United States Department of Labor
Employees' Compensation Appeals Board

Y.S., Appellant	)	
and	)	**Docket No. 08-400**
	)	**Issued: June 2, 2008**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Atwater, CA, Employer	)	

Appearances:
Norman R. McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' August 23, 2007 merit decision finding that she did not establish an injury causally related to her federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she sustained a left foot injury due to her employment duties.

FACTUAL HISTORY

On March 22, 2004 appellant, then a 49-year-old physician's assistant, filed an occupational disease claim attributing the pain and swelling in her left foot and ankle to her employment duties. Appellant stated: "A day after my right foot surgery, I fell on the work-related left foot injury and surgery site while I was standing on it using a crutch. Due to the left

foot pain I was not able to move as I needed to support myself…. On November 20, 2003 at work my left foot pain [was] aggravated and [the left foot] swollen."

In a statement dated March 22, 2004, appellant stated that her initial left foot injury occurred on June 30, 1998 in the performance of duty. She underwent surgery in June 2000 and returned to regular duty with lingering pain. Appellant occasionally tripped. Her right foot required surgery on August 19, 2003. She used crutches and her left foot for weight bearing. Due to the pain and weakness in appellant's left foot, she was not able to move around following her right foot surgery. She returned to light-duty work on September 30, 2003 and used crutches. Appellant stated that her regular-duty position required standing all day, walking and running. She returned to full-time work on November 20, 2003 with four hours of standing. Appellant stated that she favored her right foot, bearing more weight on the left foot and prolonged standing aggravated left foot pain. At the end of the day, she noticed swelling of the left foot for the first time since the 2000 surgery. Appellant then underwent physical therapy for both feet.

On May 5, 2004 Dr. Alfred A. Patino, a podiatrist, repeated appellant's history of right bunion surgery in August 2003 and use of crutches. He noted that appellant developed left ankle and posterior tibial pain in the left foot. Appellant reported increased left foot pain following her return to light-duty work on September 30, 2003. After beginning full-time work on November 20, 2003 she developed severe pain and swelling to the left ankle area in the left posterior tibial tendon area. Dr. Patino recommended surgical consultation with another physician.

The employing establishment reported on June 1, 2004 that appellant used sick leave from August 18 through October 3, 2003. Appellant worked four hours a day from October 6 to 21, 2003. Her physician stated that she was totally disabled from October 24, 2003 to January 28, 2004. The employing establishment stated that appellant returned for one day on January 29, 2004.

In a letter dated July 27, 2004, the Office requested additional factual and medical evidence from appellant in support of her claim. Dr. Steven W. Bailey, a podiatrist, released appellant to work four hours a day for six weeks beginning November 18, 2003. He took appellant off work on November 20, 2003. Dr. Bailey completed a report on August 3, 2004 noting an examination of appellant on November 18, 2003 due to left foot pain. He stated: "While at work she had to shift her weight from her right foot to the left foot in compensation for the discomfort during postoperative recovery and while doing this at her work left ankle became symptomatic."

In a report dated August 13, 2004, Dr. John S. Holmes, a Board-certified orthopedic surgeon, noted appellant's complaints of chronic left foot pain. He reviewed her history of surgery in 2003 and stated: "I feel the period of light duty from late September to late November 2003 aggravated her left foot condition and she has developed a chronic inflammatory problem that needs further treatment."

On August 20, 2004 appellant noted that her left foot never entirely recovered from the 2000 surgery. She continued to experience left foot weakness, pain and fatigue as well as

tripping. Following her return to light duty on September 30, 2003, appellant began to experience pain in both feet. Appellant was required to stand 35 to 40 minutes out of every hour while on light duty. She developed severe pain in both feet on November 20, 2003 and swelling in her left foot. Appellant stated: "I now strongly believe that on November 20, 2003 something serious happened to my left foot which consequently developed more pain in other areas of my left extremity like my left knee and left hip-lower back area, which prevented me from going back to work."

On September 23, 2004 Dr. Holmes noted that appellant's left foot pain had decreased but that she had recurrent pain in her right shoulder and low back with burning pain in her left lateral thigh and leg. In a note dated November 23, 2004, he stated that appellant could not return to work as physician's assistant due to the prolonged standing and walking required.

By decision dated January 6, 2005, the Office found that appellant had not submitted sufficient factual and medical evidence to establish that her left foot condition was due to her federal employment.

Appellant requested reconsideration on February 8, 2005 and attributed her repeated right bunion surgery to her left foot condition. She noted pain in her left low back, right knee and right ankle due to carrying her weight on her right foot 90 percent of the time. By decision dated April 21, 2005, the Office denied further review of the merits.

Appellant requested reconsideration on December 7, 2005 and submitted medical evidence. Dr. Holmes completed a report on November 17, 2005 noting appellant's continued symptoms of chronic left foot and ankle pain. He described her medical history and stated: "When she returned to work after the right foot surgery she favored the right foot which caused increased pain in her left foot and she has developed chronic tendinitis of her posterior tibial tendon left foot." Dr. Holmes concluded that appellant's condition was permanent. A magnetic resonance imaging (MRI) scan dated April 21, 2005 revealed a fracture of the anterior process of the calcaneus.

By decision dated March 6, 2006, the Office denied modification, finding that she failed to submit sufficient evidence to establish an injury on January 29, 2005 or her claim for an occupational disease.

Appellant, through her attorney, requested reconsideration on March 1, 2007. He argued that the Office was required to request a supplemental report from Dr. Holmes. He contended that the Office failed to consider whether her current left foot condition was a consequential injury. In a February 27, 2007 statement, appellant noted that she worked eight hours on November 20, 2003. She had been working four hours a day in the low security camp, distributing medication and evaluating patients which involved significant standing. This resulted in increased pain to her left foot and caused her visit to Dr. Bailey on November 18, 2003. On November 20, 2003 she performed her standard light duty and then

worked another four hours in the high security area of the prison evaluating prisoners' medical treatment charts. She stated:

> "There were 50 to 60 charts that I removed from a drawer and I would examine each of the charts for various reasons, including keeping statistics. Unfortunately, this task required me to stand most of the time as I pulled the charts out of the drawer and looked at them. At the end of my shift, I felt a great deal of pain in my left foot, which was pain significantly greater than the previous pain. I also noticed swelling in the left foot that I had not seen since my 2000 surgery."

Dr. Bailey completed a report on January 21, 2004 and provided a history of appellant's foot treatment. Following her right foot surgery, her left foot began to hurt. Appellant returned to work and complained of pain in her left ankle due to standing eight hours a day. Dr. Bailey restricted appellant to four hours of work on November 18, 2003 and she reported additional pain on December 9, 2003. He extended appellant's work restrictions through January 28, 2004. Dr. Bailey reviewed appellant's MRI scan and noted swelling of the posterior tibial tendon. He diagnosed left posterior tibial tendonopathy secondary to a transfer of weight to the left foot while recuperating from her right foot surgery.

In an April 20, 2006 report, Dr. Paul J. Braaton, a Board-certified orthopedic surgeon, addressed appellant's 1988 employment injury, resulting in a left bunionectomy with cords attached to the posterior tibialis tendon and accessory navicular. He also noted that she underwent three bunion operations on the right foot. Dr. Braaton stated that appellant returned to full weight bearing working four hours a day and experienced pain in the left leg. He performed a physical examination and reviewed x-rays. Dr. Braaton diagnosed insertional posterior tibialis tendinitis left foot. He stated: "In her left leg, she has had two injuries to her foot, one would be secondary to her compensatory gait after the surgery on her right foot. [Appellant] probably went back to full-time work too early and then developed a significant posterior tibialis tend[i]nitis…."

By decision dated August 23, 2007, the Office denied modification of the March 6, 2006 decision. The Office found that Dr. Braaton's report was not sufficiently well rationalized to meet appellant's burden of proof.[1]

LEGAL PRECEDENT

An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.[2] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to

[1] Following the Office's August 23, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching its final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[2] 20 C.F.R. § 10.5(q).

have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[3]

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[4] In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, then a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[5] Thus, it is accepted that, once the work-connected character of any condition is established, "the subsequent progression of that condition remains compensable *so long as the worsening is not shown to have been produced by an independent nonindustrial cause*."[6] (Emphasis added.)

ANALYSIS

The Board finds that appellant's claim was developed as a new occupational disease claim. Appellant's attorney argued that the claim should be developed as a consequential injury; however, appellant's statement on her claim form indicates that she sustained an intervening initial cause of her left foot pain, the right foot surgery and a fall.[7] The right foot surgery necessitated the use of crutches which resulted in the fall from her crutches the day after the right foot surgery. It is this fall which appellant stated initially retriggered her left foot pain in 2003. Following her return to light duty in October 2003, appellant's left foot condition worsened allegedly as the result of an employment-related walking and standing. This claim was appropriately developed by the Office as a new occupational disease claim.

Appellant submitted several medical reports diagnosing her current condition as left posterior tibial tendonopathy. She has established a medical diagnosis. Appellant must also present a factual statement identifying the employment factors which caused this condition. She has offered several explanations for her condition. On her claim form appellant indicated that she fell while on crutches the day after her right bunion surgery and injured her left foot such that she was unable to care herself while on crutches. On March 22, 2004 she also noted that her left foot pain was aggravated on November 20, 2003 when she worked eight hours a day, four hours

[3] *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

[4] *Albert F. Ranieri*, 55 ECAB 598, 602 (2004); A. Larson, *The Law of Workers' Compensation* § 10.01 (2000).

[5] *Charles W. Downey*, 54 ECAB 421, 422-23 (2003).

[6] *Raymond A. Nester*, 50 ECAB 173, 175 (1998).

[7] *Kathy A. Kelley*, 55 ECAB 206, 210 (2004); *Nester, supra* note 6; *Robert W. Meeson*, 44 ECAB 834 (1993).

of which were standing. On August 20, 2004 appellant stated that her left foot pain began after she returned to light-duty work on September 30, 2003. She asserted that "something serious" happened on November 20, 2003 and she began to develop pain throughout her body. In a February 27, 2007 statement, appellant asserted that she worked eight hours a day on November 20, 2003. She noted that her left foot pain had increased by November 18, 2003 requiring her to seek treatment from Dr. Bailey. She again sought treatment from him on November 20, 2003 due to the pain and swelling in her left foot.

The employing establishment noted that appellant returned to light duty on October 6, 2003 and stopped work on October 24, 2003 returning for one day on January 29, 2004. There are several factual inconsistencies in appellant's various statements to the Office when compared to the employing establishment records documenting her employment. However, the employing establishment did not dispute that appellant was required to stand and walk as part of her job description. The Board will accept as factual that appellant was required to stand or walk for some portion of her four-hour day for the period October 6 through 24, 2003.

Appellant submitted several physicians' reports addressing her current left foot condition and its relationship to her employment. Dr. Patino, a podiatrist, noted her statements that her left foot pain began after returning to work. However, he failed to provide a diagnosis of her current condition. This report is not sufficient to meet appellant's burden of proof.

Dr. Bailey, a podiatrist, completed notes dated November 18 and 20, 2003. He found that appellant could work four hours a day beginning November 18, 2003 and then found that she was totally disabled as of November 20, 2003. However, these dates do not correspond with the dates the employing establishment indicated that she worked. Dr. Bailey submitted reports on January 21 and August 3, 2004, which attributed appellant's left foot pain to shifting her weight from her right foot to compensate for pain following surgery. He stated that, while doing this at work, appellant's left foot became symptomatic and was a result of her recovery from right foot surgery. Dr. Bailey diagnosed left posterior tibial tendonopathy. He did not provide an accurate history of injury based on either the factual events provided by appellant or that of the employing establishment. Dr. Bailey's report is therefore of diminished probative value. Appellant indicated that she experienced severe foot pain and swelling on November 20, 2003 following an eight-hour day at work. Dr. Bailey did not discuss this additional work experience and did not report examining appellant on November 20, 2003. His reports do not comport with the employing establishment statement that appellant stopped work on October 24, 2003. Medical conclusions based on inaccurate or incomplete histories are of little probative value and are insufficient to satisfy a claimant's burden of proof.[8]

Dr. Holmes, a Board-certified orthopedic surgeon, submitted reports dated August 13, 2004 and November 17, 2005 addressing appellant's chronic left foot and ankle pain. He opined that, when appellant returned to work following her right foot surgery, from September to late November 2003, she placed extra weight on the left foot which caused increased pain in her left foot and chronic tendinitis of her posterior tibial tendon. These reports are also based on an inaccurate history, as the employing establishment indicated that appellant performed light-duty

[8] *John W. Montoya*, 54 ECAB 306 (2003).

work in October 2003 and one day in January 2004. Without an accurate history of when appellant worked and the hours she worked, this report is not sufficient to meet appellant's burden of proof in establishing her claim for an occupational disease.

Dr. Braaton, a Board-certified orthopedic surgeon, completed an April 20, 2006 report. He described appellant's left foot condition beginning in 1988. Dr. Braaton stated that appellant returned to work four hours a day and experienced pain in the left leg. He diagnosed insertional posterior tibial tendinitis of the left foot and opined that this condition was due to appellant's compensatory gait following surgery on her right foot. Dr. Braaton stated: "She probably went back to full-time work too early…." His report is also based on an incomplete and inaccurate factual background. The record does not establish that appellant returned to full-time duty following her right foot surgery. Due to the factual deficiencies, Dr. Braaton's report is of little probative value and is not sufficient to meet appellant's burden of proof.

CONCLUSION

The Board finds that appellant has not submitted sufficient medical opinion evidence to meet her burden of proof to establish that she developed tendinitis due to walking in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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