United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 14-23**
	)	**Issued: April 16, 2014**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PATROL, Buffalo, NY, Employer	)	

Appearances:
Henry E. Leinen, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 9, 2013 appellant, through her attorney, filed a timely appeal from a June 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[2]

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a right foot injury on June 3, 2010.

[1] 5 U.S.C. §§ 8101-8193.

[2] With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

This case has previously been before the Board.[3] In an April 4, 2012 decision, the Board affirmed an OWCP April 14, 2011 decision that found appellant had failed to establish a right foot injury due to a June 3, 2010 employment incident.[4] The facts of the case as set forth in the Board's prior decision are incorporated by reference.

On April 20, 2012 appellant was treated by Dr. David Perelstein, a podiatrist, for right foot pain around the tibial sesamoid, who noted weight bearing lateral oblique and sesamoid axial x-ray views revealed radiolucency of the tibial sesamoid which suggested aseptic necrosis. Examination of the other bones in the foot revealed no stress fractures in the fifth metatarsal. Appellant was placed in a right side semi-weight bearing short leg cast. Dr. Perelstein returned her to work full time with physical restrictions. Appellant was also treated by Dr. Kenneth T. Goldstein, a podiatrist and associate of Dr. Perelstein. In reports dated April 30 to August 6, 2012, Dr. Goldstein noted that she was in a right foot cast for 10 days. There was no edema of the lower limbs bilaterally, no varicosities or venous insufficiency and normal capillary refill. Dr. Goldstein diagnosed aseptic necrosis of the bone and recommended surgical excision. In a May 3, 2012 report, he noted that appellant's symptoms began after repetitive use of the stairs at work, which traumatized the area and radiograph confirmed aseptic necrosis of the medial sesamoid bone. Dr. Goldstein noted that conservative therapy improved her condition but it was exacerbated when she returned to weight bearing and repetitive trauma. He opined that appellant's condition was related to repetitive climbing and descending stairs which was a job requirement. An August 13, 2012 magnetic resonance imaging (MRI) scan of the right foot revealed tibial sesamoiditis with chronic stress fracture. An October 12, 2012 pathology report noted that a portion of the excised right foot sesamoid bone had focal devitalization.[5] Appellant also submitted physical therapy reports.

On April 2, 2013 appellant requested reconsideration. She submitted a February 11, 2013 report from Dr. Frank A. Luzi, Jr., a Board-certified orthopedic surgeon, who treated her for bilateral hip and knee pain. Appellant had a history of right foot problems since a June 3, 2010 work injury and a sesamoid excision in October 2012. Postoperatively she used a cam walker and walked with a limp which caused hip and knee problems. Hip and pelvis x-rays revealed no arthritic change, fracture or tumor. Knee x-rays showed narrowing of the medial compartments bilaterally, minimal arthritic changes. Dr. Luzi opined that appellant's hip symptoms were due to a degenerative lumbar spine, which was aggravated from the limping due to the right foot problem and use of the cam walker. He stated that her hip condition was consequential to the right foot problem and not directly due to the June 3, 2010 injury. Dr. Luzi noted that

[3] Docket No. 11-1885 (issued April 4, 2012). On June 4, 2010 appellant, a customs and border patrol officer, filed a traumatic injury claim, alleging that on June 3, 2010 she developed a bump on the bottom of her right foot and had pain when walking and when putting pressure on the big toe. She noted that the cause of the injury was unknown but that she was working in the vehicle export office and was walking up and down stairs. Appellant did not stop work.

[4] In a January 24, 2013 order, the Board dismissed appellant's appeal for lack of jurisdiction. Docket 12-1203 (issued January 24, 2013).

[5] Appellant had surgery on October 5, 2012 to excise the right foot sesamoid bone.

appellant's knee condition was neither consequential nor directly related to the June 3, 2010 injury.

On April 1, 2013 Dr. Goldstein treated appellant for right foot pain secondary to injuring the area going up and down stairs at work. A right foot MRI scan confirmed a fracture of the medial sesamoid bone. Dr. Goldstein opined that appellant's symptoms progressed and x-rays on July 8, 2010 revealed avascular necrosis of the medial sesamoid bone of the right foot. On October 5, 2012 appellant underwent an excision of the fractured sesamoid bone. Dr. Goldstein opined that her condition was causally related to the June 3, 2010 injury of the medial sesamoid, which occurred while performing her work duties.

On April 30, 2013 appellant was treated by Dr. Christopher Ritter, a Board-certified orthopedic surgeon, for right foot pain. Dr. Ritter had not treated her since June 29, 2010. Since that time, appellant had a medial sesamoidectomy and a cyst removed from her foot. Dr. Ritter noted that the right foot was normally aligned, normal skin and muscle tone, tender from the tip of the great toe to the metatarsophalangeal joint and normal sensation. Diagnostic studies revealed medial sesamoidectomy, minimal arthritic changes, stable alignment and mild hallux valgus. Dr. Ritter opined that he could not be specific with regard to the cause of appellant's ongoing pain and noted that it was possible that after surgery she could have developed reflex sympathetic dystrophy, chronic pain syndrome or scarring in the area of the surgery site. He recommended an MRI scan. An April 30, 2013 right foot x-ray revealed no fracture, arthritis of the first metatarsophalangeal joint, hallux vulgus deformity of the great toe, pes planus, calcaneal spur and possible reflex sympathetic syndrome.

In a June 18, 2013 decision, OWCP denied modification of the April 4, 2012 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 FECA, that the claim was filed within the applicable time limitation of FECA, 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 is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[6]

To determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[7] The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition,

[6] *Gary J. Watling*, 52 ECAB 357 (2001).

[7] *Michael E. Smith*, 50 ECAB 313 (1999).

as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[8]

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.[9] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

ANALYSIS

The Board finds that the medical evidence is insufficient to establish that appellant sustained a right foot injury due to the June 3, 2010 work incident.

Appellant was treated by Dr. Goldstein from April 30 to October 24, 2012 for right foot pain. Dr. Goldstein noted that she was in a right foot cast for 10 days and diagnosed aseptic necrosis bone and recommended surgical excision. He advised that appellant's symptoms began after repetitive use of the stairs during her work, which traumatized the area and radiograph confirmed aseptic necrosis of the medial sesamoid bone. Dr. Goldstein did not specifically address the June 3, 2010 incident. He noted that appellant's condition was exacerbated when she returned to weight bearing and repetitive trauma. Dr. Goldstein opined that her condition was related to repetitive climbing and descending stairs, which was a requirement of her job description. He stated that x-rays revealed avascular necrosis of the right medial sesamoid bone for which appellant had surgery on October 5, 2012. Dr. Goldstein opined generally that her condition was causally related to the medial sesamoid injury sustained on June 3, 2010 while performing work duties. The Board finds that, although he generally supported causal relationship, he did not provide sufficient medical rationale advising the causal relationship between appellant's right foot condition and the June 3, 2010 incident.[11] Dr. Goldstein did not adequately explain the reasons why walking on stairs on or about June 3, 2010 was a competent

[8] *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

[9] *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[11] *See T.M.*, Docket No. 08-975 (issued February 6, 2009) (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).

cause or contributor to her diagnosed right foot conditions.[12] Rather, he indicated that appellant's condition was due to work activities over more than one shift.

Appellant submitted a February 11, 2013 report from Dr. Luzi who treated her for a hip condition and opined that her hip symptoms were caused by degenerative lumbar spine, which was aggravated from the limping due to the right foot problem and use of the cam walker. Dr. Luzi opined that the hip condition was consequential to the right foot problem and not directly related to the June 3, 2010 injury. The Board finds that he did not sufficiently explain how walking up and down steps on June 3, 2010 caused or contributed to the claimed right foot injury. Dr. Luzi's report is insufficiently rationalized to establish the claim.[13]

In an April 30, 2013 report, Dr. Ritter treated appellant for right foot pain. This report is insufficient to establish that the claimed right foot condition was causally related to her employment duties as he explained that he "could not be specific with regard to the cause of her ongoing pain" and that it was "certainly possible" that after surgery she could have developed reflex sympathetic dystrophy. This report is speculative with regard to causal relationship and insufficient to meet appellant's burden of proof.[14]

Appellant submitted April 20, 2012 reports from Dr. Perelstein, who did not specifically address how the accepted incident caused or aggravated her diagnosed medical condition.[15] The other medical reports of record are insufficient to establish the claim as they do not address whether the June 3, 2010 incident caused or contributed to a diagnosed medical condition.

As to the physical therapy records, the Board has held that treatment notes signed by a physical therapist are not medical evidence. A physical therapist is not a "physician" under FECA.[16]

On appeal, appellant asserts that she established fact of injury and noted that her condition, specifically possible fracture, osteonecrosis, could be caused by the trauma reported by appellant. As noted, she has not submitted sufficient medical evidence explaining how walking on stairs on or about June 3, 2010 incident caused or aggravated a diagnosed right foot condition.

[12] *Supra* note 10.

[13] *Id.*

[14] Medical opinions that are speculative or equivocal in character are of diminished probative value. *D.D.*, 57 ECAB 734 (2006).

[15] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[16] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a right foot injury causally related to her June 3, 2010 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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