



By decision dated April 28, 2004, the Office denied appellant's claim on the grounds that he did not submit medical evidence to establish that he sustained a left foot injury in the performance of duty on February 13, 2004.

Appellant submitted a February 13, 2004 report in which Dr. Ralph A. Atkinson, an attending Board-certified internist, noted that appellant reported sustaining an injury to his left big toe on that date. Dr. Atkinson noted that appellant had tenderness at the left great toenail and indicated that the findings of x-ray testing showed a fracture at the base of the distal phalanx. He diagnosed fracture of the distal phalanx of the left hallux. Appellant also submitted several notes of nurses and physician's assistants.

In a report dated August 17, 2004, Dr. James W. Dyer, a Board-certified orthopedic surgeon who served as an Office medical adviser, stated that the results of the February 13, 2004 x-ray testing did not show any fracture of the distal or proximal phalanx of appellant's left great toe at the site of his greatest pain. Dr. Dyer noted that the x-ray showed the presence of a bipartite sesamoid bone which was proximal and unrelated to the described incident on February 13, 2004. He recommended a formal radiology report of the x-ray with detailed study under intensity lighting.<sup>1</sup>

By decision dated August 20, 2004, the Office affirmed its April 28, 2004 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his 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.<sup>3</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.<sup>5</sup> Second, the employee must

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<sup>1</sup> The record does not contain the results of the February 13, 2004 x-ray testing.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

<sup>5</sup> *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).

submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>6</sup> The term “injury” as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.<sup>7</sup>

### ANALYSIS

Appellant alleged that he sustained a fracture of his left big toe when his foot was run over by a table at work on February 13, 2004. The Office accepted that occurrence of the February 13, 2004 employment incident, but found that he did not submit sufficient medical evidence to establish that he sustained a left foot injury in the performance of duty on that date.

Section 8123(a) of the Act provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”<sup>8</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>9</sup>

The Board finds that there is a conflict in the medical evidence between Dr. Atkinson, an attending Board-certified internist, and Dr. Dyer, a Board-certified orthopedic surgeon who served as an Office medical adviser, regarding whether appellant sustained a left foot injury due to the February 13, 2004 employment incident.

In a report dated February 13, 2004, Dr. Atkinson mentioned the February 13, 2004 employment incident and noted that the findings of x-ray testing showed a fracture at the base of the distal phalanx. He diagnosed fracture of the distal phalanx of the left hallux. In contrast, Dr. Dyer indicated that an August 17, 2004 report that the results of the February 13, 2004 x-ray testing did not show any fracture of the distal or proximal phalanx of appellant’s left great toe at the site of his greatest pain. Dr. Dyer noted that the x-ray showed the presence of a bipartite sesamoid bone which was proximal and unrelated to the described incident on February 13, 2004.

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between Dr. Atkinson and Dr. Dyer regarding whether appellant sustained an employment-related left foot injury on February 13, 2004. On remand the Office should refer appellant, along with the case file, the statement of accepted facts and any the results of diagnostic testing, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After such further development as the

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<sup>6</sup> *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).

<sup>7</sup> *Elaine Pendleton*, *supra* note 3; 20 C.F.R. § 10.5(a)(14).

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

**CONCLUSION**

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence regarding whether appellant sustained an employment-related left foot injury on February 13, 2004. The case should be remanded to the Office for further development, including referral to an impartial medical specialist, to be followed by an appropriate decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 20 and April 28, 2004 decisions are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 22, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
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