

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

J.H., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Columbia, SC, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 07-1193
Issued: September 21, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated August 28, 2006 affirming the denial of her occupational disease claim. The Board also has jurisdiction to review the Office's February 27, 2007 nonmerit decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits.

ISSUES

The issues are: (1) whether appellant established that she sustained a foot condition caused or aggravated by her federal employment; and (2) whether the Office properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 21, 2003 appellant, then a 39-year-old food service worker, filed an occupational disease claim alleging that on February 20, 2003 she first realized that her bilateral

foot condition was employment related. Specifically she attributed her condition to long periods of standing, walking and bending over the pot sink and pulling and pushing large food carts.

In a letter dated November 3, 2003, the Office advised appellant that additional evidence was needed in support of her claim. Appellant was instructed to provide medical evidence, including a comprehensive medical report from a treating physician containing a diagnosis, results of examinations and tests, the treatment provided and the doctor's opinion on the cause of her condition.

By decision dated December 20, 2003, the Office denied appellant's claim on the grounds that she did not submit any medical evidence to establish that her foot condition was caused or aggravated by her federal employment.

On July 19, 2004 appellant requested reconsideration and submitted medical evidence in support of her claim.

In a July 31, 2003 treatment note, Dr. Angus M. McBryde, Jr., a treating Board-certified orthopedic surgeon, diagnosed bilateral plantar fasciitis and released appellant to work effective August 11, 2003. He also stated that he had "written a note for a job change." Dr. McBryde diagnosed bilateral plantar fasciitis which he noted "has been previously diagnosed and which has improved with the time off." He recommended that appellant limit the amount of time she stands or walks.

On September 17, 2003 Dr. Renee Hutto-Altman, a treating podiatrist, diagnosed right heel plantar and heel spur based upon x-ray interpretations. She noted that appellant's job required standing and delivering food for several hours. Dr. Hutto-Altman opined that, based upon her work duties and heel spur diagnosis, loss of work time could be expected until the problem resolved.

On May 20, 2004 Dr. McBryde noted that appellant was not working as she "could not find work that permitted her only limited time on her feet." He diagnosed plantar fasciitis and noted "[t]his is not thought to be work related." On July 6, 2004 Dr. McBryde opined that appellant's bilateral plantar fasciitis was not employment related. He opined that the condition was "a repetitive stress injury that could occur at any point, at any time, at any job or unrelated work activity with standing and walking responsibilities." Dr. McBryde concluded that if the condition was due to her employment "there would be a bilateral problem since the same amount of time was spent on her other foot."

By decision dated October 20, 2004, the Office denied modification of the December 20, 2003 decision. It indicated that Dr. McBryde did not support appellant's foot condition as employment related.

On May 13, 2005 appellant requested reconsideration and submitted medical evidence, including a March 7, 2005 neck magnetic resonance imaging (MRI) scan and a March 4, 2005 left wrist MRI scan. In reports dated February 23 to June 9, 2005, Dr. Green B. Neal, an examining physician, noted that appellant had complaints of ankle and foot pain which started approximately two years prior. On April 14, 2005 he noted that appellant worked for the employing establishment for approximately seven years delivering heavy trays. Dr. Neal opined

that she developed hypertension due to her chronic pain. He stated that appellant “has a lot of pathology in both ankles, the left wrist and the posterior cervical neck and LS spine.” An MRI scan of the right revealed “a small amount of fluid seen surrounding the distal Achilles tendon consistent with Achilles tendinitis.” Based upon appellant’s current physical condition, Dr. Neal opined that she was unable to work. He noted that appellant had plantar fasciitis, two small cysts near the talus, significant degenerative disease in her neck and spine, diabetes and significant lipodystrophy.

On April 25, 2005 Dr. Michael R. Ugino, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome, noting that it was worse on the left side than on the right side.

By decision dated August 26, 2005, the Office denied modification of the October 20, 2004 decision.

On March 22, 2006 appellant requested reconsideration and submitted a March 15, 2006 chart note from Dr. Neal who diagnosed mild plantar fasciitis, bilateral tarsal tunnel syndrome in her feet, bilateral carpal tunnel syndrome, bulging cervical disc, hypertension, diabetes, chronic pain syndrome, degenerative arthritis, L3-4 disc protrusion with L4-5 and L5-S1 facet arthropathy, fibromyalgia and C4-5 degenerative disc disease. Dr. Neal noted that appellant had been diagnosed with mild plantar fasciitis prior to working for the employing establishment. He opined that her employment duties exacerbated her preexisting problem of arthritis in the joints, including the spine, that lead to her present disability. Dr. Neal noted the nature of work appellant performed which included pushing and pulling a cart over a concrete floor for eight years. He opined that she was totally disabled, which he attributed to the physical exertional of the work she performed for eight years.

By decision dated May 1, 2006, the Office denied modification of the August 26, 2005 decision.

On June 27, 2006 appellant requested reconsideration and submitted medical evidence in support of her request. In a June 14, 2006 report, Dr. Neal noted that he had been treating appellant since February 2005 for severe feet and knee pain. He noted that her job required her to do a lot of walking and standing for long distances as well as bending and pushing and pulling of large food carts. These duties caused leg, knee and foot pain which was exacerbated by walking any distance and standing which resulted in severe bilateral knee degenerative arthritis, plantar fasciitis and tibialis and severe Achilles tendinitis. Dr. Neal stated that appellant’s condition “is not related to a single event or a single day but is a culmination of all her work environment over the years.” He concluded that there was a direct link between appellant’s foot condition, bilateral carpal tunnel syndrome and her employment duties. Dr. Neal opined that her preexisting bilateral knee degenerative arthritis had been aggravated by her foot condition. He noted that a physical examination revealed tarsal tunnel syndrome, but he has been unable to prove this by electromyogram testing.

By decision dated September 20, 2006, the Office denied modification of the May 1, 2006 decision.

On January 9, 2007 appellant requested reconsideration and submitted medical evidence, including evidence previously submitted and considered. In office notes for the period August 14 to November 13, 2006, Dr. Neal saw appellant for complaints of left arm pain. On August 14, 2006 he reported that appellant had a normal colonoscopy. Dr. Neal stated that she was doing well in a September 12, 2006 note.

By decision dated February 27, 2007, the Office denied further merit review. It found that the medical evidence from Dr. Neal was duplicative of his prior reports and did not constitute a basis for reopening the claim.¹

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of her 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 disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.³ 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.⁴

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.⁵ The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant.⁶

¹ The Board notes that appellant submitted new evidence with her appeal to the Board. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB ____ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

² 5 U.S.C. §§ 8101-8193.

³ *Bonnie A. Contreras*, 57 ECAB ____ (Docket No. 06-167, issued February 7, 2006); *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *D.E.*, 58 ECAB ____ (Docket No. 07-27, issued April 6, 2007); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ See *D.D.*, 57 ECAB ____ (Docket No. 06-1315, issued September 14, 2006); *William Taylor*, 50 ECAB 234 (1999); see also 20 C.F.R. § 10.5(q).

⁶ *J.M.*, 58 ECAB ____ (Docket No. 06-2094, issued January 30, 2007); *Donna L. Mims*, 53 ECAB 730 (2002).

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁷ The opinion of the physician must be based on a complete factual and medical background of the claimant⁸ and must be one of reasonable medical certainty⁹ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰

ANALYSIS -- ISSUE 1

Appellant alleged that her bilateral foot condition was due to long periods of standing, walking and bending over a pot sink and pulling and pushing large food carts. The employing establishment did not dispute that appellant was engaged in such employment activities as a food service worker. The Board finds that the evidence establishes that appellant's job required her to stand, walk and bend as well as push and pull food carts. The issue to be resolved is whether appellant's bilateral foot condition resulted from these employment activities. The Board finds that the medical evidence is not sufficient to establish her claim.

In a September 17, 2003 report, Dr. Hutto-Altman, a treating podiatrist, diagnosed right heel plantar and heel spur based upon x-ray interpretation. She indicated that it was expected that appellant would have periods of lost work until her right heel spur and plantar condition was resolved. However, Dr. Hutto-Altman did not address the issue of causal relationship. She failed to explain how appellant's job duties caused or aggravated her right foot condition. As Dr. Hutto-Altman's report does not address the relevant issue of causal relationship, it is of diminished probative value.¹¹

Similarly, the reports by Dr. McBryde are insufficient to support her claim. Dr. McBryde diagnosed plantar fasciitis in reports dated July 31, 2003 and May 20, 2004. In a July 6, 2004 report, he opined that appellant's plantar fasciitis was not employment related. As Dr. McBryde concluded that her foot condition was not caused or aggravated by her employment, his opinion is not sufficient to establish her claim.

Appellant submitted diagnostic reports regarding back, hand and foot conditions; however, these reports do not contain a discussion on causal relationship. As noted, the requisite

⁷ *G.G.*, 58 ECAB ____ (Docket No. 06-1564, issued February 27, 2007); *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁸ *L.D.*, 58 ECAB ____ (Docket No. 06-1627, issued February 8, 2007); *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

⁹ *Roy L. Humphrey*, 57 ECAB ____ (Docket No. 05-1928, issued November 23, 2005); *John W. Montoya*, 54 ECAB 306 (2003).

¹⁰ *J.M.*, *supra* note 6; *Judy C. Rogers*, 54 ECAB 693 (2003).

¹¹ *See A.D.*, 58 ECAB ____ (Docket No. 06-1183, issued November 14, 2006); *Leslie C. Moore*, *supra* note 7.

evidence needed to establish the claim was a medical report from a physician explaining how her federal employment contributed to her diagnosed conditions.¹²

In an April 14, 2005 report, Dr. Neal diagnosed plantar fasciitis, two small cysts near the talus, significant degenerative disease in appellant's neck and spine, diabetes and significant lipodystrophy. In a March 15, 2006 chart note, he diagnosed mild plantar fasciitis, bilateral tarsal tunnel syndrome in her feet, bilateral carpal tunnel syndrome, bulging cervical disc, hypertension, diabetes, chronic pain syndrome, degenerative arthritis, L3-4 disc protrusion with L4-5 and L5-S1 facet arthropathy, fibromyalgia and C4-5 degenerative disc disease. In an June 14, 2006 report, Dr. Neal attributed severe bilateral knee degenerative arthritis, plantar fasciitis and tibialis and severe Achilles tendinitis due to the pain in her legs, knee, which had been exacerbated by long walking or standing. He opined that there was a direct link between appellant's feet problems and bilateral carpal tunnel syndrome and her employment duties. Dr. Neal also opined that appellant's preexisting bilateral knee degenerative arthritis had been aggravated by her feet problems. He provided no explanation other than a conclusory statement attributing appellant's condition to her employment. Dr. Neal did not provide adequate medical rationale to explain how the various conditions he diagnosed had been caused or aggravated by her employment duties.¹³ Moreover, he did not start treating appellant until 2005 and she stopped work in late 2003. Without additional explanation or rationale, Dr. Neal's reports are insufficient to establish causal relationship or show that appellant's condition had been caused or aggravated by her employment duties. The Board finds that Dr. Neal's reports are insufficient to establish a causal relationship between appellant's diagnosed condition and employment factors, as Dr. Neal did not provide sufficient explanation or rationale to fortify his conclusions.

Dr. Ugino did not address causal relationship and thus his report is insufficient to establish appellant's claim.

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between her claimed condition and her employment.¹⁴ To establish causal relationship, she must submit a physician's report in which the physician reviews the employment factors identified as causing her condition and, taking these factors into consideration as well as findings upon examination, state whether the employment injury caused or aggravated the diagnosed conditions and present medical rationale in support of his or her opinion.¹⁵ Appellant failed to submit such evidence in this case and, therefore, has failed to discharge her burden of proof to establish that she sustained an employment-related foot condition.

¹² *Victor J. Woodhams*, *supra* note 4.

¹³ *Roma A. Mortenson-Kindschi*, 57 ECAB ____ (Docket No. 05-977, issued February 10, 2006) (where the Board found that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁴ *Robert A. Boyle*, 54 ECAB 381 (2003); *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁵ *Calvin E. King*, 51 ECAB 394 (2000).

LEGAL PRECEDENT -- ISSUE 2

The Act¹⁶ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.¹⁷ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹⁸

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁹

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.²⁰ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²¹

ANALYSIS -- ISSUE 2

The Office denied appellant's occupational disease claim on the grounds that the medical evidence did not establish that her foot condition was causally related to her federal employment. The Board finds that appellant's request for reconsideration met none of the regulatory requirements for a review of the merits of this decision.

Appellant's January 9, 2007 request for reconsideration did not allege that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by the Office. She is thus not entitled to further review on the merits of her case under the first two sections of 10.606(b)(2).²² Though appellant stated that new medical evidence formed the basis for reconsideration, the evidence she submitted with her

¹⁶ 5 U.S.C. § 8101 *et seq.*

¹⁷ 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ____ (Docket No. 06-121, issued June 6, 2006).

¹⁸ 20 C.F.R. § 10.605.

¹⁹ 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB ____ (Docket No. 06-868, issued June 16, 2006).

²⁰ 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).

²¹ 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB ____ (Docket No. 05-677, issued July 13, 2005).

²² 20 C.F.R. § 10.606(b)(2)(i) and (ii).

request was duplicative of that previously considered; a December 12, 2006 nerve conduction study and office notes for the period August 14 to November 13, 2006 by Dr. Neal. Neither Dr. Neal nor the report of the diagnostic test discuss the cause of appellant's condition. As there was no new relevant or pertinent evidence for the Office to consider. Appellant was not entitled to review under the third section of 10.606(b)(2).²³

Because appellant did not meet any of the statutory requirements for a review of the merits of her claim, the Office properly denied her January 9, 2007 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof in establishing that she developed an occupational disease over the course of her employment and that the Office properly denied appellant's request for reconsideration without conducting a merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 27, 2007 and August 28, 2006 are affirmed.

Issued: September 21, 2007
Washington, DC

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

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

²³ 20 C.F.R. § 10.606(b)(2)(iii).