United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 21-0825**
	)	**Issued: February 17, 2022**
DEPARTMENT OF THE INTERIOR, COLORADO RIVER AGENCY, Parker, AZ, Employer	)	

Appearances:
Jason S. Lomax, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 19, 2021 appellant, through counsel, filed a timely appeal from an August 26, 2020 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 a traumatic injury in the performance of duty on November 30, 2017, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On January 18, 2018 appellant, then a 44-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on November 30, 2017 he was working around debris, including boards with nails and screws, when he stepped on a nail while in the performance of duty. He indicated that he had neuropathy in his feet and did not notice that the nail had pierced his left shoe and foot. Appellant noted that he started running a fever and believed that he had the flu. He indicated that he woke up on December 6, 2017 with extreme pain in his left foot and underwent emergency surgery. Appellant reported that, two of his toes were amputated, the skin was removed off the top of his left foot, and half of the bottom of his left foot was stitched. On the reverse side of the claim form appellant's supervisor controverted appellant's claim, asserting that he was not informed of the incident until December 6, 2017 and that medical reports were not submitted until January 5, 2018. Appellant stopped work on December 6, 2017.

In a hospital emergency room report dated December 6, 2017, Dr. Raymond B. Wallace, an osteopath Board-certified in emergency medicine, noted that appellant was seen for a foot infection, with onset of symptoms approximately one week prior. He noted that appellant was a diabetic male with left 3rd toe blackness, odor, swelling, and redness. Dr. Wallace diagnosed gangrene of the left toe, left lower leg cellulitis, peripheral vascular disease, and diabetes mellitus.

In a December 15, 2017 note, Dr. Samar Kubba, an osteopath specializing in internal medicine, indicated that appellant had left foot necrotizing fasciitis due to a puncture wound from a nail. He noted that appellant had undergone amputation of the third and fourth toes of the left foot.

In a January 25, 2018 attending physician's report (Form CA-20), Dr. Glenn Silverstein, a podiatrist, noted appellant's history of injury as stepping on a nail on November 30, 2017. He checked a box marked "Yes" in response to whether appellant's condition was caused or aggravated by the employment activity and noted that appellant had neuropathy, which limited feeling in his foot.

In a February 2, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

[3] Docket No. 19-1759 (issued April 3, 2020).

OWCP continued to receive medical evidence. In a December 6, 2017 report, Dr. Silverstein noted that appellant developed an ulcer on the bottom of his left foot "probably a couple of weeks ago and maybe even at work." He indicated that appellant did not have much feeling in his foot and was unsure if he stepped on something.

In a December 6, 2017 report, Dr. Patrick Shayegan, Board-certified internist, noted that appellant "likely stepped on a large nail that went through [appellant's] boot and through the bottom of his foot." He reported that appellant did not feel it at the time because he had neuropathy. Dr. Shayegan noted that there was a plantar ulcer present on his foot. He diagnosed necrotizing fasciitis and Type 2 diabetes.

In a February 14, 2018 statement, appellant responded to OWCP's development questionnaire. He stated that, while working on November 30, 2017, he received a call from his wife who informed him that he needed to take his daughter to the emergency room. Appellant noted that he hurriedly began cleaning up his work area and, while doing so, he lost his balance and stepped on a wooden board embedded with 16D penny nails. He reported that he "did not feel any pain, or any wetness on [his] left foot," and that there were "no signs of blood or pain at the time." Appellant indicated that he only wore his steel-toe boots at work and that at the time of the incident he assumed that he stepped on the nail, but it did not go through his boot. He added that he "kicked the 2x4 [board] off an[d] away in front of me." Appellant related that he worked on December 4, 2017, but did not work the following day because he began experiencing nausea, chills, and fever. He stated that he noticed discoloration and swelling in his toes and left foot on December 6, 2017 and went to the emergency room. Appellant noted that he was diagnosed with gangrene and reported that his mother notified his supervisor about the injury.

In an accompanying statement, appellant's wife asserted that she received a telephone call from appellant's supervisor at 1:23 p.m. on December 6, 2017. She related that she had notified the supervisor of appellant's workers' compensation claim due to stepping on a nail on November 30, 2017.

In an undated statement, appellant's mother indicated that she informed appellant's supervisor of his injury on December 6, 2017. She noted that appellant's supervisor stated that he would provide her with OWCP paperwork, but never did. Appellant's mother attached telephone records with her statement.

By decision dated March 9, 2018, OWCP denied appellant's claim, finding that the factual evidence of record was insufficient to establish that the employment incident occurred as alleged.

On March 8, 2019 appellant, through counsel, requested reconsideration.

In support of his request, appellant submitted a January 24, 2019 statement, wherein appellant's wife noted that she had observed him performing renovations at his work site on November 29, 2017 at which time she observed him pulling things off the walls, repairing holes in the wall, and prepping the premises to be painted. She indicated that there were boards with nails, splintered wood, and other debris scattered around the floor. Appellant's wife related that on the morning of December 6, 2017 appellant woke her up complaining of severe foot pain. She reported that she noticed he was sweating and seemed feverish. Appellant's wife observed that

appellant had a perfectly round hole on the pad of his left foot that was producing a secretion. She related that she knew he had diabetes, but was unaware that he had diabetic neuropathy until the trip to the emergency room. Appellant's wife noted that she checked appellant's work boots and observed a hole on the bottom of his left boot approximately where his wound was located on his foot. She indicated that she put her hand in the boot and felt a bump and a hole where something had pushed up through the sole of the boot.

In a January 29, 2019 statement, appellant's mother provided additional information to expand and clarify on her previous statement. She noted that on December 6, 2017 she met appellant at the emergency room. Appellant's mother stated that both the medical staff and appellant had told her that he had stepped on a nail causing a puncture wound. She indicated that she observed the puncture wound and noticed that it was dark and oozing. Appellant's mother also reported that she went to appellant's house a few weeks after he was hospitalized and asked to look at his work boots. She stated that she found a hole toward the front, middle of the left boot at what appeared to be the same location that he had suffered the puncture wound.

In a March 6, 2019 statement, appellant noted that he had been diagnosed with diabetes and was aware of his diabetic condition prior to November 30, 2017. However, he indicated that he was unaware of his diabetic neuropathy and loss of sensation in his feet until the events of December 6, 2017. Appellant clarified that on November 30, 2017 he was in a rush to leave work to take his daughter to the emergency room. He asserted that he stepped on a wooden board with a penny nail in it and that he had to kick the board off and away from him to remove it from his boot. Appellant related that he originally stated that he "assumed [he] stepped on it and it did not go thru [his] boot." He explained that the nail definitely punctured the sole of his boot as it was stuck in such a way that he had to kick the board off of his boot. Appellant indicated that he "assumed" that the nail did not puncture his foot because he did not feel pain as a result of his diabetic neuropathy. He alleged that, in his pained and medicated state, he had difficulty understanding that diabetic neuropathy caused loss of sensation and that he could not feel the nail puncture in his foot. Appellant reported that the location where he discovered the wound in his foot was in the same place that the nail had punctured the sole of his boot on November 30, 2017.

In a March 8, 2019 narrative report, Dr. Roland Palmquist, a podiatrist, noted that he had been treating appellant since April 18, 2018. He indicated that appellant presented to his clinic with amputation of the third and fourth toes of the left foot after surgery on December 6, 2017. Dr. Palmquist noted that appellant had stepped on a nail at work on November 30, 2017, but had not realized that his foot had been punctured because he had diabetic neuropathy. He explained that diabetic patients commonly injure themselves and are unaware of the injury until the infection spreads far enough to reach unaffected nerves, often above the knee. Dr. Palmquist opined that the nail puncture caused appellant's bone infection in the third and fourth metatarsals, which resulted in appellant's amputation and skin graft.

By decision dated May 28, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On August 19, 2019 appellant, through counsel, appealed the May 28, 2019 nonmerit decision of OWCP to the Board. By decision dated April 3, 2020, the Board set aside the May 28, 2019 decision, finding that OWCP had improperly denied appellant's request for reconsideration

of the merits of his claim pursuant to 5 U.S.C. § 8128(a).[4] The Board found that appellant submitted relevant and pertinent new evidence not previously considered by OWCP. The Board remanded the case for merit review and further development of the evidence as deemed necessary, to be followed by an appropriate merit decision.

On remand, OWCP requested that appellant's supervisor provide a further comment regarding appellant's claim. No response was received.

By decision dated August 26, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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,[6] 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.[7] 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.[8]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established.[9] Fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.[10] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[11]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of

[4] *Id*.

[5] 5 U.S.C. § 8101 *et seq*.

[6] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[8] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[10] *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

action.[12] The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statements in determining whether a *prima facie* case has been established.[13] An employee's statements alleging 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.[14]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that a traumatic incident occurred in the performance of duty on November 30, 2017, as alleged.

The record establishes that on November 30, 2017 appellant was performing duties of his federal employment while working around debris including boards with nails and screws. At the time, due to his diabetic neuropathy, appellant did not immediately realize that his boot and left foot has been pierced by a nail. However, he later clarified and expanded upon his previous statements. Appellant explained that while rushing to leave work to take his daughter to the emergency room, he stepped on a wooden board with a penny nail in it and that he had to kick the board off and away from him to remove it from his boot.

Appellant also provided a January 24, 2019 statement from his wife, corroborating that appellant's work entailed pulling things off the walls, filling holes, and painting. Appellant's wife observed him working around boards with nails, splintered wood, and other debris scattered around the floor. She related that on the morning of December 6, 2017 appellant woke her up complaining of severe foot pain. Appellant's wife observed that appellant had a perfectly round hole on the pad of his left foot that was producing a secretion; and that she checked appellant's work boots, observing a hole on the bottom of his left boot approximately where his wound was located on his foot. She indicated that she put her hand in the boot and felt a bump and a hole where something had pushed up through the sole of the boot. Appellant's mother also reported in a statement dated January 29, 2019 that she went to appellant's house a few weeks after he was hospitalized and asked to look at his work boots. She stated that she found a hole toward the front, middle of the left boot at what appeared to be the same location that he had suffered the puncture wound.

The injuries appellant claimed are consistent with the facts and circumstances he set forth, his course of action, and the medical evidence he submitted. He has explained any apparent inconsistencies in his earlier statements reviewed by OWCP. Appellant has provided statements from his family that help to explain why and how he came to realize that he had stepped on a nail at work on November 30, 2017. He has also provided an explanation from Dr. Palmquist explaining how it would be possible for appellant not to immediately notice the nail piercing his

[12] *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

[13] *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

[14] *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

left foot at the time, as a result of his diagnosed diabetic neuropathy. As noted above, the injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[15] An employee's statements alleging 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.[16] The Board, thus, finds that appellant has met his burden of proof to establish that the November 30, 2017 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the November 30, 2017 employment incident occurred as alleged, the question becomes whether the incident caused an injury.[17] As OWCP found that he had not established fact of injury, it did not evaluate the medical evidence. The case must, therefore, be remanded for consideration of the medical evidence of record.[18] After such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met his burden of proof to establish an injury causally related to the accepted November 30, 2017 employment incident, and any attendant disability.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that a traumatic incident occurred in the performance of duty on November 30, 2017, as alleged.

[15] *Supra* note 12.

[16] *Supra* note 14.

[17] *See M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

[18] *See supra* note 13; *S.M.*, Docket No. 16-0875 (issued December 12, 2017).

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 17, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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