

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

_____)	
J.T., Appellant)	
)	
and)	Docket No. 17-0462
)	Issued: August 9, 2018
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, Philadelphia, PA,)	
Employer)	
_____)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 29, 2016 appellant, through counsel, filed a timely appeal from an August 1, 2016 merit decision and a December 8, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that his left foot and ankle conditions are causally related to the accepted September 9, 2014 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 10, 2014 appellant, a 56-year-old painter (leader), filed a traumatic injury claim (Form CA-1) alleging that he injured his left foot and ankle on September 9, 2014 as a result of stepping out of a high-reach piece of equipment and catching his heel on a curb in the performance of duty. He did not stop work.

In a September 10, 2014 emergency room report, Dr. Masashi Rotte, a Board-certified emergency medicine specialist, asserted that appellant injured his left heel the day before at work when stepping off equipment on an uneven surface. He found no acute fracture or dislocation of the left foot or ankle based upon x-rays dated September 10, 2014.

On October 15, 2014 Dr. Joseph Daniel, a Board-certified orthopedic surgeon, diagnosed left Achilles paratendinosis with mild insertional tendinitis. He noted that on September 9, 2014 appellant sustained a significant twisting injury to the left ankle while at work. Dr. Daniel reported that appellant had an immediate onset of left ankle pain and some challenges with weight bearing. He referred appellant to physical therapy.

Appellant submitted physical therapy reports dated October 19 through December 23, 2014.

In a November 5, 2014 report, Dr. Daniel diagnosed left Achilles insertional tendinitis and modified appellant's physical therapy to avoid stretching exercises in the Achilles tendon as it was causing appellant pain.

A magnetic resonance imaging scan of the left ankle revealed Achilles tendinitis and retrocalcaneal bursitis, mild joint effusion, tenosynovitis of the posterior tibial tendon, and no internal derangement.

On December 24, 2014 Dr. Daniel diagnosed chronic left Achilles insertional tendinitis and recommended operative intervention to include a left calcaneal ostectomy with Achilles tendon debridement and primary repair, and a possible flexor hallucis longus deep tendon transfer.

In a January 20, 2015 development letter, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim for consideration. OWCP requested additional evidence and afforded appellant 30 days to respond to its inquiries.

Subsequently, appellant submitted a February 5, 2015 narrative statement indicating that he injured himself when he stepped out of a government-owned high-reach piece of equipment and a February 4, 2015 witness statement from his coworker indicating that on September 9, 2014 he saw appellant step out of the basket of a high-reach piece of equipment and catch his left heel between the curb and cobblestone, causing injury and noticeable pain to his left ankle.

In a February 3, 2015 report, Dr. Daniel reiterated his diagnoses and opinions, noting that at his initial visit appellant informed him that he sustained a twisting injury to the left ankle while at work on September 9, 2014 and admitted to pain localized to the left Achilles tendon.

By decision dated February 23, 2015, OWCP denied appellant's claim as the evidence of record did not support that the injury or events occurred as described by him and, therefore, he failed to establish that an injury occurred in the performance of duty.

On March 10, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He submitted a March 13, 2015 report from Dr. Daniel who noted that appellant continued to suffer from pain with his initial step in the morning and not wearing a boot and then with attempts at not wearing the boot throughout the day. Dr. Daniel released appellant to modified duty effective March 13, 2015 with restrictions of no running and no ladder climbing/catwalk.

An oral hearing was held on August 31, 2015 before an OWCP hearing representative. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted an October 27, 2015 report from Dr. Daniel who diagnosed pain in the left ankle and joints of the left foot and left Achilles insertional tendinitis. Dr. Daniel noted that appellant had no preinjury pain to the posterior aspect of the left ankle. He opined that the injury appellant sustained at work "likely exacerbated" an enthesophyte at the insertion site of the Achilles tendon and resulted in an inflammatory process at the insertion side of the Achilles tendon.

By decision dated November 16, 2015, OWCP's hearing representative affirmed the prior decision denying appellant's claim. She found that the evidence established that the September 9, 2014 incident occurred as alleged. However, the hearing representative further found the medical evidence insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted September 9, 2014 employment incident.

On May 3, 2016 appellant requested reconsideration and submitted an April 2, 2016 report from Dr. Jack Bondi, a podiatrist, who diagnosed enthesiopathic tendinopathy/paratendinosis of the left Achilles. Dr. Bondi noted that appellant likely had enthesiopathy or bone spur formation at the Achilles tendon insertion region prior to his work incident, but he opined that the September 9, 2014 work incident of stepping off a curb was the true cause and exacerbation of the problem as appellant was symptom-free prior to the incident.

By decision dated August 1, 2016, OWCP denied modification of its prior decision.

On September 22, 2016 appellant requested reconsideration and resubmitted an April 2, 2016 report from Dr. Bondi, which included a new paragraph indicating that appellant's area of injury was an anatomically vulnerable zone within the Achilles tendon known as the "watershed region" and, due to the paucity of blood flow to this area of the tendon, injury to the area could often be slow to heal and could result in a situation of chronic tendinosis. Dr. Bondi opined with "medical certainty that this was indeed the mechanism that created this ongoing problem."

By decision dated December 8, 2016, OWCP denied appellant's request for reconsideration without a merit review finding that Dr. Bondi's April 2, 2016 report was repetitive and did not constitute relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish 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 timely filed within the applicable time limitation period of FECA, that an injury³ was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her condition relates to the employment incident.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.⁶

³ OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁴ See *T.H.*, 59 ECAB 388 (2008).

⁵ *Id.*

⁶ *Id.*

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that his left foot and ankle conditions are causally related to the accepted September 9, 2014 employment incident.

In his reports, Dr. Daniel diagnosed left Achilles paratendinosis with mild insertional tendinitis, left Achilles insertional tendinitis, and chronic left Achilles insertional tendinitis. He noted that on September 9, 2014 appellant sustained a significant twisting injury to the left ankle while at work. Dr. Daniel reported that appellant had an immediate onset of left ankle pain and some challenges with weight bearing. He released appellant to modified duty effective March 13, 2015 with restrictions of no running and no ladder climbing/catwalk. On October 27, 2015 Dr. Daniel noted that appellant had no preinjury pain to the posterior aspect of the left ankle. He opined that the injury appellant sustained at work likely exacerbated an enthesophyte at the insertion site of the Achilles tendon and resulted in an inflammatory process at the insertion side of the Achilles tendon. The Board finds that Dr. Daniel failed to provide sufficient medical rationale explaining the mechanism of how stepping out of a high-reach piece of equipment and catching his heel on a curb at work on September 9, 2014 caused appellant's left foot and ankle conditions. Dr. Daniel noted that appellant's conditions occurred while he was at work, but such generalized statements do not establish causal relationship because they merely repeat his allegations and are unsupported by adequate medical rationale explaining how his physical activity at work actually caused or aggravated the diagnosed condition.⁷ His opinion was based, in part, on temporal correlation. However, the Board has held that 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.⁸ Dr. Daniel did not otherwise sufficiently explain the reasons why diagnostic testing and examination findings led him to conclude that the September 9, 2014 incident at work caused or contributed to the diagnosed conditions. Thus, the Board finds that the reports from Dr. Daniel are insufficient to establish that appellant sustained an employment-related injury.

In an April 2, 2016 report, Dr. Bondi diagnosed enthesiopathic tendinopathy/paratendinosis of the left Achilles and noted that appellant likely had enthesiopathy or bone spur formation at the Achilles tendon insertion region prior to his work incident, but he opined that the September 9, 2014 work incident of stepping off a curb was the true cause and exacerbation of the problem as appellant was symptom-free prior to the incident. He noted that appellant's condition occurred while he was at work, but, as noted above, such generalized statements do not establish causal relationship.⁹ Dr. Bondi did not provide sufficient medical rationale explaining how appellant's condition was caused or aggravated by stepping out of a high-reach piece of equipment and catching his heel on a curb at work on September 9, 2014. For these reasons, the Board finds that the report from him is insufficient to establish a left Achilles condition causally related to the September 9, 2014 work incident.

⁷ See *K.W.*, Docket No. 10-0098 (issued September 10, 2010).

⁸ See *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁹ See *supra* note 7.

In his report, Dr. Rotte noted that appellant injured his left heel on September 9, 2014 when stepping off equipment on an uneven surface at work. He found no acute fracture or dislocation of the left foot or ankle. The Board finds that Dr. Rotte's diagnosis of left heel injury is a description of a symptom rather than a clear diagnosis of the medical condition.¹⁰ Therefore, the Board finds that this report is insufficient to establish that appellant sustained an employment-related injury.

Appellant further submitted evidence from physical therapists. These documents do not constitute competent medical evidence because a physical therapist is not considered a "physician" as defined under FECA.¹¹ As such, this evidence is also insufficient to meet appellant's burden of proof.

Other medical evidence of record, including diagnostic test reports, is of limited probative value and insufficient to establish the claim as it does not specifically address whether appellant's diagnosed conditions are causally related to the September 9, 2014 work incident.¹²

As appellant has not submitted any rationalized medical evidence to support his allegation that he sustained an injury causally related to the September 9, 2014 employment incident, he has failed to meet his burden of proof to establish a claim for compensation.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹⁴ To be entitled to a merit review of an OWCP 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.¹⁵ When a claimant fails to meet

¹⁰ The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *See P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹¹ 5 U.S.C. § 8101(2); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

¹² *See K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹³ *Supra* note 2. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. 5 U.S.C. § 8128(a).

¹⁴ *See Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹⁵ 20 C.F.R. § 10.607(a).

one of the standards below, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁶

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁷

ANALYSIS -- ISSUE 2

Appellant's September 22, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. He resubmitted an updated April 2, 2016 report from Dr. Bondi, which included a new paragraph indicating that appellant's area of injury was an anatomically vulnerable zone within the Achilles tendon known as the "watershed region" and due to the paucity of blood flow to this area of the tendon, injury to the area could often be slow to heal and could result in a situation of chronic tendinosis. Dr. Bondi opined that it was with "medical certainty that this was indeed the mechanism that created this ongoing problem." The Board finds that submission of this evidence did not require reopening appellant's case for merit review as it failed to address the issue of causal relationship between his left foot and ankle conditions and the September 9, 2014 employment incident, which was the issue before OWCP. Therefore, this evidence does not constitute relevant and pertinent new evidence and is insufficient to require OWCP to reopen the claim for consideration of the merits.

The Board finds that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3) and, thus, OWCP properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his left foot and ankle conditions are causally related to the accepted September 9, 2014 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁶ *Id.* at § 10.608(b).

¹⁷ *Id.* at § 10.606(b)(3).

ORDER

IT IS HEREBY ORDERED THAT the December 8 and August 1, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 9, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board