United States Department of Labor
Employees' Compensation Appeals Board

T.K., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, LOUIS STOKES CLEVELAND VETERANS ADMINISTRATION MEDICAL CENTER, Cleveland, OH, Employer	)	**Docket No. 19-0055** **Issued: May 2, 2019**

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 11, 2018 appellant, through counsel, filed a timely appeal from a September 17, 2018 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 that his left foot condition is causally related to the accepted March 14, 2017 employment incident.

FACTUAL HISTORY

On June 8, 2017 appellant, then a 71-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on March 14, 2017 he injured his left foot while in the performance of duty. He attributed his injury to "[stress on left foot]." On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on May 31, 2017, and had not returned.

In a development letter dated June 19, 2017, OWCP advised appellant of the need for factual information and medical evidence in support of his claim for FECA benefits. It specifically inquired about the circumstances of the alleged March 14, 2017 employment incident. OWCP also requested that appellant provide a narrative report from his attending physician, which included a diagnosis and an explanation as to how the reported work incident either caused or aggravated a medical condition. It afforded him 30 days to submit the requested information.

OWCP subsequently received a June 29, 2017 temporary modified-duty assignment, which appellant accepted on June 30, 2017. It also received an e-mail exchange and other correspondence from employing establishment injury compensation specialists regarding appellant's claim and a modified-duty assignment.

By decision dated July 27, 2017, OWCP denied appellant's traumatic injury claim, finding that the evidence of record did not establish that the incident occurred as alleged. It also found he had not submitted medical evidence containing a diagnosis in connection with the alleged injury. As appellant had not established the factual element of his claim, OWCP concluded that he had not met the requirements for establishing an injury as defined by FECA.

On November 30, 2017 appellant, through counsel, requested reconsideration. In support of the request, he submitted a June 5, 2017 letter from Dr. Jodi L. Long, an employing establishment podiatrist. Dr. Long noted that appellant had been under her care since May 31, 2017 for "sudden onset foot pain," and reported that, according to appellant's supervisor, he could not perform the duties of his position and that there were no limited-duty jobs appellant could perform in light of his currently limited weight-bearing ability. She noted her intention to fit appellant with custom footwear, and that appellant was to undergo a magnetic resonance imaging (MRI) scan on his foot.

On February 28, 2018 OWCP denied reconsideration of the merits of the claim. It found that the evidence submitted was irrelevant to the issue of the factual element of fact of injury.

On June 13, 2018 counsel requested reconsideration of OWCP's July 27, 2017 merit decision.

In a May 9, 2018 statement, appellant explained that on or about March 14, 2017 he was mopping a patient's room when the mop hit something sticky on the floor. As a result, the mop

head stuck to the floor and his left foot moved in such a way that he could "feel a pop or tear of [his] arch." Appellant stated that he used a putty knife to remove the substance from the floor and then he continued mopping. At home that evening, he began to feel a sharp pain on the arch of his left foot. The following morning appellant asked his supervisor if he could go to the personnel health unit, where an on-duty physician told him that he had plantar fasciitis and recommended a foot brace. Appellant further stated that, on or about April 4, 2017, Dr. Long had a magnetic resonance imaging (MRI) scan taken on his foot, and that the doctor had placed him into a walking boot. He reported that he was in physical therapy for three months and placed in the position of a telephone operator as an accommodation for his injury. Finally, appellant indicated that he continued to have pain in his left ankle.

On July 11, 2018 OWCP received progress notes dated March 22, 2017. The progress notes indicated that appellant was seen by Florencio E. Marquinez, a physician assistant. Mr. Marquinez reported that appellant's left foot pain started 1 week ago on March 15, at 9:00 a.m. He noted that appellant did not recall an injury or trauma and that he had an appointment with Dr. Knappenberger, but forgot to mention the foot pain because it is mild. Appellant denied past trauma to his left foot. Mr. Marquinez assessed that appellant suffered from plantar fasciitis.

Additional progress notes from March 22, 2017, signed by Nurse Kinxian J. Thach, report that "[appellant] states his left foot has been hurting [this] past week. Does n[o]t recall trauma to affect[ed] area."

Progress notes dated April 14, 2017 reflect that appellant was seen by Nicole M. Evans, a registered nurse. Her notes indicate that appellant stated his symptoms from the earlier visit of March 22, 2017 had been worsening. The notes indicate that appellant's assignments changed on April 10, 2017, when he was assigned to clean bathrooms. Since this change, the notes reflect that appellant indicated his foot pain has gotten worse and that he also experiences knee pain.

Progress notes dated May 17, 2017 reflect that appellant was issued shoe inserts on that day. Appellant submitted a single page of the progress note from May 31, 2017. The note document that, "[appellant] presents with increased pain in his left heel and arch, explains that it began about two months ago when he was mopping floors and twisted it -- he just kept working thought nothing of it. However the pain started the next day and has progressively gotten worse every day since…."

A treatment note from July 18, 2017 reflects that appellant was treated for and diagnosed with a partial tear of his left plantar fascia band, as confirmed by the MRI scan. The patient history notes that appellant stated the injury occurred around March 2017, and appellant was first seen for the injury on April 4, 2017. Appellant was placed in a boot, with the intention to transition into a supportive stiff soled shoe with orthotics. Dr. Brittney Bolton recommended physical therapy and stretching. Dr. Whitaker, a podiatrist, was also present for the examination, and indicated that partial plantar fascial tear was healing, and recommended appellant follow-up in four weeks.

A consultation sheet dated October 11, 2017 reflected that appellant had been previously treated for a left plantar fascial tear. Appellant was advised as to return in four months. He was treated by Dr. Anthony B. Cresci, a Board-certified podiatric surgeon.

Appellant submitted progress notes from his physical therapist, Kevin L. Brochetti, for the period October 2017 and January 2018. These notes report a diagnosis of lumbar radiculopathy and plantar fasciitis, and that by January 16, 2018 appellant was doing well and did not believe he needed another appointment.

A consultation note dated March 6, 2018 and signed by Dr. Cresci reflects that appellant presented for a diabetic lesion on the top of his fourth right toe, and to have his toe nails trimmed. The report notes appellant had previously been treated for a left plantar fascial tear, and that he has a high medial arch, mild tenderness to the central band of the plantar fascia center of the arch on his left foot, and that he experienced a decrease in strength in his left foot. Appellant was advised as to proper hygienic practices for the care of his feet, and further advised to always wear proper footwear.

OWCP received a note authored and signed by Dr. Zachary Markley, a resident physician, dated May 8, 2018, and acknowledged by Dr. Cresci and Dr. Whittaker. The note indicates that appellant sought documentation of pathology from the treatment of his left plantar fasciitis/fascial tear. The note reports, "[appellant] wanted specific documentation [that] his injury was caused by his duties as a custodian here at the [the employing establishment] in February of 2017."

By decision dated September 17, 2018, OWCP found that appellant established that the March 14, 2017 employment incident occurred as alleged and that there was a medical diagnosis in connection with the incident. However, it continued to deny appellant's traumatic injury claim because the medical evidence failed to establish causal relationship between his left plantar fasciitis/fascial tear and the March 14, 2017 employment incident.

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,[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 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]

[3] *Supra* note 2.

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

[5] *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] *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).

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] Generally, fact of injury consists of 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] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[10]

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.[11] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[12] 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 factor(s).[13]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that his left foot condition is causally related to the accepted March 14, 2017 employment incident.

In support of his claim appellant submitted a series of treatment notes. The treatment note dated April 20, 2017 from Dr. Whitaker reported that appellant sought treatment for right foot pain, and received an x-ray on his right foot. While the note includes a diagnosis of plantar fasciitis, left greater than right, the report does not offer an opinion as to the cause of appellant's left foot condition. Medical evidence which does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[14]

The unsigned note from May 31, 2017 documents that appellant reported that his left foot pain "began about two months ago when he was mopping floors and twisted it." This report is of

[7] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[8] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[11] *T.H.*, *supra* note 7; *Robert G. Morris*, 48 ECAB 238 (1996).

[12] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[13] *Id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[14] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

no probative value because the author cannot be discerned, and thus it has not been established that the author of the note was a qualified physician within the definition provided by FECA.[15]

Dr. Long's June 5, 2017 note is also insufficient to establish causal relationship. She did not reference the March 14, 2017 employment incident, nor did she provide a specific medical diagnosis or address causal relationship. Thus, Dr. Long's June 5, 2017 note is of no probative value to the issue of causal relationship.[16]

The progress notes dated July 18, 2017 by Dr. Bolton and Dr. Whitaker reflect that appellant was treated during a follow-up appointment for a left foot MRI scan confirmed plantar fasciitis of the left foot. However, neither Dr. Bolton nor Dr. Whitaker offered an opinion as to the cause of the left plantar fasciitis. This report is therefore of no probative value, and is insufficient to establish that appellant's left foot condition is causally related to appellant's employment.[17]

The treatment notes dated October 3, 2017 and March 6, 2018 mention a past history of plantar fasciitis of the left foot, but do not contain any opinion on causal relationship between the left plantar fasciitis and the employment incident, and are therefore of no probative value.[18]

Finally, OWCP received various treatment records authored by nurses, physician assistants, and physical therapists. As these healthcare providers are not considered "physician[s]" as defined under FECA, their respective reports are insufficient for purposes of establishing entitlement to FECA benefits.[19]

For these reasons, the Board finds that the evidence of record is insufficient to establish causal relationship between appellant's left plantar fasciitis/facial tear and the accepted March 14, 2017 employment incident.[20]

Appellant may submit new evidence and/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.

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[15] *E.V.*, Docket No. 18-1617 (issued February 26, 2019).

[16] *Supra* note 17.

[17] *Id.*

[18] *Id.*

[19] 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See* 5 U.S.C. § 8102(2); *M.M.*, Docket No. 16-1617 (issued January 24, 2017); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *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).

[20] *R.R.*, Docket No. 16-1901 (issued April 17, 2017).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a left foot condition causally related to the accepted March 14, 2017 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 2, 2019
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