

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

G.A., Appellant)	
)	
and)	Docket No. 17-0865
)	Issued: July 5, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Cleveland, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 10, 2017 appellant, through counsel, filed a timely appeal from a January 23, 2017 merit 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish that his left foot condition occurred in the performance of duty, as alleged.

FACTUAL HISTORY

On November 18, 2015 appellant, a 56-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed left tibial tendinopathy as a result of over usage of the left foot subsequent to a right Achilles injury. He indicated that he first became aware of his claimed condition on November 7, 2013 and first realized that it was caused or aggravated by his federal employment on November 28, 2013.

In a November 18, 2015 letter, the employing establishment controverted the claim, contending that appellant had initially stopped work on November 21, 2012 and returned to work on November 8, 2013. Appellant then worked seven days between November 8 and 19, 2013 for a total of 30.22 hours. He did not return to work after November 19, 2013 and retired on August 18, 2014. The employing establishment argued that appellant could not have become aware of a left foot condition causally related to federal employment factors on November 7, 2013 because he did not initially return to work until November 8, 2013. It further noted that no medical evidence had been submitted in support of his claim.

In a November 19, 2015 development letter, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries. Appellant did not respond.

The employing establishment continued to controvert appellant's claim, in a letter dated December 18, 2015, and submitted a copy of his position description.

By decision dated December 21, 2015, OWCP denied appellant's claim finding that the evidence of record failed to establish fact of injury as he had not provided a detailed statement describing the employment factors believed to have caused his claimed condition.

On November 7, 2016 counsel requested reconsideration and submitted a June 17, 2013 report from Dr. Michael Canales, a podiatrist, who diagnosed adult-acquired flatfoot deformity with posterior tibial tendon dysfunction and concomitant equinus. Dr. Canales indicated that appellant had been seen for "longstanding bilateral foot problems." He found that appellant's painful hammertoes were a result of his ruptured Achilles tendon and over-lengthened tendon that had resulted in an increased use of his left side. Dr. Canales diagnosed posterior tibial tendinopathy, resulting in posterior tibial dysfunction and adult-acquired flatfoot deformity. He recommended surgical intervention to treat appellant's condition.

By decision dated January 23, 2017, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

A claimant seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty, as alleged, and that any specific condition or disability claimed is causally related to the employment injury.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that his left foot condition occurred in the performance of duty.

On his claim form appellant alleged that he developed left tibial tendinopathy as a result of over usage of the left foot subsequent to a right Achilles injury. He indicated that he first became aware of his claimed condition on November 7, 2013. However, the employing establishment indicated that appellant was off work on November 7, 2013. Appellant had initially stopped work on November 21, 2012 and then returned to work on November 8, 2013, before stopping work again on November 19, 2013 and retiring on August 18, 2014. OWCP informed appellant of the deficiencies in his claim, but he did not provide the required documentation prior to OWCP's issuance of its January 23, 2017 decision. Accordingly, the Board finds that appellant failed to meet his burden of proof to establish fact of injury in the performance of duty.⁶

As appellant has not established that he sustained an injury in the performance of duty, he failed to meet his burden of proof.

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.

³ *Id.*

⁴ 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁵ *See D.R.*, Docket No. 09-1723 (issued May 20, 2010). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *See M.L.*, Docket No. 12-0957 (issued December 7, 2012).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his left foot condition occurred in the performance of duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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