

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

B.C., Appellant

and

**U.S. POSTAL SERVICE, TUSTIN POST
OFFICE, Tustin, CA, Employer**

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**Docket No. 10-1208
Issued: June 3, 2010**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 17, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' December 24, 2008 merit decision finding that he did not sustain an injury while in the performance of duty and a February 17, 2009 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained a right foot injury while in the performance of duty; and (2) whether the Office properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that he did not sustain a new right foot injury. Rather, he sustained a recurrence of his 1982 employment-related bilateral foot condition in Office File No. xxxxxx098. Therefore, the Office should have authorized his July 16, 2008 right foot surgery.

FACTUAL HISTORY

On July 23, 2008 appellant, then a 55-year-old customer service supervisor, filed an occupational disease claim alleging that in 2007 he first became aware of his right foot condition. In 1982 he underwent bilateral foot surgery due to a prior work-related foot injury. Subsequently, appellant experienced recurring foot complications secondary to diabetes mellitus, which included infected ulcerations on the left foot for which he underwent surgery in 2007 and significant peripheral polyneuropathy. He contended that, over the prior year, he developed ulcerations on his right foot, some of which became infected. The ulcers were treated but did not respond to multiple conservative measures. An attending physician advised appellant that surgery was necessary to prevent complications such as possible amputation. Appellant stopped work on July 16, 2008.

A May 21, 2008 medical report from Dr. Allan G. Weiss, an attending Board-certified podiatrist, reviewed a history of appellant's bilateral foot complaints and medical treatment including his 1982 bilateral foot surgery and 2007 left foot surgery. Dr. Weiss stated that appellant developed recurrent neuropathic diabetic foot ulcers on the right foot, some of which became infected and were treated over the prior year. Appellant also developed insulin-dependent diabetes mellitus and significant peripheral polyneuropathy. Dr. Weiss advised that appellant's foot ulcerations were unresponsive to appropriate treatment. In a June 25, 2008 prescription, Dr. Weiss ordered Cephalexin. A consent form signed by appellant on July 2, 2008 authorized Dr. Weiss to perform surgery on July 16, 2008 to correct a recurrent infected diabetic ulcer on his right foot.

On July 28, 2008 the employing establishment contended that appellant did not sustain a right foot injury while in the performance of duty. It attributed his condition to his nonindustrial preexisting diabetes mellitus.¹

By letter dated August 8, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. On August 25, 2008 appellant contended in a telephone conference with the Office that his claimed right foot injury was caused by his 1982 employment-related foot surgery.

In an August 25, 2008 report, Dr. Weiss reviewed a history of appellant's foot conditions and medical treatment. He stated that appellant experienced complications since his 1982 work-related foot surgery. Appellant underwent left foot surgery in 2007 secondary to complications from a prior work-related injury, recurring foot complications due to diabetes mellitus, which included peripheral polyneuropathy and his work duties. Dr. Weiss advised that appellant was doing extremely well following the 2007 surgery but had developed right foot ulcers secondary to insulin-dependent diabetes mellitus, significant peripheral polyneuropathy, unresponsiveness to appropriate conservative measures, prior foot surgery with abnormal metatarsal parabolas, work requirements which included extensive standing and walking and the prior work-related injuries. Dr. Weiss performed surgery on July 16, 2008.

¹ The employing establishment indicated that appellant filed a prior claim, Office File No. xxxxxx143, for a left foot injury which was accepted by the Office for temporary aggravation of a preexisting injury.

By decision dated September 10, 2008, the Office denied appellant's claim, finding the medical evidence insufficient to establish that he sustained a right foot condition causally related to the established work-related duties.

By letter dated September 29, 2008, appellant requested reconsideration of the Office's September 10, 2008 decision.

In a December 24, 2008 decision, the Office denied modification of the September 10, 2008 decision. It found that the evidence submitted by appellant was insufficient to establish that he sustained a right foot injury causally related to the established work-related duties. On February 4, 2009 appellant requested reconsideration.

By decision dated February 17, 2009, the Office denied appellant's request for reconsideration, finding that it neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant further merit review of appellant's claim.²

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act³ 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.⁴ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

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 the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment 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 employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion

² On appeal, appellant submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See* 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB ____ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a formal written request for reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

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. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.⁶ Neither the fact that appellant's condition became apparent during a period of employment nor his belief that the condition was caused by his employment is sufficient to establish a causal relationship.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant performed the work duties of a customer service supervisor as alleged. The Board finds that the medical evidence submitted is insufficient to establish that his diagnosed foot conditions were caused or aggravated by his work-related duties.

Appellant submitted medical records from Dr. Weiss, an attending podiatrist. In a May 21, 2008 report, Dr. Weiss reviewed a history of appellant's bilateral foot complaints and medical treatment. He diagnosed recurrent neuropathic diabetic foot ulcers on the right foot, some of which were infected and treated, insulin-dependent diabetes mellitus and significant peripheral polyneuropathy. Dr. Weiss did not specifically attribute appellant's right foot ulcers to the established work-related duties of a customer service supervisor. Rather, he related them to appellant's diabetes. Dr. Weiss did not adequately address whether appellant's peripheral polyneuropathy condition was caused by the established work-related duties. On June 25, 2008 he prescribed medication but did not provide any additional medical opinion addressing whether appellant sustained a right foot condition caused or aggravated by his work activities.

On August 25, 2008 Dr. Weiss reviewed a history of appellant's foot condition and 1982 and 2007 employment-related surgeries. He opined that appellant's right foot ulcers were secondary to, among other things, his work duties which required extensive standing and walking and to the prior work injuries. Again, Dr. Weiss failed to provide sufficient medical opinion explaining how the diagnosed condition was caused or aggravated by appellant's work duties or injuries. The Board finds that his reports are insufficient to establish appellant's claim.

The Board finds that there is insufficient rationalized medical evidence to establish that appellant sustained a right foot condition causally related to the accepted factors of his federal employment as a customer service supervisor. Appellant did not meet his burden of proof.

While appellant contends on appeal that his current right foot condition and surgery were due to the 1982 work injury, causal relation is a medical question that can generally be resolved only by probative opinion from a physician.⁸ Dr. Weiss did not adequately address how

⁶ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁷ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁸ *Robert G. Morris*, 48 ECAB 238 (1996).

appellant's condition in 2007 or need for surgery related to his prior injury or surgery in 1982 or how his current right foot condition was a natural progression of the accepted injury. Appellant did not submit any additional medical evidence addressing the causal relationship between his right foot condition and his accepted 1982 injury.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,⁹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁰ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹¹ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

Appellant's February 4, 2009 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by the Office. Appellant did not submit any additional medical evidence in connection with his February 4, 2009 reconsideration request. He submitted an appeal form indicating that he wanted reconsideration without any explanation regarding the basis of his request. Therefore, appellant has not satisfied any of the three regulatory requirements for obtaining a merit review of his claim. The Board finds that the Office properly refused to reopen his claim for reconsideration of the merits.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a right foot injury while in the performance of duty. The Board further finds that the Office properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁹ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(1)-(2).

¹¹ *Id.* at § 10.607(a).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2009 and December 24, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 3, 2010
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