

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coppell, TX, Employer**

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**Docket No. 14-1421
Issued: November 14, 2014**

Appearances:
Debra Hauer, Esq., for the appellant
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 9, 2014 appellant, through his attorney, filed a timely appeal from April 16 and May 7, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP) which denied her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on November 25, 2011.

FACTUAL HISTORY

On February 15, 2012 appellant, then a 51-year-old temporary employee letter carrier, filed a traumatic injury claim alleging that on November 25, 2011 he slipped while stepping into

¹ 5 U.S.C. § 8101 *et seq.*

his postal vehicle and sustained injuries to his right ankle, right knee and lower back. He did not stop work.²

On the claim form, Roy Russell, appellant's supervisor, checked "no" to the question of whether appellant's injury occurred in the performance of duty. He stated that appellant was terminated from employment on January 17, 2012 and did not turn in a traumatic injury form until February 27, 2012. Mr. Russell also noted that appellant did not submit any medical evidence along with his claim. He submitted a termination letter dated January 17, 2012 which indicated that appellant was terminated from employment due to "unacceptable work performance."

In a workers' compensation history form dated January 23, 2012, appellant indicated that the date of his present injury was January 17, 2012. He reported that he was delivering mail in the afternoon when he "had accident when stepped off of curb."

In reports dated January 23 to April 18, 2012, Dr. Mahe T. Nadeem, Board-certified in physical medicine and rehabilitation, stated that he examined appellant for complaints of pain in his right knee radiating down the right leg and in his lower back. He related that appellant was out delivering mail on a new route when he stepped off the curb, missed a step and fell down. Upon examination of the right knee, Dr. Nadeem observed mild and moderate tenderness on the medial joint line and present crepitus. Examination of the lumbar spine demonstrated moderate tenderness right L5-S1 and mild on the left L5-S1 on spinous processes. Dr. Nadeem provided range of motion findings and reported no tenderness bilaterally of the sacroiliac joint, greater trochanter and sciatic notch. Straight leg raise testing was positive on the right. Dr. Nadeem reported that a January 24, 2012 x-ray of appellant's right knee revealed no fracture and mild decrease of the medial joint space. He diagnosed lumbar disc injury and right knee internal derangement. Dr. Nadeem opined that the injuries sustained were directly related to appellant's employment.

In a February 17, 2012 statement, Mr. Russell stated that on February 17, 2012 appellant entered his office and demanded that he sign CA-1 and CA-2 forms. He noted that appellant had never reported any on-the-job injury from November 25, 2011 up to that date and pointed out that appellant was terminated from employment on January 17, 2012. Mr. Russell also reported that on January 25, 2012 he received a fax from a medical clinic about a CA-17 form for appellant with a date of injury of January 17, 2012.

In a March 9, 2012 investigative report, Special Agent Krafels of the U.S. Office of the Inspector General stated that on February 15, 2012 appellant filed a questionable on-the-job injury claim for an injury to his right foot, ankle and knee, which allegedly occurred on November 25, 2011. He reported that the investigation revealed that appellant was terminated from employment on January 17, 2012 due to poor performance, changed the story of how the

² The record reveals that on February 15, 2012 appellant also filed an occupational disease claim which indicated that on November 25, 2011 he slipped on the step of his postal vehicle. He also noted that he was "always stepping on holes and tripping." The claim was assigned File No. xxxxxx557. On April 2, 2012 OWCP determined that File No. xxxxxx557 was a duplicate filing of the traumatic injury claim and would be deleted from the records system. All documentation in that file was incorporated into File No. xxxxxx321, traumatic injury claim.

alleged work injury happened when he reported it to the employing establishment and the doctor's office and reported two different dates of injury. Special Agent Krafels noted that he spoke with the office manager where appellant received medical treatment. He was informed that appellant was first treated on January 23, 2012 and had told Dr. Nadeem that he sustained injuries to his right knee and lower back on January 17, 2012 when he stepped off the curb wrong and fell down. Special Agent Krafels also described an interview he had with appellant on March 2, 2012 and provided the memorandum of interview. He reported that it was apparent that appellant's injury did not happen as reported and was filed a month after he was terminated for poor performance. Agent Krafels explained that throughout the investigation appellant continually changed his story as to how and where the alleged injury happened. He requested that appellant's claim be denied based on the facts presented.

By letter dated March 13, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual evidence to demonstrate that he actually experienced the incident at the time, place and in the manner alleged and additional medical evidence to establish that he sustained a diagnosed condition as a result of the employment incident.

Appellant submitted various reports by Dr. Nadeem dated March 21 to April 5, 2012, which described a January 17, 2012 employment injury and the medical treatment appellant received.

In a decision dated May 8, 2012, OWCP denied appellant's claim finding that fact of injury had not been established. It determined that the factual evidence did not demonstrate that the November 25, 2011 incident occurred at the time, place and in the manner that appellant alleged.

On May 24, 2012 OWCP received appellant's request for a telephone hearing. On September 18, 2012 a telephone hearing was held. Appellant was represented by his attorney, Tim Egbuchunam. He alleged that the employing establishment never controverted appellant's claim but merely stated that more evidence was coming and that there were no inconsistencies regarding the alleged November 25, 2011 employment incident. Mr. Egbuchunam also pointed out that Dr. Nadeem corrected the earlier description of the November 25, 2011 incident, which was now consistent with the facts. He stated that appellant's claim was a simple traumatic injury claim and that OWCP erred by not reviewing the evidence on its own merit.

In a May 15, 2012 report, Dr. Nadeem provided a "corrected history." He stated that appellant was examined for injuries sustained on the job when he was delivering mail and attempted to step into the mail car but he missed the step and almost fell down. Although appellant was able to catch his balance, he experienced sharp pain in his right knee and lower back. Dr. Nadeem reviewed appellant's history and conducted an examination. He provided examination findings similar to his previous reports and diagnosed lumbar disc injury and right knee internal derangement. Dr. Nadeem opined that the injuries appellant sustained were directly related to his employment. Appellant also resubmitted Dr. Nadeem's various other reports.

In a May 15, 2012 letter, Dr. Nadeem stated that on November 25, 2011 appellant was working as a postal worker when he slipped on the step of the postal vehicle and almost fell. He noted that appellant recovered his balance but twisted his right knee and experienced low back and right knee pain. Dr. Nadeem explained that appellant hyperextended his back and twisted his right knee, resulting in an injury to the internal anatomy of the right knee and most likely a slipped disc in his low back. He reviewed appellant's history and noted that a January 24, 2012 x-ray of the right knee showed decreased medial joint line and arthritic changes. Dr. Nadeem provided physical examination findings and diagnosed lumbar and right knee sprain. In subsequent reports dated August 30 to September 14, 2012, he continued to provide medical treatment for appellant for his alleged November 25, 2011 employment injury.

On May 23, 2012 appellant also underwent magnetic resonance imaging (MRI) scan examinations of the lumbar spine and right knee. The examinations revealed a two-millimeter broad-based annular bulge which touched and effaced the thecal sac and L4-5 of the lumbar spine and evidence of a marginal tear within the posterior horn of the lateral meniscus and posterior horn of the medial meniscus of the right knee.

By decision dated December 4, 2012, an OWCP hearing representative affirmed the May 8, 2012 denial decision.

In letters received by OWCP on March 18 and April 12, 2013, appellant requested that OWCP reconsider its decision. He stated that on November 25, 2011 he injured himself when stepping into a vehicle and that on January 17, 2012 he sustained a reinjury of the November 25, 2011 injury. Appellant stated that he did not initially report the November 25, 2011 incident because he feared he would lose his job and because he hoped that he would get better on his own. He noted that on January 25, 2012 he sought medical treatment for his continued knee and lower back pain and was advised to remain off work for a week. Appellant related the knee and back pain he continued to experience and the stress he was under due to financial problems and his father-in-law's health problems. He further contended that the employing establishment and Special Agent Krafels had acted maliciously and committed federal crimes in preventing him from obtaining medical treatment. Appellant submitted another letter from Dr. Nadeem dated May 14, 2013.

In a February 13, 2013 report, Dr. Jacqueline Le, a Board-certified family practitioner, examined appellant for lumbago with lumbar radiculitis condition. She noted that appellant was setting up the MRI scan study and would receive pain management specialist for his pain in the meantime. Appellant underwent another MRI scan of the lumbar spine which revealed mild spondylosis and disc desiccation of the L5-S1 and L4-5 and mild degenerative changes, most pronounced at L4-5, acute stress reactive changes in right L5 pedicle and superior articular facet and mild-to-moderate bilateral neuroforaminal stenosis.

By decision dated July 11, 2013, OWCP denied modification of the December 4, 2012 denial decision. It found that the new evidence submitted did not resolve the discrepancies in the evidence of record and the initial differing explanations in appellant's medical history.

In a letter received on January 24, 2014, appellant, through his attorney, requested reconsideration. He alleged that Dr. Nadeem provided a comprehensive medical report based on

a detailed review of appellant's medical history and physical assessment which provided the necessary evidence for OWCP to accept appellant's claim.

In a November 1, 2013 report, Dr. Don West, Board-certified in physical medicine and rehabilitation, noted appellant's complaints of severe pain in the lower back and both legs. He related that appellant was injured on the job on July 25, 2011 and that an MRI scan of the lumbar spine revealed bulging discs of the lower two levels with minimal nerve root irritation and facet changes. Upon examination, Dr. West observed no lumbar tenderness and intact lower extremities. Straight leg raise testing was negative bilaterally. Dr. West diagnosed discogenic low back pain and bilateral lumbar radiculitis.

In a January 24, 2014 causation letter, Dr. Nadeem stated that on November 25, 2011 appellant was out delivering mail when he stepped into the mail car and missed a step. Although appellant was able to recover his balance and not fall down he experienced sharp pain in his right knee and lower back. He continued to deliver mail. Dr. Nadeem explained that, when a person misses a step, the full weight of the body is supported by the upper leg, knee and lower leg closest to the ground as the other leg is in the air. He noted that the phase of the gait, known as the terminal stance, puts all of the weight of the body on the menisci of the knee and discs of the low back. Dr. Nadeem reported that, when the body is unprepared, such as during a misstep, and lands with the full weight of the body this traumatic impact could damage the menisci and discs which are "shock" absorbers. When additional weight is added such as a load of mail, this tremendous amount of stress could cause tears in the menisci of the knee and discs in the lumbar region. Dr. Nadeem reported that appellant's right knee meniscal tear and lumbar disc bulge were causally related to the occupational injury occurring on November 25, 2011. He also provided medical treatment for appellant in reports dated August 22, 2013 to March 20, 2014.

In a decision dated May 7, 2014, OWCP denied modification of the July 11, 2013 denial decision. It determined that the factual evidence remained insufficient to resolve the discrepancies in the factual element of his traumatic injury claim and to establish that the employment incident occurred as he alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an employee with the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ 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.⁴

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1999).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁵ Second, the employee must submit sufficient evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁶

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.⁷ An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to 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 sufficient doubt on an employee's statement in determining whether a *prima facie* case has been established. An employee's statement 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.⁸

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹ To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.¹⁰

ANALYSIS

Appellant alleges that on November 25, 2011 he sustained injuries to his right ankle, right knee and lower back when he slipped while stepping into his mail vehicle. He did not stop work and filed a traumatic injury claim on February 15, 2012. OWCP denied appellant's claim finding insufficient evidence to establish fact of injury. The Board finds that OWCP properly

⁵ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁶ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

⁸ *D.B.*, 58 ECAB 529 (2007); *Robert A. Gregory*, 40 ECAB 478 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

⁹ *J.Z.*, 58 ECAB 529 (2007).

¹⁰ *Michael E. Smith*, 50 ECAB 313 (1999).

found that the factual evidence is insufficient to establish that the November 25, 2011 employment incident occurred at the time, place and in the manner alleged.

The Board finds that there are numerous and serious inconsistencies in the evidence as to cast doubt upon the validity of appellant's statement that he sustained an injury on November 25, 2011 in the performance of duty. In the February 15, 2012 claim form, appellant alleged that the injury occurred on November 25, 2011. In a January 23, 2012 form, however, he reported the date of his present injury as January 17, 2012 and explained that he "had accident when stepped off of curb." Appellant's supervisor also stated that on January 25, 2012 he received a fax from a medical clinic about a CA-17 form with a date of injury of January 17, 2012. In an interview with Special Agent Krafels, appellant also provided varying accounts as to how and where the alleged injury happened. The Board finds that these above-mentioned inconsistencies call into serious question appellant's account of the alleged November 25, 2011 incident.¹¹

Appellant's subsequent course of conduct also fails to support that the November 25, 2011 incident occurred as alleged. The record reflects that he delayed in filing a traumatic injury claim for the alleged November 25, 2011 work injury until February 15, 2012. In various statements, appellant explained that he did not initially report the November 25, 2011 employment incident because he was waiting to see if he improved on his own and because he feared he would lose his job if he reported the injury. The Board notes, however, that in the February 15, 2012 occupational disease claim form he explained that he did not file a claim within 30 days because he was "always stepping on holes and tripping." Doubt is further raised by the fact that appellant waited until after he was no longer employed to file his claim and did not promptly notify anyone of the November 25, 2011 employment incident. As previously noted, late notification of injury, if otherwise unexplained, may cast doubt on an employee's statement that an injury occurred as alleged.¹² The Board notes that appellant did not adequately explain why he delayed so long in filing his claim.

Appellant also delayed in seeking medical attention and continued to work following the alleged November 25, 2011 incident. The record reveals that he did not seek medical treatment until January 23, 2012, more than two months after the alleged injury occurred. The earliest medical report received is dated January 23, 2012 by Dr. Nadeem, who related that appellant sustained an injury on January 17, 2012 when he stepped off the curb, missed a step and almost fell down. The Board notes that although Dr. Nadeem provided a "corrected history" of appellant's alleged injury in later reports and described the November 25, 2011 incident as appellant alleged, this correct description by only one person is insufficient to rebut the other inconsistencies and evidence in the record. There is no other medical evidence in the record that provides an accurate history of the alleged November 25, 2011 incident as appellant described. On the other hand, in a November 1, 2013 report, Dr. West related that appellant was injured on the job on July 25, 2011. Although appellant indicated that he was waiting to see if the injury was permanent, the Board finds that he did not adequately explain why his delay in seeking medical treatment was so long given the severity of the injuries that he claimed.

¹¹ See *R.M.*, Docket No. 13-173 (issued April 16, 2013); *R.R.*, Docket No. 11-919 (issued December 19, 2011).

¹² *Supra* note 8.

Although an employee's statement alleging that an injury occurred at a given time and in a given manner is generally accorded great probative value, there is strong persuasive evidence refuting appellant's account of the events of November 25, 2011. The Board finds that appellant has not established the occurrence of the November 25, 2011 work incident as alleged and therefore has not established that he sustained an injury on November 25, 2011 in the performance of duty.

On appeal, appellant's attorney alleges that appellant has satisfied all five elements necessary to establish his claim. She contended that appellant's account of the injury should be given great probative value because it was not refuted by strong or persuasive evidence. Counsel explained that appellant never changed the account of what happened but his doctor erred in providing an incorrect history. Despite these explanations, however, the Board finds that appellant has still not provided a preponderance of the reliable, probative, and substantial evidence that the November 25, 2011 incident occurred at the time, place and in the manner alleged.

Appellant's attorney also references the Board's decision in *C.C. v. Department of Justice*, Docket No. 10-2054 (issued July 8, 2011) in support of his claim. The Board finds, however, that that case substantially differentiates from appellant's present claim. In that case, the Board set aside OWCP's July 7, 2010 decision and found that the November 1, 2009 employment incident occurred as alleged. Unlike appellant's present claim, the employee in that case promptly sought medical treatment from the employee health unit and from the hospital emergency room on the day of the alleged injury. In addition, the only inconsistencies in that case record were from the employing establishment whereas in appellant's present claim there are inconsistencies in appellant's statements themselves along with the medical record. The Board finds that appellant did not submit evidence to establish that he actually experienced an employment incident at the time, place and in the manner alleged. Accordingly, he failed to establish fact of injury.

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 did not meet his burden of proof to establish that he sustained an injury in the performance of duty on November 25, 2011.

ORDER

IT IS HEREBY ORDERED THAT the May 7 and April 16, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 14, 2014
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board