United States Department of Labor
Employees' Compensation Appeals Board

D.N., Appellant	)	
and	)	**Docket No. 07-2377**
	)	**Issued: March 7, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Boston, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 20, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 29, 2007 merit decision denying his claim for a November 3, 2004 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a toe injury in the performance of duty on November 3, 2004.

FACTUAL HISTORY

On December 9, 2004 appellant, then a 62-year-old laborer, filed a traumatic injury claim alleging that on November 3, 2004 he sustained an employment-related fractured toe of his left

foot. Regarding the cause of the injury, he stated that it was "unknown." Appellant stopped work on November 3, 2004.[1]

In a November 4, 2004 report, Owen Dyer, an attending nurse practitioner, stated that appellant reported swelling of the second toe of his left foot since the prior day. Appellant denied having pain or engaging in "new activities." Mr. Dyer indicated that appellant's toe exhibited moderate swelling, minimal erythema and minimal tenderness to palpation. X-rays showed a fracture of the second toe of his left foot. In another November 4, 2004 report, Deborah Perkins, an attending nurse practitioner, stated that appellant reported that his feet hurt since he started wearing steel-toe boots. She indicated that appellant appeared to have ill-fitting shoes as several areas of his toes showed friction sheering.

On November 10, 2004 Dr. Charles D. Foster, III, an attending podiatrist, stated that appellant had been referred to him for a fracture of the second middle phalanx of his left toe which was reported as occurring one-week prior. He diagnosed nondisplaced fracture of the second middle phalanx of the left toe with no sign of infection.[2] In a December 17, 2004 report, Dr. Foster diagnosed nondisplaced fracture of the second middle phalanx of the left toe and indicated that appellant's swelling and tenderness had decreased.

On January 3, 2005 the Office requested that appellant submit additional factual and medical evidence in support of his claim. Appellant submitted a November 19, 2004 in which Dr. Jacques Daniel, an attending podiatrist, diagnosed nondisplaced fracture of the second middle phalanx of the left toe which was reported as occurring two weeks prior.[3]

In a February 3, 2005 decision, the Office denied appellant's claim that he sustained a toe injury in the performance of duty on the grounds that he did not establish that any work-related event occurred which caused injury to his toe.

Appellant requested a hearing before an Office hearing representative. At the February 14, 2006 hearing, he testified that on November 3, 2004 he stumbled when he got out of a vehicle at work. Appellant indicated that he laughed about the incident with a coworker "because it was a tree there" when he stumbled. He noted that he did not feel any pain immediately after he stumbled but stated that he noticed swelling in the second toe of his left foot that same evening.

In an April 7, 2006 decision, the Office hearing representative denied appellant's claim that he sustained a toe injury in the performance of duty. She accepted that an employment incident occurred on November 3, 2004 when he stumbled while at work. The Office hearing

---

[1] Appellant resigned from the employing establishment in early 2006.

[2] In an undated note, Dr. Foster stated that he had seen appellant for a left foot problem since November 4, 2004 and recommended that he stay off work from December 17, 2004 to January 14, 2005 in order "to avoid additional complications."

[3] On January 20, 2005 the Office received a partially illegible report in which Dr. Foster recommended work restrictions.

representative found, however, that appellant did not submit sufficient medical evidence to establish that he sustained an injury due to the accepted employment injury.

In April 2004 appellant requested reconsideration of his claim and claimed that he fractured his toe on November 3, 2004 when he "stumbled on some limbs and other debris." He submitted the findings of November 4, 2004 x-ray testing and a November 19, 2004 report in which Dr. Foster diagnosed nondisplaced fracture of the second middle phalanx of the left toe. Appellant also resubmitted several reports of Dr. Foster.

In a June 29, 2007 decision, the Office denied appellant's claim that he sustained a toe injury in the performance of duty on November 3, 2004. The Office indicated that he did not establish the occurrence of an employment incident by noting that his "statements concerning the facts of the injury have been inconsistent."

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employees' Compensation Act[4] for an employment-related traumatic injury must first submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[6] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.[7] An employee has not met his burden of proof of establishing the occurrence of an injury 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]

---

[4] 5 U.S.C. §§ 8101-8193.

[5] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[6] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[7] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.,* 35 ECAB 1175, 1179 (1984).

[8] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988). 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, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established. *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[9] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

ANALYSIS

Appellant alleged that while working on November 3, 2004 he sustained a fracture of the second toe of his left foot. In a June 29, 2007 decision, the Office affirmed its prior decisions denying his claim that he sustained a toe injury in the performance of duty on November 3, 2004. The most recent Office decision noted that appellant did not establish the occurrence of an employment incident on that date. The Board finds, however, that he established the occurrence of an employment incident on November 3, 2004, that he stumbled without falling while getting out of a vehicle.

The record reveals that appellant did not delay in seeking treatment for his claimed injury in that he sought treatment on November 4, 2004, *i.e.*, the day after the claimed injury. Moreover, he stopped work on the date of the claimed injury. Appellant consistently asserted that the injury occurred on November 3, 2004. While he delayed in identifying the precise cause of his claimed injury, he consistently described the mechanism of injury.[10] At the hearing before an Office hearing representative, appellant testified that on November 3, 2004 he stumbled when he got out of a vehicle at work. He explained that a tree caused him to stumble. Appellant later indicated that on November 3, 2004 he "stumbled on some limbs and other debris." For these reasons, there are not such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim.[11]

Although appellant established the occurrence of an employment incident, *i.e.,* stumbling without falling on a single occasion on November 3, 2004, he did not submit sufficient medical evidence to establish that he sustained an injury due to that incident. He submitted numerous reports, dated in November and December 2004, in which his attending podiatrists described their treatment of his foot condition and diagnosed nondisplaced fracture of the second middle phalanx of the left toe. These reports, however, are of limited probative value on the relevant issue of the present case in that his physicians did not provide any opinion on causal relationship.[12] Neither Dr. Foster nor Dr. Daniel obtained a history of the incident accepted in this case or addressed the cause of appellant's fractured toe.[13] The record does not contain any medical evidence relating appellant's claimed injury to the accepted employment incident, *i.e.*, stumbling on November 3, 2004.[14]

---

[10] While appellant apparently did not report the mechanism of injury to his physicians or nurses he consistently indicated that the injury occurred on November 3, 2004.

[11] *See supra* notes 7 through 9 and accompanying text.

[12] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[13] The physicians stated that appellant reported injuring his toe on or about November 3, 2004 but neither physician indicated that appellant reported the accepted employment incident for that date.

[14] Appellant submitted reports in which attending nurses described his foot condition. In addition to the fact that these reports did not provide a clear opinion on causal relationship, a nurse is not a "physician" as defined under the Act and cannot render a medical opinion on the causal relationship between a given physical condition and implicated employment factors. *See* 5 U.S.C. § 8101(2); *Bertha L. Arnold*, 38 ECAB 282, 285 (1986).

For these reasons, appellant has not shown that he sustained a toe injury in the performance of duty on November 3, 2004.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a toe injury in the performance of duty on November 3, 2004.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 29, 2007 decision is affirmed.

Issued: March 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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