appellant's family clinic, it was noted that she had injured her right ankle and had heard a popping sound in her ankle while lifting a patient on March 7, 2008.

In reports dated March 16 and 17, 2008 report, Dr. Mathew Driver, a general surgeon and specialist in direct patient care, stated that he had treated appellant for right ankle pain. He stated that appellant had sustained an injury consistent with either hematoma or a small inflammatory fluid sac. Dr. Driver diagnosed right Achilles tendinitis.

Dr. Daskalos submitted progress reports dated March 20 and 24, 2008, which he essentially reiterated his previous findings and conclusions. In an April 9, 2008 report, he noted that appellant had exacerbated her right ankle injury the day before in a twisting incident.

In a report dated March 19, 2008, Dr. Thomas H. Thompson, Board-certified in orthopedic surgery, stated:

> "[Appellant's] history is that of injuring her right ankle when she was lifting a patient using a Hoyer lift at [the employing establishment] on

March 7, 2008. She has worked there as a [nursing assistant] for one year. [Appellant] complains of generalized pain about the anterior, lateral and posterior right ankle and, more specifically along the Achilles tendon radiating up into the gastrocnemius. When last seen by Dr. Driver she had had an ultrasound of the Achilles area that I will describe below. He had released [appellant] for light[-]duty work and she was told she would have to sit in a wheelchair and not put weight on her right lower extremity."

Dr. Thompson noted minimal swelling of the right ankle on examination, with tenderness across the anterior ankle and the anterior talofibular ligament area. He stated that appellant had trouble actively dorsiflexion the ankle, although he was able to passively dorsiflexion the ankle above neutral with no crepitus noted. Dr. Thompson stated that appellant was tender along the right Achilles tendon up into the gastrocnemius. He related that appellant's Achilles tendon was palpably intact and not swollen, with no ecchymosis or swelling in the hindfoot area. Dr. Thompson stated:

"I reviewed x-rays of the ankle from March 8, 2008, which demonstrate preexisting degenerative changes with anterior spurring at the distal tibia, traction spur at the Achilles insertion on the calcaneus and what appears to be soft tissue swelling about the lateral ankle. Interestingly, [appellant] had a prior x-ray of her right ankle following an ankle injury in July 2007 that was done at [the employing establishment] and that is here for my review. It is identical to the x-ray from March 8, 2008. The ultrasound appears to demonstrate a small cyst adjacent to the Achilles tendon and according to Dr. Driver's report the cyst is approximately one centimeter in diameter medial to the Achilles tendon. I think it is an incidental finding and not related to [appellant's] present symptoms."

Dr. Thompson diagnosed a minor right ankle sprain, morbid obesity and preexisting degenerative arthritis of the right ankle. He advised appellant that her overall weight status put her joints, particularly the lower extremity joints, at significant risk for arthritis and failure over time. Dr. Thompson opined that appellant's overall condition was likely to progressively deteriorate over time and stated that the primary cause of her ankle condition was attributable to weight rather than work activities.

On May 22, 2008 the Office advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. It further requested that appellant describe in detail how the injury occurred and when she initially sought medical treatment for her alleged employment injury. The Office informed her that she had 30 days to submit the requested information. Appellant did not respond to this request within 30 days.

By decision dated June 27, 2008, the Office denied appellant's claim, finding that she failed to submit sufficient evidence to support her claim, that she sustained an injury in the performance of duty on March 7, 2008.

On July 11, 2008 appellant requested reconsideration.

Appellant submitted a July 8, 2008 report from Dr. Driver in which he essentially reiterated his previous findings and conclusions. She related that she was much improved and believed that she was entirely capable of full use of the ankle; she demonstrated full, active range of motion, full strength and displayed no visible bruising or swelling in her right ankle. Dr. Driver indicated that appellant's right ankle sprain had resolved and released her to return to work without restrictions.

By decision dated August 12, 2008, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require it to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] 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.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[5]

In order to determine whether an employee actually sustained an injury in the performance of her duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered, in conjunction with one another.[6]

The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred. An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the

[1] 5 U.S.C. § 8101 *et seq*.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(e)(e).

[6] *Caroline Thomas*, 51 ECAB 451 (2000).

performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action. A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether she has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantive evidence.[7] An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[8] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[9]

ANALYSIS -- ISSUE 1

In the present case, the Office found that the record contained insufficient, conflicting and inconsistent evidence which cast doubt on whether the claimed event occurred at the time, place and in the manner alleged. It noted that, although appellant stated on her Form CA-1 that she injured himself on March 7, 2008 while lifting a patient into a Hoyer lift, she told a claims examiner during a June 5, 2008 telephone conversation that she twisted her ankle at home. The claims examiner also noted that the Office did not receive a response to the May 22, 2008 development letter and stated that the reports from Dr. Daskalos did not contain an accurate history.

The Board, however, finds that appellant presented sufficient evidence to establish that the incident to her right ankle occurred at the time, place and in the manner alleged.[10] Although she did not provide a witness statement from a person who observed the March 7, 2008 incident first hand, she sought medical attention from Dr. Daskalos and from her family clinic one day after the alleged March 7, 2008 work incident. Further, all of the accounts of the March 7, 2008 work incident appellant submitted are consistent with the statement she made in her March 13, 2008 Form CA-1, on which she asserted that she experienced pain in her right ankle on March 7, 2007 while lifting a patient who had fallen from his wheelchair into a Hoyer lift. The March 8, 2008 reports from Dr. Daskalos and appellant's family clinic all indicated that she was at work the previous night when she was squatting, doing some type of lifting and felt a severe popping and twisting in her right ankle and foot area. Dr. Thompson stated in his March 19, 2008 report that appellant injured her right ankle when she was lifting a patient using a Hoyer lift at the employing establishment on March 7, 2008.

[7] *John J. Carlone*, *supra* note 4.

[8] *Louise F. Garrett*, 47 ECAB 639, 643-644 (1996).

[9] *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

[10] *Id.*

The Board finds that the totality of this evidence, which includes three reports indicating that appellant was examined and treated for a March 7, 2008 right ankle injury one day after the alleged employment incident, is sufficient to establish that she sustained the incident in the performance of duty on March 7, 2008. The claims examiner's statement that appellant told him she twisted her right ankle while at home is of diminished probative value because the record does not contain a verified transcript of the June 5, 2008 telephone conversation between appellant and the claims examiner. The record contains no contemporaneous factual evidence indicating that the claimed March 7, 2008 work incident did not occur as alleged.[11] Under the circumstances of this case, therefore, the Board finds that appellant's allegations have not been refuted by sufficiently strong or persuasive evidence. The Board finds that the evidence of record is sufficient to establish that the incident in which appellant injured her right ankle on March 7, 2008 occurred at the time, place and in the manner alleged.

The Board finds, however, that appellant failed to submit rationalized medical opinion evidence to sufficiently describe or explain the medical process by which the March 7, 2008 work incident would have been competent to cause the claimed injury. In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[12]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor is the belief that his condition was caused, precipitated or aggravated by his employment sufficient to establish causal relationship.[13] Causal relationship must be established by rationalized medical opinion evidence and she failed to submit such evidence. Appellant submitted reports from Drs. Daskalos, Driver and Thompson. Dr. Daskalos submitted several reports from March and April 2008 in which he stated findings on examination, noted appellant's complaints of pain, diagnosed acute ankle sprain with significant ligamentous stretching and placed appellant on temporary disability from work. Dr. Driver stated that he treated appellant for right ankle pain, advised that she had sustained an injury consistent with either hematoma or a small inflammatory fluid sac and diagnosed right Achilles tendinitis. In his March 19, 2008 report Dr. Thompson reviewed the medical record and the history of injury and noted minimal swelling and tenderness of the right ankle on examination. Dr. Driver reviewed x-rays of the ankle from March 8, 2008 which demonstrated preexisting degenerative changes with anterior spurring at the distal tibia, traction spur at the Achilles insertion on the calcaneus and soft tissue swelling about the lateral ankle, he stated that an ultrasound appeared to demonstrate a small cyst adjacent to the Achilles tendon. Dr. Thompson diagnosed right ankle sprain and concluded that the primary cause of her ankle condition was obesity as opposed to work activities.

The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided the care of analysis manifested and the medical rationale expressed

[11] *See Thelma Rogers*, 42 ECAB 866 (1991).

[12] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[13] *Id.*

in support of stated conclusions.[14] Although the physicians of record did present diagnoses of appellant's condition, right ankle sprain, right Achilles tendinitis, they did not indicate whether these conditions were causally related to the March 7, 2008 employment injury. There is no indication in the record, therefore, that the diagnosed conditions were work related. Appellant failed to provide a rationalized, probative medical opinion relating her current condition to any factors of her employment. Therefore, she failed to provide a medical report from a physician that the work incident of March 7, 2008 caused or contributed to the claimed left shoulder injury.

The Office advised appellant of the evidence required to establish her claim. However, appellant failed to submit such evidence. She did not provide a medical opinion which describes or explains the medical process through which the March 7, 2008 work accident would have caused the claimed injury. Accordingly, appellant did not establish that she sustained a right ankle injury in the performance of duty. The Office properly denied her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[15] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[16]

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, she has not advanced a relevant legal argument not previously considered by it and she has not constituted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted is not pertinent to the issue on appeal. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[17] The July 8, 2008 report from Dr. Driver indicated that appellant's right ankle sprain had fully resolved and contains no opinion on causal relationship to the accepted injury. Appellant has not submitted any new medical evidence which addresses the relevant issue of whether her claimed right ankle sprain was causally related to factors of her federal employment. Her reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. It did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

[14] *See Anna C. Leanza*, 48 ECAB 115 (1996).

[15] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[16] *Howard A. Williams*, 45 ECAB 853 (1994).

[17] *See David J. McDonald*, 50 ECAB 185 (1998).

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a right ankle injury in the performance of duty. The Board finds that the Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 12 and June 27, 2008 decisions of the Office of Workers' Compensation Programs be affirmed as modified.

Issued: May 18, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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