United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
	)	**Docket No. 08-1358**
and	)	**Issued: November 6, 2008**
U.S. POSTAL SERVICE, POST OFFICE New York, NY, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 7, 2008 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs' dated December 11, 2007, which denied his reconsideration request.[1] He also filed a timely appeal of a September 5, 2007 merit decision, denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision.

ISSUES

The issues are: (1) whether appellant has met his burden to establish that he sustained a traumatic injury in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

[1] The record includes evidence received after the Office issued the December 11, 2007 decision. The Board cannot consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c) (2004).

FACTUAL HISTORY

On May 24, 2007 appellant, then a 47-year-old motor vehicle operator, filed a traumatic injury claim alleging that on May 23, 2007 he twisted his left foot and ankle when getting off the truck resulting in swelling.

A May 24, 2007 medical note from a nurse stated that appellant was seen that day for evaluation. In notes dated June 7 and 21, 2007, Dr. Peter J. Iannuzzi, a podiatrist, excused appellant from work from June 7 to July 9, 2007. A June 22, 2007 magnetic resonance imaging (MRI) scan of appellant's left ankle noted that it was suggestive of bone marrow contusion/edema at the anterior aspect of the talus and superolateral aspect of the talus with suggestions of tear and contusion of the anterior talofibular ligament. In a June 28, 2007 note, Dr. Iannuzzi prescribed physical therapy for the leg and ankle three times a week and diagnosed "ankle" and another word.[2] A July 3, 2007 progress note from an unidentified individual noted that on May 23, 2007 appellant stepped off a truck at work and fell, injuring his left ankle and diagnosed left ankle fracture. Physical therapy notes dated from July 3 to 20, 2007 were received. In a July 9, 2007 note, Dr. Iannuzzi excused appellant from working for four more weeks.

In a July 25, 2007 letter, the Office requested additional medical information to support appellant's claim.

On July 25, 2007 the Office denied appellant's request for authorization for an ankle arthroscopy noting that his claim had not been adjudicated.

Additional evidence was received. An August 31, 2007 note from an unidentified individual[3] stated that appellant fell off a truck and sustained a fracture of left navicular and twisting injury to the ankle. In an August 6, 2007 note, Dr. Iannuzzi excused appellant from work until September 4, 2007. The Office also received visit notes dated July 23, 24, 25, 30 and 31, 2007

In a September 5, 2007 merit decision, the Office denied appellant's claim finding that the medical evidence did not establish that he sustained an injury in connection with the accepted incident. It did accept that the incident occurred as alleged.

On October 5, 2007 appellant requested reconsideration. Additional medical evidence was submitted. In an August 1, 2007 attending physician's report Dr. Iannuzzi diagnosed "fracture metatarsal closed/edema" and stated that appellant's injury was caused by stepping off a truck. In an October 2, 2007 letter, he stated that he saw appellant after his May 23, 2007 injury, which occurred when he fell off a truck and twisted his foot and ankle. Dr. Iannuzzi reported that x-rays were taken which showed a nondisplaced fracture of the navicular and contusion and possible ligament sprains of the ankle. He also noted that appellant was treated

[2] The handwriting is illegible.

[3] The signature is illegible and there is no indication of who wrote the note.

for several months and continued to have antalgic gait and limps. Dr. Iannuzzi opined that appellant required surgical intervention to alleviate his problem.

In a December 11, 2007 nonmerit decision, the Office denied appellant's request for reconsideration finding that he did not submit any relevant new evidence to warrant a merit review. It found that the histories provided by Dr. Iannuzzi were contradictory as there was a difference between falling off a truck and stepping off a truck.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his or 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 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 an employee 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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[7] The second component is whether the employment incident caused a personal injury.[8] Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a left ankle condition when he stepped out of his truck and twisted his ankle. The Office accepted that the incident occurred as alleged. The issue remains whether appellant's incident caused an injury. In order to establish that the employment

[4] 5 U.S.C. §§ 8101-8193.

[5] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *Elaine Pendleton*, *supra* note 5.

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

[9] *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, *supra* note 6 at 352. Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the claimant's specific employment factors. *Id*.

incident caused an injury appellant must establish through medical evidence that he has a diagnosed condition causally related to the incident. Appellant submitted various medical reports. Of these reports only the MRI scan study offered a medical diagnosis. None of the reports from his attending physicians provided a diagnosis. Dr. Iannuzzi diagnosed "ankle" and another word but the writing is illegible. "Ankle" is not a diagnosed condition. The rest of the medical notes were not from an identified physician. Therefore whether they diagnose a condition is immaterial as only a physician under the Act can provide a diagnosis.[10]

A June 22, 2007 MRI scan of appellant's left ankle noted that it was suggestive of bone marrow contusion/edema at the anterior aspect of the talus and superolateral aspect of the talus with suggestions of tear and contusion of the anterior talofibular ligament however this report offered no medical opinion regarding the cause of this condition. The evidence does not establish that appellant has a diagnosed condition that is casually related to the employment incident. The Board finds that as of the date of the September 5, 2007 merit decision appellant had not established that he sustained a condition causally related to his employment incident.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[11] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[12] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[13]

ANALYSIS -- ISSUE 2

In order to require the Office to reopen a case for merit review appellant must: show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered.[14] Appellant did not present any legal arguments but did submit documents not previously considered by the Office. The issue is whether these documents constitute relevant and pertinent new evidence. In the most recent merit decision appellant's

[10] 5 U.S.C. § 8101(2).

[11] 20 C.F.R. § 10.606(b)(2) (2003).

[12] *Id*. at § 10.608(b).

[13] *Annette Louise*, 54 ECAB 783 (2003).

[14] 20 C.F.R. § 10.606(b)(2).

claim was denied due to a lack of medical evidence therefore only documents containing medical evidence would be considered relevant. Appellant submitted two reports from Dr. Iannuzzi who diagnosed a closed metatarsal fracture, edema, navicular fracture, contusion and possible ligament sprain of the ankle. The previously submitted medical reports reviewed by the Office in its September 4, 2007 merit decision did not contain a diagnosis from a physician whereas these reports do. The new reports from Dr. Iannuzzi also offer a medical opinion regarding the cause of appellant's diagnosed condition. The reports from Dr. Iannuzzi are neither repetitive nor duplicative and address the issue at hand, whether appellant sustained a medical condition causally related to his accepted employment incident. Evidence does not have to be substantial enough as to cause appellant's claim to be accepted in order to be granted merit review.

Additionally, the Board notes that while the Office refused to evaluate Dr. Iannuzzi's new reports based upon a finding that the history of injury reported by Dr. Iannuzzi was inconsistent, this was not a proper basis for denying merit review. Whether appellant stepped out of his truck, twisted his ankle and fell; or fell while getting out of his truck twisting his ankle appears to be a semantic disagreement. Whether the mechanism of injury is the same is a medical question to be resolved and goes to the weight of the medical evidence, but is not a proper basis for denying merit review. The Board finds that the evidence submitted constitutes relevant and pertinent new evidence not previously considered by the Office. As such, appellant is entitled to a merit review by the Office. The December 11, 2007 decision will be set aside and remanded in order for the Office to evaluate the evidence and issue a new decision on the merits.

CONCLUSION

The Board finds that appellant had not established that she sustained a traumatic injury at the time of the September 5, 2007 merit decision. The Board further finds that the Office improperly denied appellant's request for reconsideration and a merit decision should have been issued addressing the merits of the new medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated September 5, 2007 is affirmed and the decision dated December 11, 2007 will be set aside and remanded for further action consistent with this decision.

Issued: November 6, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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