

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

CYNTHIA E. McBETH, Appellant

and

U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Kansas City, MO, Employer

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**Docket No. 04-2032
Issued: January 10, 2005**

Appearances:
Cynthia E. McBeth, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On August 16, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 12, 2004 finding that she had not established an injury in the performance of duty on August 10, 1994. The record also contains an Office decision dated May 17, 2004 denying appellant's request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision and the nonmerit decision in this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing an injury in the performance of duty on August 9, 1994; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On August 12, 1994 appellant, then a 37-year-old mail processor, filed a traumatic injury claim alleging that she sustained an injury to her right small toe in the performance of duty on

August 10, 1994. She stated, "I was trying to place an empty APC [all purpose container] in place and I stumped the right foot little toe on the front wheel of the APC." Appellant's attending physician, Dr. Sheldon Fleishman, a podiatrist, diagnosed a fracture of the proximal phalanx on August 12, 1994. He did not provide any history of injury. Dr. Fleishman found that appellant could return to full duty with no restrictions on October 24, 1994 in a report dated November 7, 1994. He stated that appellant could not work over 8 hours a day or 40 hours a week until the end of January 1995.

Appellant filed a recurrence of disability on February 20, 2004 and stated that she had experienced continuous pain and swelling since her date of injury. She stated that her physician recommended surgery.

In a letter dated March 2, 2004, the Office stated that appellant's original claim was handled administratively as a simple uncontroversial case that resulted in minimal or no time lost from work and that the merits of her original injury claim had not been formally determined. The Office requested additional factual and medical evidence and allowed appellant 30 days to establish her claim for right small toe fracture in 1994.

In support of her claim, appellant submitted notes from Dr. Susan K. Bonar, a Board-certified orthopedic surgeon, dated December 2, 2003 which stated that she first examined appellant on that date and diagnosed right fifth lateral toe pain, two bone fifth toe and bilateral plantar fasciitis. Dr. Bonar noted appellant's statements that she fractured her right fifth toe a few years prior and that since then appellant's toe nail fell out periodically. She recommended surgery to address the right toe pain. On February 17, 2004 Dr. Bonar again reported right fifth toe pain and bilateral plantar fasciitis. She noted that appellant was awaiting approval for surgery.

Appellant responded to the Office's request for factual information on March 25, 2004. She stated that, following her 1994 toe injury, she experienced swelling throbbing, sharp shooting and aching pain in her fifth toe on her right foot. Appellant reported difficulty standing and walking due to the pain and swelling in her toe. She described the continuous nature of her condition and described the original employment incident. Appellant denied any other injury or similar foot symptoms.

Appellant also submitted photographs of postal equipment, as well as clippings from newspapers and magazine articles regarding postal employees and equipment.

By decision dated April 12, 2004, the Office denied appellant's claim for injury in the performance of duty in August 1994. The Office found that there was no medical evidence that a condition resulted from appellant's August 1994 employment incident of stubbing her right fifth toe.

Appellant requested reconsideration of the Office's April 12, 2004 decision on May 1, 2004 by checking that she wished reconsideration on an appeal request form. By decision dated May 17, 2004, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that she failed to provide legal argument or new and relevant evidence in support of her request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether “fact of injury” has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury. Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.¹

As part of an employee’s burden of proof, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relation. The question of whether there is a causal relationship is medical in nature, and generally, can be established only by medical evidence. This medical opinion must be based upon a complete factual and medical background with an accurate history of appellant’s employment injury. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician’s opinion.²

ANALYSIS -- ISSUE 1

The Board finds that the Office properly accepted that appellant sustained the employment incident on August 9, 1994. However, the Office also found that appellant failed to submit the necessary medical opinion evidence to support that her diagnosed condition of fracture of the right fifth proximal phalanx and the Board concurs with this finding. Although Dr. Fleishman, a podiatrist and appellant’s attending physician, diagnosed a fracture of the proximal phalanx on August 12, 1994, he did not provide any history of injury.

Dr. Bonar, a Board-certified orthopedic surgeon, first examined appellant on December 2, 2003 and diagnosed right fifth lateral toe pain, two bone fifth toe and bilateral plantar fasciitis. She noted that appellant reported that she fractured her right fifth toe a few years ago and that since then appellant’s toe nail fell out periodically. Dr. Bonar did not provide a specific history of injury mentioning the August 9, 1994 employment incident and did not offer any opinion on the causal relationship between this incident and appellant’s previously diagnosed condition of toe fracture. Without a medical opinion discussing the relationship between appellant’s employment incident and her diagnosed condition, this report is not sufficient to meet appellant’s burden of proof in establishing her claim.

There is no medical evidence in the record offering an opinion on the causal relationship between appellant’s accepted employment incident on August 9, 1994 and the diagnosis of a fracture of the right fifth proximal phalanx made on August 12, 1994. Due to this lack of medical evidence, appellant has failed to meet her burden of proof.

¹ *Steven S. Saleh*, 55 ECAB ___ (Docket No. 03-2232, issued December 12, 2003).

² *James Mack*, 43 ECAB 321, 328-29 (1991).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously consideration by the Office.⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's April 12, 2004 decision on May 1, 2004 by checking that she wished reconsideration on an appeal request form. Appellant did not provide any additional evidence or written statement in support of this request. Without additional evidence or a statement of legal argument, appellant failed to comply with the Office's requirement for additional review of the merits of her claim.

CONCLUSION

The Board finds that appellant failed to submit the necessary medical opinion evidence to establish that she sustained an injury in the performance of duty on August 9, 1994. The Board further finds that appellant did not submit any new evidence or new legal argument in support of her request for reconsideration and that, therefore, the Office properly declined to reopen her claim for consideration of the merits.

³ 5 U.S.C. §§ 8101-8193, § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 17 and May 1, 2004 are affirmed.

Issued: January 10, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member