United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
	)	**Docket No. 19-1282**
and	)	**Issued: December 23, 2019**
	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dayton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 21, 2019 appellant, through counsel, filed a timely appeal from an April 30, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 right foot conditions causally related to the accepted March 23, 2018 employment incident.

FACTUAL HISTORY

On April 10, 2018 appellant, then a 52-year-old lead information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on March 23, 2018 he injured his right "big toe" when he stepped on a nail that went through his toe while walking between buildings while in the performance of duty. On the reverse side of the claim form, the employing establishment acknowledged that appellant was in the performance of duty at the time of his alleged injury and that he did not stop work. No additional evidence was submitted.

In a development letter dated April 16, 2018, OWCP notified appellant of the deficiencies of his claim and the evidence necessary to establish his claim. Appellant was instructed to provide a narrative medical report from his physician which contained a detailed description of findings and diagnoses, explaining how the reported work incident had caused or aggravated his medical condition. OWCP afforded him 30 days to submit the requested information.

In response appellant submitted a surgical consultation note dated March 30, 2018 from Dr. Aaron J. Schneider, a surgical resident physician. Dr. Schneider noted that appellant presented with a wound on his right great toe and reported that he had stepped on a nail one week prior. He discussed examination findings and laboratory test results. Dr. Schneider provided an assessment that appellant had a history of diabetes and a one-week history of a right great toe wound which was debrided at bedside. He advised that there was no evidence of necrotizing fasciitis. The wound was draining purulent fluid which appeared to extend close to the bone, but there was no absolute evidence of osteomyelitis at that time. Dr. Schneider indicated that appellant was scheduled for debridement of the right great toe and possible amputation the next day following his examination.

In a consultation note and progress notes dated March 31 and April 1, 2, and 3, 2018, Dr. Dominic E. Dipierro, an attending podiatrist and foot and ankle surgeon, examined appellant and diagnosed gas gangrene with acute osteomyelitis, cellulitis, and tarsal tunnel syndrome of the right foot, contributory diabetes mellitus with peripheral neuropathy and tarsal tunnel syndrome. On March 31, 2018 he performed a transmetatarsal amputation and flexor hallucis longus tenosynovectomy of the right foot and tarsal tunnel decompression of the right foot and ankle. In an attending physician's report (Form CA-20) dated May 2, 2018, Dr. Dipierro checked a box marked "yes" indicating that appellant's gas gangrene condition was caused or aggravated by walking at work. He opined that appellant was totally disabled from work commencing March 31, 2018. Dr. Dipierro, in a May 7, 2018 duty status report (Form CA-17), described a history of injury that on March 23, 2018 appellant stepped on a nail that went through his right great toe while walking between buildings. He provided a clinical finding of gas gangrene limb threatening infection due to injury. Dr. Dipierro advised that the condition required partial foot amputation surgery and hospitalization. He noted that appellant could not resume full-duty work.

Dr. Scott Zelasko, a Board-certified diagnostic radiologist, in a right foot x-ray report dated March 30, 2018, provided an impression of soft tissue swelling with a small amount of subcutaneous emphysema involving the great toe without definite evidence for osseous erosive changes. He reported that the findings were compatible with soft tissue infection without definite evidence for osteomyelitis. Dr. Zelasko advised that if there was continued clinical concern for osteomyelitis, then further evaluation with a magnetic resonance imaging (MRI) scan would be considered. He also provided an impression that nonspecific density was seen adjacent to the great toe distal phalanx on the oblique view which may only be on the skin surface or possibly related to a foreign body.

In a report also dated March 30, 2018, Dr. Ali T. Jaffery, an internist, noted that appellant related a history that he stepped on a nail one week prior and developed a wound on his right foot. He reported examination findings and reviewed diagnostic test results, including Dr. Zelasko's March 30, 2018 right foot x-ray report.

In a discharge summary report dated April 11, 2018, Dr. Abdul M. Masood, a Board-certified internist, indicated that appellant was admitted to the hospital for gas gangrene with cellulitis of the right foot and acute osteomyelitis and underwent transmetatarsal amputation. He also indicated that appellant developed an acute kidney injury (AKI) secondary to use of the antibiotic medicine vancomycin. Dr. Masood noted that his creatinine was improving after adjustment of his antibiotics and that he was waiting to undergo another reconstructive surgery performed by Dr. Dipierro after improvement of his AKI.

In a second development letter dated June 14, 2018, OWCP advised appellant of the factual deficiencies of his claim and provided a questionnaire for his completion. It afforded him 30 days to respond.

On July 5, 2018 appellant responded to OWCP's development questionnaire, noting that on March 23, 2018 he was walking between two buildings at work when he stepped on a nail that entered the bottom of his shoe and right great toe. He maintained that he did not realize that he was injured until he arrived at home and removed his shoe. Appellant described the treatment he performed at home and indicated that he sought treatment in an emergency room on March 30, 2018. He claimed that his injury occurred on March 23, 2018 because he checked his extremities daily since he was a diabetic. Appellant told hospital staff that he had not felt the nail in his foot due to diabetic neuropathy.

OWCP thereafter received a July 6, 2018 work/school excuse form from Dr. Dipierro who advised that appellant could return to work with the restriction of wearing a controlled ankle motion boot.

In a letter dated July 12, 2018, the employing establishment informed OWCP that appellant had stopped work on April 30, 2018 and returned on July 8, 2018 with restrictions.

OWCP subsequently received an additional Form CA-17 report dated July 17, 2018 from Dr. Dipierro in which he reiterated appellant's history of injury and diagnosis of gas gangrene due to injury. He advised that appellant could resume full-time regular work with restrictions.

By decision dated August 22, 2018, OWCP accepted that the March 23, 2018 employment incident occurred as alleged and that there was a diagnosed right foot condition. However, it denied the claim finding that the medical evidence then of record was insufficient to establish that appellant's diagnosed conditions were causally related to the accepted March 23, 2018 employment incident. Thus, appellant had not met the requirements for establishing an injury as defined by FECA.

OWCP continued to receive medical evidence from Dr. Dipierro. In a May 22, 2018 progress note, Dr. Dipierro again examined appellant's right foot and provided an impression of complicated open wound, diabetic ulcer of the right foot and ankle, Wagner grade 2 with derangement complicated by contributive history of transmetatarsal amputation gas gangrene, tarsal tunnel syndrome, and type 2 diabetes mellitus with peripheral neuropathy. Also, on May 22, 2018 he performed a partial metatarsectomy and secondary complicated closure of the right foot.

On September 21, 2018, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In an operative report dated April 16, 2018, Dr. Dipierro performed a partial metatarsectomy, intrinsic abductor hallucis, flexor digitorum brevis, adductor digiti minimi muscle transposition, and secondary complicated closure of the right foot. The preoperative diagnoses were complicated open wound with equinus contracture osteomyelitis right lower extremity with contributory diabetes mellitus with peripheral neuropathy, status post open transmetatarsal amputation and tenosynovectomy with tarsal tunnel decompression, complicated open wound with equinus contracture osteomyelitis of the right lower extremity with contributory diabetes mellitus with peripheral neuropathy, and status post open transmetatarsal amputation and tenosynovectomy with tarsal tunnel decompression.

By decision dated April 30, 2019, OWCP's hearing representative affirmed the August 22, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related

[3] *Id.*

[4] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[7] There are two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[8] The second component is whether the employment incident caused a personal injury.[9]

Pursuant to OWCP's procedures, where the condition reported is a minor one, such as a burn, laceration, insect sting, or animal bite, which can be identified on visual inspection by a lay person, a case may be accepted without a medical report and no development of the case need be undertaken, if the injury was witnessed or reported promptly, and no dispute exists as to the occurrence of an injury; and no time was lost from work due to disability.[10] An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[11]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[12] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment incident must be based on a complete factual and medical background.[13] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition, and appellant's specific employment incident.[14]

[5] *T.H.,* Docket No. 18-1736 (issued March 13, 2019); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.,* 40 ECAB 312 (1988).

[6] *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett,* 41 ECAB 992 (1990).

[7] *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.,* 59 ECAB 388, 393-94 (2008).

[8] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Elaine Pendleton,* 40 ECAB 1143 (1989).

[9] *E.M., id.*; *John J. Carlone,* 41 ECAB 354 (1989).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.6(a) (June 2011).

[11] *See M.C.,* Docket No. 18-1278 (issued March 7, 2019); *R.T.*, Docket No. 08-0408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

[12] *S.S., supra* note 7; *Robert G. Morris*, 48 ECAB 238 (1996).

[13] *C.F.*, Docket No. 18-0791 (issued February 26, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[14] *Id.*

ANALYSIS

The Board finds that appellant has met his burden of proof to establish a right great toe injury causally related to the accepted March 23, 2018 employment incident. The Board further finds that he has not met his burden of proof to establish consequential right foot conditions as casually related to the puncture wound to his right great toe.

OWCP found that the March 23, 2018 employment incident, in which appellant sustained a puncture wound to his right great toe, occurred as alleged. As such, that puncture wound is clearly a diagnosed condition which is causally related to the accepted employment incident which consisted of appellant stepping on a nail which punctured his shoe and entered his right great toe.[15] In the contemporaneous medical notes, it is documented by Dr. Schneider that appellant had presented with a puncture wound to his toe consistent with the accepted employment incident. The Board therefore finds that appellant has met his burden of proof to establish a puncture wound to his right great toe as a result of the accepted March 23, 2018 employment incident.

Appellant has not, however, submitted sufficient medical evidence to establish that he sustained diagnosed conditions as a consequence of his accepted right toe injury, as alleged.

In a May 2, 2018 Form CA-20 report, Dr. Dipierro checked a box marked "yes" indicating that appellant's gas gangrene condition was caused or aggravated by walking at work. He advised that appellant was totally disabled from work commencing March 31, 2018. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim. This report is therefore insufficient to establish appellant's claim for additional right foot conditions.

Similarly, Dr. Dipierro's May 17 and July 17, 2018 Form CA-17 reports are insufficient to establish causal relationship for consequential right foot conditions. In these reports he noted a history of the March 23, 2018 employment incident and diagnosed gas gangrene limb threatening infection due to injury. Dr. Dipierro indicated that the diagnosed condition required partial foot amputation surgery and hospitalization. In addition, he initially advised that appellant was totally disabled from work as of May 17, 2018 and subsequently advised that he could return to full-time regular work with restrictions as of July 17, 2018. Again, Dr. Dipierro failed to explain the medical process through which the March 23, 2018 employment incident would have been competent to cause the diagnosed foot conditions and resulted in the need for surgery and appellant's total disability from work and the subsequent need for restrictions.

In his remaining consultation note, progress notes, and reports, Dr. Dipierro reiterated his prior right foot diagnosis and opinion that appellant could return to work with restrictions. He also described his March 31, April 6, and May 22, 2018 right foot surgeries and provided additional right foot diagnoses and a diagnosis of type 2 diabetes mellitus with peripheral neuropathy. These additional reports do not contain a specific opinion as to the cause of appellant's diagnosed conditions or resultant surgeries and work restrictions. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative

[15] *Supra* note 10.

value on the issue of causal relationship.[16] These reports, therefore, are insufficient to establish appellant's claim.

Likewise, Dr. Schneider's March 30, 2018 consultation note, Dr. Jaffery's March 30, 2018 report, and Dr. Masood's April 11, 2018 discharge summary report, related a history of the March 23, 2018 employment incident and indicated that appellant sustained a right great toe wound and diagnosed the conditions for which he underwent a transmetatarsal amputation, also are deficient as there is no opinion regarding causal relationship.[17]

Appellant also submitted a diagnostic test report from Dr. Zelasko. The Board has held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[18] Such reports are therefore insufficient to establish appellant's claim.

On appeal counsel contends that OWCP's April 30, 2019 decision is contrary to fact and law. For the foregoing reasons, the Board finds that the medical evidence of record is insufficient to establish that appellant sustained a right foot condition causally related to the accepted March 23, 2018 employment incident.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish a right great toe injury causally related to the accepted March 23, 2018 employment incident. The Board further

[16] *See M.S.*, Docket No. 19-0587 (issued July 22, 2019); *B.C.*, Docket No. 18-1735 (issued April 23, 2019); *A.L.*, Docket No. 18-1756 (issued April 15, 2019); *K.E.*, Docket No. 18-1357 (issued March 26, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[17] *Id.*

[18] *See M.S., supra* note 16; *B.C., supra* note 16; *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

finds that he has not met his burden of proof to establish consequential right foot conditions as casually related to the puncture wound to his right great toe.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed as modified and the case is remanded for further development of the claim consistent with this decision of the Board.

Issued: December 23, 2019
Washington, DC

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

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

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