

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

CARLOS GALAVEZ, Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Palo Alto, CA, Employer)

**Docket No. 06-871
Issued: June 23, 2006**

Appearances:
Carlos Galavez, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 6, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 7, 2006 decision rescinding acceptance of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the performance of duty and overpayment issues in the case.

ISSUE

The issue is whether the Office met its burden of proof in rescinding acceptance of appellant's claim on the grounds that his diagnosed left plantar foot ulcer/abscess did not arise out of the course of his federal employment.

FACTUAL HISTORY

On July 13, 2005 appellant, then a 50-year-old housekeeping aid, filed an occupational injury claim (Form CA-2) alleging that on June 27, 2005 he developed an infection in his left foot, which resulted in swelling, deterioration of tissue and pain.

Following a July 15, 2005 letter from the Office requesting additional information, appellant submitted forms from Kaiser Permanente dated July 6, 2005 bearing an illegible signature, reflecting that he had been seen on June 30, 2005 and was unable to work from June 30 through November 1, 2005. A July 7, 2005 nursing discharge summary bearing an illegible signature indicated that appellant was restricted from bearing weight on his left foot.

In an undated narrative received by the Office on August 2, 2005, appellant stated that while mopping floors at work on Monday, June 27, 2005, he spilled dirty water on his left foot. He indicated that he was feverish by that evening. Appellant claimed that, by the following Wednesday evening, he was experiencing “sweats” and fever, and his left foot was swollen and throbbing. He went to the hospital on Thursday, and subsequently underwent three operations on his left foot.

In a report dated August 4, 2005, Dr. Tram N. Nguyen, a Board-certified physiatrist, provided a history of injury as reported by appellant. Appellant stated that the “infection of [his] left foot was due to a water spill on [his] foot causing damage to the bottom of foot, needing surgery, antibiotics, home care and use of a wheel chair and freedom VAC [vacuum] pump with medications.” Under the section entitled “subjective complaints,” Dr. Nguyen noted that appellant believed that a “dirty water spill caused damage to the bottom of his foot with eventual diagnosis of left plantar foot abscess leading to need for surgeries.” He further stated that appellant was a diabetic, with a history of noncompliance with medications, as well as peripheral neuropathy prior to development of this left plantar foot abscess. Under the section entitled “objective findings,” Dr. Nguyen stated that on August 1, 2005 he had discussed appellant’s diagnosis with a Dr. Bui, a podiatrist, who assessed that appellant’s left foot ulcer was not work related. He provided a diagnosis of left plantar foot ulcer/abscess. In response to the question as to whether his findings and diagnosis were consistent with appellant’s account of injury and onset of illness, Dr. Nguyen answered, “Y[es].”

In an August 11, 2005 report, Dr. Scarlet Herdocia, a treating physician, diagnosed foot cellulites. She indicated that appellant suffered from poorly controlled diabetes and was experiencing swelling, pain and redness of his left foot, as well as fever, chills and myalgia.

On October 6, 2005 the Office accepted appellant’s claim for left plantar ulcer/abscess.

In a report dated October 10, 2005, Dr. Nguyen stated that he informed appellant that he did not believe that his diagnosis was work related. He also noted that Dr. Bui had confirmed this belief. Dr. Nguyen reiterated his diagnosis of “left plantar foot ulcer/abscess, with a history of underlying diabetic peripheral neuropathy, nonwork related.”

On December 6, 2005 the Office notified appellant of its intent to rescind acceptance of his claim, based on new evidence which established that his medical condition was not related to the alleged work incident. The Office advised appellant that he had 30 days to submit additional information in support of his claim.

In a narrative statement dated December 18, 2005, appellant stated his belief that his case should be accepted because the Office was aware that he was a diabetic when he was hired. He further contended that the Office should not rely on the reports of Dr. Bui and Dr. Nguyen, as they were not his primary physicians at the time of the injury. He contended that, his podiatrist, Dr. Goldman, should provide information for his case. Appellant also submitted January 25, 2005 notes from Dr. Darron Woolley, a treating physician, reflecting that appellant's incision had healed and that he was ready for a prosthesis.

By decision dated February 7, 2006, the Office rescinded its acceptance of appellant's claim, on the grounds that the medical evidence failed to establish that his diagnosed medical condition was caused by a work injury.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.¹ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.³ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁴

The Office may rescind a claim if it determines that an accepted injury did not occur in the performance of duty.⁵ The fact that an injury occurred on the premises of the employing establishment is not sufficient to establish entitlement to benefits. Section 8102(a) of the Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁶ The

¹ See 20 C.F.R. § 10.610.

² *Eli Jacobs*, 32 ECAB 1147 (1981).

³ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁴ *George A. Rodriguez*, 57 ECAB ____ (Docket No. 05-490, issued November 18, 2005). *Delphia Y. Jackson*, 55 ECAB ____ (Docket No. 04-165, issued March 10, 2004); *Paul L. Stewart*, 54 ECAB 824 (2003); *Alice M. Roberts*, 42 ECAB 747 (1991).

⁵ *Belinda R. Darville*, 54 ECAB 656 (2003).

⁶ 5 U.S.C. § 8102(a).

claimant must also show that the injury arose out of the employment and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.⁷ To arise in the course of employment, the injury must occur at a time when the employee may be reasonably said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. The employee must also establish an injury arising out of the employment. To arise out of employment, the injury must have a causal connection to the employment, whether by precipitation, acceleration or aggravation.⁸

ANALYSIS

The Board finds that the Office's decision to rescind acceptance of appellant's claim was proper.

The Office initially accepted appellant's claim for left plantar ulcer/abscess on October 6, 2005. At that time, the only medical evidence of record that contained an opinion on the cause of appellant's diagnosed condition was the August 4, 2005 report from Dr. Nguyen. Appellant told Dr. Nguyen that he believed that a dirty water spill caused his left plantar foot abscess. Dr. Nguyen noted that appellant was a diabetic, with a history of noncompliance with medications, as well as peripheral neuropathy prior to development of his left plantar foot abscess. He stated that on August 1, 2005 he had discussed appellant's diagnosis with Dr. Bui, a podiatrist, who assessed that appellant's left foot ulcer was not work related. In response to the question as to whether his findings and diagnosis were consistent with appellant's account of injury and onset of illness, Dr. Nguyen answered, "Y[es]." Although the Office apparently relied on it in accepting appellant's claim, the Board finds that Dr. Nguyen's report was vague and ambiguous.

Following the acceptance of the claim, the Office received a report dated October 10, 2005, in which Dr. Nguyen opined that he did not believe that appellant's condition was work related. He also noted that Dr. Bui had confirmed this belief. Dr. Nguyen reiterated his diagnosis of left plantar foot ulcer/abscess, with a history of underlying nonwork-related diabetic peripheral neuropathy. While Dr. Nguyen did not categorically identify the cause of appellant's foot condition, he did unequivocally state that it was not caused by factors of employment.

Appellant contended that his claim should remain accepted because his employer was aware of his diabetic condition when he was hired. The employer's knowledge of appellant's diabetic condition does not eliminate the requirement of establishing a causal relationship between the diagnosed condition and the claimed work incident. Appellant also argued that the Office should not have relied upon the opinions of Drs. Bui and Nguyen, because these physicians did not treat him at the time of the alleged employment injury. Instead, he contended that the opinion of his podiatrist, Dr. Goldman, should be controlling. The Board notes that

⁷ *Narbik A. Karamian*, 40 ECAB 617 (1989).

⁸ *Annie L. Ivey*, 55 ECAB ____ (Docket No. 02-1855, issued April 29, 2004).

appellant did not submit any medical report from Dr. Goldman, or any other physician, on the issue of causal relationship. Appellant's belief of causal relation, without supporting medical evidence, is insufficient to establish his claim.

The Office reopened appellant's case based on new evidence, in the form of Dr. Nguyen's October 10, 2005 report, establishing that appellant's condition did not arise in the course of employment. The Office provided a clear explanation of its rationale for rescission.⁹ The Board finds that the Office's decision to rescind acceptance of appellant's occupational disease claim was proper.

CONCLUSION

The Board finds that the Office properly rescinded appellant's compensation claim on the grounds that appellant's condition did not arise out of the course of his employment.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁹ *George A. Rodriguez, supra* note 4.