U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN WYMAN SMITH and DEPARTMENT OF THE ARMY, U.S. ARMY TRAINING & DOCTRINE COMMAND, Fort Rucker, Ala.

Docket No. 96-1871; Submitted on the Record;
Issued May 14, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury to his right foot in the performance of duty on April 17, 1995, as alleged.

On April 17, 1995 appellant, then a 51-year-old motor vehicle operator, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sustained an employment-related injury to his right foot on April 17, 1995. Appellant stated that he was pulling two pallets to the back of a truck when he dropped them on his right foot, causing a bruised right foot. He did not seek medical treatment or lose any time from work following the alleged right foot injury. On October 24, 1995 appellant filed a separate claim for recurrence of disability (Form CA-2a) alleging that he sustained a recurrence of disability on September 5, 1995 causally related to the alleged work-related injury of April 17, 1995. In a decision dated January 9, 1996, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that fact of injury was not established. In an accompanying memorandum, the Office noted that "an additional x-ray report dated February 8, 1995, prior to the date of incident, indicates that ... [appellant] has had prior injury to the right foot, which may be the cause of the current condition, however, without prior medical evidence it is impossible to be sure."

The Board has fully reviewed the case record and finds that appellant has not met his burden of proof in establishing that he sustained an injury to his right foot in the performance of duty on April 17, 1995, as alleged.

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[2] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[3] that the claim

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Daniel R. Hickman,* 34 ECAB 1220 (1983); *see also* 20 C.F.R. § 10.110.

[3] *See James A. Lynch,* 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

was timely filed within the applicable time limitation period of the Act,[4] 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.[5] 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.[6]

In order to determine whether a federal employee has 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, which must be considered in conjunction with one another. 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.[7] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[8] An employee may establish that an injury occurred in the performance of duty as alleged, but failed to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.[9]

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an "injury." The term "injury" as defined by the Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or condition.[10] The question of whether an employment incident caused a personal injury, generally can be established only by medical evidence.[11]

There is no dispute that the incident occurred at the time, place and in the manner alleged by appellant. However, an injury resulting from this incident has not been established.

Appellant filed a traumatic injury claim alleging an employment-related injury to his right foot on April 17, 1995. Appellant did not seek medical treatment and continued to work following the alleged injury. The employing establishment indicated that appellant had only reported the April 17, 1995 incident in case future problems developed with his right foot.

---

[4] 5 U.S.C. § 8122.

[5] *See Melinda C. Epperly*, 45 ECAB 196 (1993); *Joe Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *David J. Overfield*, 42 ECAB 718 (1991); *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

[8] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(14).

[9] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury. i.e., a physical impairment resulting in the loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

[10] *See Elaine Pendleton, supra* note 5.

[11] *See John J. Carlone, supra* note 7.

Thereafter, approximately six months later on October 24, 1995, appellant filed a notice of recurrence of disability alleging that his right foot gradually began to swell, burn and turn red on September 5, 1995. Appellant saw and was treated by Dr. Andrew E. Barber, Jr., an occupational medicine physician, concerning his alleged work-related right foot injury on various occasions between September 5 to December 7, 1995. Dr. Barber initially noted in a progress note dated September 5, 1995, that appellant intermittently began having burning sensations of the right fourth and fifth toes, without traumas to the right foot and/or any back pain trauma. He indicated that the x-rays taken by Dr. John L. Reichle, Board-certified in diagnostic radiology, revealed: "Right Foot: mild hammer toe deformities are seen to involve the fourth and fifth digits. There is no evidence of traumatic, degenerative, or erosive change."

In a progress note dated September 14, 1995, Dr. Barber noted the history of injury as given to him by appellant as "dropped two pallets on his foot in April, 1995." He noted that appellant had "stated that his toes have been hurting him since approximately August 1994, but there was no specific injury at that time." Dr. Barber then opined that he did not consider appellant's diagnosed condition of mild hammer toe deformity of the fourth and fifth toes to be a work-related condition. Dr. Barber went on to state that "no work caused etiology of [appellant's] hammer toes noted." By letter dated November 30, 1995, the Office advised appellant of the type of evidence needed to establish his claim, but evidence sufficient to establish that appellant's alleged right foot injury was causally related to any workplace factor has not been submitted.[12]

As Dr. Barber did not provide a history of appellant's preexisting right foot condition, or otherwise provide a reasoned medical opinion attributing appellant's current diagnosed condition to an injury, sustained at work on April 17, 1995, the evidence submitted is insufficient to establish fact of injury. Furthermore, Dr. Barber clearly stated that he did not consider appellant's current right foot condition to be work related and that no work caused etiology of appellant's hammer toes was noted. Consequently, the medical evidence submitted by Dr. Barber is insufficient to meet appellant's burden of proof.

In view of these circumstances, appellant has failed to establish an injury to his right foot on April 17, 1995 by a preponderance of reliable, probative and substantial evidence. As appellant has failed to establish the original injury, he cannot establish a recurrence of disability effective September 5, 1995.

[12] Following the Office's January 9, 1996 decision appellant submitted additional evidence. However, the Board may not consider such evidence for the first time on appeal; 20 C.F.R. § 501.2(c). This decision does not preclude appellant from having such evidence considered by the Office as part of a reconsideration request.

The decision of the Office of Workers' Compensation Programs, dated January 9, 1996 is affirmed.

Dated, Washington, D.C.
May 14, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member