United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 10-603**
	)	**Issued: November 4, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

Appearances:
Appellant, pro se
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 January 4, 2010 appellant filed a timely appeal from the August 11, 2009 merit decision of the Office of Workers' Compensation Programs denying her occupational injury claim and the September 23, 2009 nonmerit decision denying her 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 met her burden of proof to establish that she sustained an injury causally related to factors of her federal employment; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

FACTUAL HISTORY

On May 12, 2009 appellant, a 46-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her left foot as a result of employment activities. She described the history of her injury, noting that she fractured and tore ligaments in her left foot on May 30, 2007 while walking her route. On January 4, 2008 appellant injured her left foot as she stepped out of her postal vehicle and, on January 3, 2009, she injured her knee when she fell in snow while delivering mail. Appellant returned to full duty on February 9, 2009 following her knee injury. After walking her route for seven hours a day beginning February 9, 2009, she experienced excruciating pain in her left foot and knee.

In a January 16, 2009 report, Dr. Mark A. Lazar, a treating physician, stated that appellant complained of pain over the plantar and lateral aspect of the base of the fifth metatarsal since January 4, 2008 when she rolled her foot stepping out of a truck. Appellant previously fractured the fifth metatarsal in May 2007. A subsequent magnetic resonance imaging (MRI) scan revealed mild stress reactions to the second and third metatarsal cuneiform and medial navicular, with no stress fracture identified. Dr. Lazar restricted appellant temporarily to four hours each of walking and driving, with the hope that she would be able to resume her walking route full time within the next few weeks.

In a February 17, 2009 report, Dr. Jonathan Smerek, a Board-certified orthopedic surgeon, treated appellant for complaints of lateral-sided tenderness over the fifth metatarsal. He diagnosed left forefoot synovitis. Dr. Smerek described the history of her left foot condition, noting that she originally sustained a left fifth metatarsal fracture on May 30, 2007 when she twisted her foot while exiting from a postal vehicle. On January 4, 2008 appellant again sustained a left midfoot fracture when she stepped off a truck and inverted her left foot.

On examination of the left lower extremity, appellant demonstrated no anteromedial or anterolateral ankle joint line tenderness. Ankle range of motion was from 20 degrees of dorsiflexion to 60 degrees of plantar flexion with no tenderness. There was a negative Tinel's sign over the tarsal tunnel. Examination of the midfoot demonstrated no talonavicular or calcaneacuboid or Lisfranc tenderness. There was tenderness over the proximal metatarsals two through five. X-rays demonstrated a prior bunionette correction, as well as evidence of an accessory sesamoid of the fifth metatarsophalangeal joint. There was no evidence of stress fracture, midfoot arthritis or prior fracture. A July 2008 MRI scan demonstrated stress reaction within the second and third metatarsals. An October 2007 computerized tomography scan of the left foot showed a nondisplaced avulsion fracture at the base of the fifth metatarsal. Dr. Smerek stated that appellant's lateral column pain "may be due to her prior fractures, early stress fractures."

In a May 20, 2009 letter, the Office informed appellant that the evidence submitted was insufficient to establish her claim and advised her to submit details regarding the employment duties she believed caused or contributed to her claimed condition. It also requested a comprehensive medical report from a treating physician, which contained symptoms, a diagnosis and an opinion with an explanation as to how employment activities in which she engaged after February 9, 2009 were causally related to her claimed condition.

Appellant submitted a May 19, 2009 duty status report from Dr. Ronald R. Banta, a podiatrist. In the history of injury section, Dr. Banta stated that appellant fell out of her postal vehicle on January 4, 2009, "broke her foot and continued to have pain." He diagnosed tibio fibular ligament distal.

On June 15, 2009 Dr. Banta stated that appellant was being treated for traumatic degenerative arthritis in the left foot at the mid tarsal joint. Incidental findings demonstrated calcaneal valgus bilaterally and lateral ankle weakness on the left side, as well as peroneal tendinitis. Dr. Banta advised that her condition had been building for two years. X-rays demonstrated degenerative changes in the three cuneiforms of the left foot at the mid tarsal joint, with mild osteoporosis. Dr. Banta stated:

> "Based on the patient's job description, the changes could be compounded by continuous walking. We believe her daily job walking requirement may be worsening this condition."

By decision dated August 11, 2009, the Office denied appellant's claim. It accepted that she had engaged in repetitive walking on her route following her return to work on February 9, 2009. The Office denied the claim, however, on the grounds that the medical evidence did not establish a causal relationship between the diagnosed left foot condition and the accepted work-related activities.

On May 7, 2007 appellant requested reconsideration. She did not submit any evidence or argument in support of her request.

In a September 23, 2009 decision, the Office denied appellant's request for reconsideration on the grounds that she had not submitted sufficient evidence or argument to warrant further review of the merits.[1]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of her claim, including the fact that an injury was

[1] The Board notes that appellant submitted additional evidence after the Office issued its September 23, 2009 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this evidence cannot be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a request for reconsideration pursuant to 5 U.S.C. § 8128(a) and *id*. at § 10.606(b)(2).

[2] *Id*. at §§ 8101-8193.

sustained in the performance of duty as alleged[3] and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4]

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 the 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 diagnosed condition is causally related to the employment factors identified by the claimant.[5] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to the claimant's diagnosed condition. To be of probative value, 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]

An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.[7]

ANALYSIS -- ISSUE 1

The medical evidence of record is insufficient to establish that appellant's left foot condition was caused or aggravated by factors of her federal employment. Therefore, she has failed to meet her burden of proof.

On January 16, 2009 Dr. Lazar noted appellant's complaints of pain over the plantar and lateral aspect of the base of the fifth metatarsal since January 4, 2008, when she rolled her foot stepping out of a truck. He restricted her temporarily to four hours each of walking and driving, with the hope that she would be able to resume her walking route full time within the next few weeks. Dr. Lazar did not, however, provide a current diagnosis or an opinion on the cause of her

[3] *Joseph W. Kripp,* 55 ECAB 121 (2003); *see also Leon Thomas*, 52 ECAB 202, 203 (2001). "When an employee claims that he sustained injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and manner alleged. He must also establish that such event, incident or exposure caused an injury." *See also id*. at § 8101(5) ("injury" defined); *id*. at § 10.5(q) and (ee) (2002) ("Occupational disease or Illness" and "Traumatic injury" defined).

[4] *Dennis M. Mascarenas,* 49 ECAB 215, 217 (1997).

[5] *Michael R. Shaffer,* 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

[6] *Leslie C. Moore*, 52 ECAB 132, 134 (2000); *see also Ern Reynolds*, 45 ECAB 690, 695 (1994).

[7] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Dennis M. Mascarenas*, *supra* note 4 at 218.

current condition. The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value.[8]

In a February 17, 2009 report, Dr. Smerek provided examination findings and diagnosed left forefoot synovitis. He described the history of appellant's left foot condition, noting that she originally sustained a left fifth metatarsal fracture on May 30, 2007 when she twisted her foot coming out of a postal vehicle and again sustained a left midfoot fracture on January 4, 2008 when she stepped off of a truck and inverted her left foot. Dr. Smerek opined that her lateral column pain "may be due to her prior fractures, early stress fractures." His opinion as to the cause of appellant's condition is vague and speculative. Dr. Smerek did not explain the medical process through which the accepted repetitive work activities would have been competent to coutribute to her preexisting condition. Medical conclusions unsupported by rationale are of limited probative value.[9]

On May 19, 2009 Dr. Banta diagnosed "tibio fibular ligament distal." On June 15, 2009 he diagnosed traumatic degenerative arthritis in the left foot at the mid tarsal joint and indicated that her condition had been building for two years. Based on appellant's job description, he opined that the changes "could" be compounded by continuous walking and that her daily job walking requirement "may be worsening this condition." Dr. Banta's speculative opinion is insufficient to establish a causal relationship between accepted employment activities and a diagnosed condition. His reports fail to adequately explain how repetitive walking contributed to appellant's current condition. Such an explanation is particularly important in light of his diagnosis of traumatic degenerative arthritis. Dr. Banta did not provide a full review of appellant's medical history of treatment regarding her left foot and her prior injuries. The Board finds that Dr. Banta's reports are insufficiently rationalized to establish a causal relationship between the established employment factors and appellant's claimed condition. Therefore, they are of limited probative value.

Appellant expressed her belief that her alleged condition resulted from her duties as a carrier. However, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[10] Neither the fact that the condition became apparent during a period of employment, nor the belief that the condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[11] Causal relationship must be substantiated by reasoned medical opinion evidence, which it is appellant's responsibility to submit. Therefore, appellant's belief that her condition was caused by the alleged work-related injury is not determinative.

The Office advised appellant that it was her responsibility to provide a comprehensive medical report which described her symptoms, test results, diagnosis, treatment and the doctor's

[8] *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

[9] *Willa M. Frazier*, 55 ECAB 379 (2004).

[10] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[11] *Id.*

opinion, with medical reasons, on the cause of her condition. Appellant failed to do so. As there is no probative, rationalized medical evidence addressing how her claimed conditions were caused or aggravated by her employment, she has not met her burden of proof in establishing that she sustained an occupational disease in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[12]

The application for reconsideration 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.[13]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/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.[14] 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.[15]

ANALYSIS -- ISSUE 2

The Office refused to reopen appellant's case for further consideration on the merits of her claim on the grounds that the evidence she submitted was insufficient to warrant a merit review. The record reflects that appellant submitted no additional evidence or argument subsequent to the last merit decision in this case.

The Board finds that, although timely filed, appellant's August 31, 2009 application for reconsideration did not set forth arguments or contain evidence that either: (1) showed that the Office erroneously applied or interpreted a specific point of law; (2) advanced a relevant legal argument not previously considered by the Office; or (3) constituted relevant and pertinent new evidence not previously considered by the Office.[16] Therefore, because appellant failed to meet

[12] 20 C.F.R. § 10.605.

[13] *Id*. at § 10.606.

[14] *Donna L. Shahin*, 55 ECAB 192 (2003).

[15] 20 C.F.R. § 10.608.

[16] *Supra* note 13.

at least one of these standards, the Office properly denied the application for reconsideration without reopening the case for a review on the merits.[17]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty. The Board also finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration on the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the September 23 and August 11, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 4, 2010
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

[17] *Supra* note 15.