United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 19-0673**
	)	**Issued: September 6, 2019**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Pine Knot, KY, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 5, 2019 appellant, through counsel, filed a timely appeal from a January 2, 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.[3]

[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.*

[3] The Board notes that following the January 2, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a right foot fracture causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On March 1, 2018 appellant, then a 39-year-old medical records technician, filed a traumatic injury claim (Form CA-1) alleging that at 10:00 a.m. on November 27, 2017 she experienced the onset of severe right foot pain when escorting inmates to and from a mobile "MRI truck" while in the performance of duty. In a March 7, 2018 statement, she noted that she had initially attributed her right foot pain to gout, a possible side effect of a recently prescribed diuretic. Appellant's attending physician later diagnosed a stress fracture of the right second metatarsal.

In support of her claim, appellant submitted chart notes signed by Jennifer West, a nurse practitioner, dated from November 27, 2017 to February 9, 2018. Ms. West noted that November 27, 2017 x-rays had been negative for fracture, while x-rays reviewed on December 11, 2017 demonstrated a displaced second metatarsal fracture.

In reports dated February 6 and March 8, 2018, Dr. Tracy A. Pesut, a Board-certified orthopedic surgeon, obtained x-rays of the right foot which demonstrated a mildly angulated stress fracture of the second metatarsal neck, hammering of the second and third toes, and a hallux valgus deformity. She diagnosed a right second metatarsal stress fracture with malunion, and right metatarsalgia.

In a development letter dated March 19, 2018, OWCP informed appellant that the evidence of record did not establish the November 27, 2017 incident as factual or that work factors had caused the claimed right foot injury. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to provide the necessary information.

In response, appellant submitted a March 26, 2018 statement contending that she had not realized the metatarsal fracture had been work related until a February 28, 2018 meeting with an employing establishment safety official. She also submitted December 11, 2017 and January 30, 2018 x-rays which demonstrated an angulated fracture of the right second metatarsal.

By decision dated May 4, 2018, OWCP denied the traumatic injury claim finding that the evidence of record did not establish that the November 27, 2017 incident had occurred as alleged.

On May 18, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. At the hearing, held October 19, 2018, counsel contended that appellant had sustained an occupational condition due to frequent prolonged walking in the performance of duty, rather than a traumatic injury caused by a single incident on November 27, 2017. Appellant noted that she had returned to work intermittently in July 2018, but could not continue as fixation screws had bent or broken. She underwent revision surgery on September 26, 2018. Appellant also submitted additional medical evidence.

On April 18, 2018 Dr. Pesut performed a right second metatarsal osteotomy with plate and screw fixation, right third metatarsal Weil osteotomy, a right Lapidus bunion correction with screw

fixation, and right calcaneal autograft. In a May 3, 2018 report, she noted good postsurgical progress.

In a report dated May 31, 2018, Dr. Pesut noted that the second metatarsal fracture and surgical correction were "related to [appellant's] work activities," but that the bunionectomy and third metatarsal procedures were not occupationally related. In a July 5, 2018 report, she opined that the second metatarsal fracture "occurred at work."

In an August 16, 2018 report, Dr. Pesut obtained x-rays which demonstrated broken fixation screws. She opined that appellant had sustained the second metatarsal fracture at work, with consequential third metatarsalgia from the second metatarsal malunion.

In a letter dated August 27, 2018, Dr. Pesut opined that appellant had sustained a right second metatarsal stress fracture at work due to prolonged walking and standing in required footwear. The malunion increased pressure on the great toe and third toe which caused pain with weight bearing and necessitated an osteotomy. Dr. Pesut corrected the nonoccupational hallux valgus deformity to prevent "impingement on the second toe and difficulty with healing."

In a September 14, 2018 report, Dr. Ryan L. Dabbs, a Board-certified orthopedic surgeon, recommended surgical revision of the Lapidus bunion correction due to nonunion and broken fixation hardware.

Appellant also provided an undated letter and additional chart notes from Ms. West.

In a November 1, 2018 statement, the employing establishment noted that appellant had been required to personally escort inmates "many miles" to and from medical units during lockdown incidents.

By decision dated January 2, 2019, an OWCP hearing representative affirmed the May 4, 2018 decision as modified finding that appellant had established that the claimed employment events occurred as alleged. She indicated that, although appellant initially filed a traumatic injury claim, her testimony was sufficient as to her duties over time to change the complexion of the claim to occupational in nature. However, the claim remained denied because the medical evidence of record failed to establish that the accepted employment factors caused appellant's diagnosed stress fracture or other right foot conditions.

LEGAL PRECEDENT

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,[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

[4] *C.B.*, Docket No. 18-0071 (issued May 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (issued 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 establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[7]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[8] 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 employee.[9]

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 causal relationship.[10]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a right foot fracture causally related to the accepted factors of her federal employment.

Appellant submitted a series of reports from Dr. Pesut asserting that prolonged standing and walking in the performance of duty had caused the right second metatarsal fracture. The Board has held that a medical report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition was related to employment factors.[11] Without medical reasoning explaining how the accepted employment activities caused or contributed to appellant's diagnosed conditions, Dr. Pesut's reports are insufficient to establish appellant's claim.[12]

---

[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] *C.B.*, *supra* note 4; *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *E.M.*, Docket No. 18-0275 (issued June 8, 2018).

[8] *A.M.*, Docket No. 18-0685 (issued October 26, 2018).

[9] *E.V.*, Docket No. 18-0106 (issued April 5, 2018).

[10] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[11] *C.B.*, *supra* note 4; *see Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

[12] *Id.*

In his September 14, 2018 report, Dr. Dabbs recommended surgical revision of the Lapidus bunion correction previously performed on appellant's right foot, however, he did not offer an opinion relative to causal relationship. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[13]

Appellant also submitted reports signed solely by Ms. West, a nurse practitioner. These reports do not constitute competent medical evidence because a nurse practitioner is not considered a "physician" as defined under FECA.[14] Consequently, the medical findings and opinions of a nurse practitioner will not suffice for purposes of establishing entitlement to compensation benefits.[15]

On appeal counsel asserts that OWCP did not accord adequate weight to the medical evidence of record. As explained above, appellant's physicians did not provide sufficient medical rationale to meet appellant's 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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right foot fracture causally related to the accepted factors of her federal employment.

[13] *M.W.*, Docket No. 18-1624 (issued April 3, 2019); *S.B.*, Docket No. 18-1296 (issued January 24, 2019).

[14] 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); 20 C.F.R. § 10.5(t); *see also David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurse practitioners, and physical therapists are not competent to render a medical opinion under FECA); *K.S.*, Docket No. 18-0954 (issued February 26, 2019); *K.W.*, 59 ECAB 271, 279 (2007).

[15] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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