

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

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GREGORY S. DIXON, Appellant)	
)	
and)	Docket No. 04-1356
)	Issued: September 23, 2004
U.S. POSTAL SERVICE, MAIN POST OFFICE,)	
Raleigh, NC, Employer)	
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Appearances:
Gregory S. Dixon, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 26, 2004 appellant filed a timely appeal of the merit decision of the Office of Workers' Compensation Programs dated February 17, 2004 which denied modification of a previous decision which found that he failed to establish an injury while in the performance of duty on November 16, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this issue.

ISSUE

The issue is whether appellant has established that he sustained an injury while in the performance of duty on November 16, 2000.

FACTUAL HISTORY

On March 21, 2001 appellant, then a 39-year-old mail processor, filed a traumatic injury claim alleging that on November 16, 2000 he twisted his right knee when he tripped over a flat tub after retrieving change from his coat. He submitted a form designating Dr. Ronald A. Summers, a Board-certified orthopedic surgeon, as his treating physician. Appellant also

submitted Dr. Summers' March 23, 2001 duty status report in which he provided a history that appellant fell over trays and hurt his knee. Dr. Summers diagnosed arthrofibrosis of the right knee and noted appellant's physical restrictions. His March 22, 2001 disability certificate indicated that appellant had been treated for a right knee condition and that he could return to light-duty work for six weeks with the restrictions outlined in his duty status report. Appellant submitted a copy of a March 23, 2001 letter in which he accepted the employing establishment's offer of limited-duty work on that date.

The employing establishment controverted appellant's claim on the grounds that his accident report did not indicate that he sustained an on-the-job injury and he did not seek medical treatment for this alleged injury until March 21, 2001. In addition, the employing establishment stated that the medical evidence submitted failed to establish a causal relationship between appellant's alleged injury and factors of his employment. The employing establishment noted that it was interesting that appellant only had six hours of annual leave and four hours of sick leave.

Appellant submitted Dr. Summers' April 16 and 19, 2001 duty status reports in which he provided a history that on November 16, 2000 appellant tripped over a flat tub and twisted his right knee. He diagnosed medial meniscus tear of the right knee and provided appellant's physical restrictions. Dr. Summers' April 3, 2001 medical report indicated that he performed arthroscopic surgery on appellant's right knee on that date. In his May 17, 2001 duty status report, Dr. Summers reiterated the history of appellant's alleged injury and diagnosed appellant as having arthritis, a torn meniscus and degenerative joint disease of the right knee. He also reiterated the history of appellant's alleged injury and diagnosis of degenerative joint disease of the right knee in his May 21 and June 11 and 25, 2001 duty status reports.

A May 15, 2001 treatment note from a physician whose signature is illegible revealed that appellant was capable of performing limited-duty work with certain physical restrictions. Treatment notes dated December 18, 2000 from a physician whose signature is also illegible provided a history that on November 11, 2000 appellant fell over a tub at work and hurt his knee and findings regarding his right knee. This physician's January 17, 2001 treatment notes indicated that appellant experienced right knee pain. A December 18, 2000 Family Medical Leave Act (FMLA) form from this same physician revealed that appellant had degenerative joint disease of the right knee. This physician's January 17, 2001 FMLA form provided that appellant missed work due to his right knee condition during intermittent periods from December 14, 2000 through January 17, 2001, that his condition commenced in 1981 and that he was in need of an orthopedic evaluation. Undated treatment notes from Kaiser Permanente indicated that appellant was status post knee surgery.

An April 21, 1998 magnetic resonance imaging (MRI) scan report of Dr. Randy D. Secrist, a Board-certified radiologist, revealed a negative examination of appellant's left knee. In a September 3, 1998 x-ray report, Dr. Michael L. Kerner, a Board-certified radiologist, noted minimal arthritic change in appellant's right knee. His April 17, 2000 x-ray report revealed that joint narrowing and irregularity predominated in the medial and anterior compartment of appellant's right knee with no significant change compared with his previous September 1998 study.

In a September 7, 2001 disability certificate, Dr. Summers indicated that appellant was treated for a right knee condition and that he could not work from August 30 through September 7, 2001. He noted that appellant could return to light-duty work on September 8, 2001 for three weeks with certain physical restrictions. Dr. Summers' September 7, 2001 duty status report reiterated the history of appellant's alleged injury and physical limitations.

The August 31, 2001 duty status report of a physician whose signature is illegible revealed a history that appellant fell over some flat trays and sustained a bruised knee. The report also revealed that he could perform light-duty work with certain physical limitations. Dr. Summers' July 10, 2001 duty status report reiterated the history of appellant's alleged injury and provided a diagnosis of post-traumatic degenerative joint disease.

Appellant submitted correspondence concerning the denial of protection of his absences from work under the FMLA and his acceptance of the employing establishment's offer of limited-duty work on August 22, 2001, his requests for leave, a duplicate copy of the employing establishment's original controversion of his claim and subsequent controversion on the grounds that he did not attribute his absences from work after June 11, 2001 to a work-related injury and his leave records.

By letter dated September 25, 2001, the Office advised appellant about the type of factual and medical evidence he needed to submit so that a determination could be made regarding his claim.

The Office received Dr. Summers' September 21, 2001 duty status report which again reiterated the history of appellant's alleged injury and physical limitations. An October 1, 2001 duty status report from a physician whose signature is illegible provided a history that appellant tripped over a flat tub and twisted his right knee and a diagnosis of medial meniscus tear of the right knee.

By decision dated November 7, 2001, the Office found the evidence of record sufficient to establish that appellant actually experienced the claimed incident, but insufficient to establish that he sustained a medical condition caused by this incident. Accordingly, the Office denied appellant's claim on the grounds that he did not sustain an injury in the performance of duty.

The Office received Dr. Summers' September 25, 2001 duty status report which reiterated the history of appellant's alleged injury and a diagnosis of medial meniscus tear of the right knee and degenerative joint disease. The Office also received appellant's September 27, 2001 acceptance of the employing establishment's offer of limited-duty work.

In an undated letter postmarked July 10, 2002 and received by the Office on July 15, 2002, appellant requested an oral hearing before an Office hearing representative.

By decision dated April 30, 2003, the Office denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124. He appealed the Office's decision to the Board.

On December 12, 2003 the Board issued a decision finding that the case was not in posture for decision. The Board determined that the Office properly found that appellant's

request for an oral hearing was untimely found. However, the Board found that, in doing so, the Office abused its discretion because it failed to issue a decision regarding appellant's request in a timely manner and, thus, precluded appellant from seeking reconsideration of the November 7, 2001 decision before the Office or a merit review of the decision before the Board. Accordingly, the Board remanded the case to the Office for a merit review of appellant's claim.¹

On remand, the Office issued a decision dated February 17, 2004, in which it denied modification of the November 7, 2001 decision. The Office found the medical evidence of record insufficient to establish that appellant's arthritis and degenerative joint disease were caused by the November 16, 2000 employment incident.²

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing 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 the Act; that the claim was filed within applicable time limitation; that an injury was sustained while 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.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.⁶ In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.

¹ Docket No. 03-1535 (issued December 12, 2003).

² On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c). The Board notes that appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2) (1999).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ See *Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 4.

⁶ See also, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁷ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.⁸ The belief of the claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.⁹

ANALYSIS

In this case, the Office found the evidence of record sufficient to establish that on November 16, 2000 appellant tripped over a flat tub at the employing establishment while getting money out of his coat. The employing establishment contends that appellant did not sustain an injury at work on November 16, 2000. The employing establishment noted that appellant's accident report did not indicate that he sustained an on-the-job injury and he did not seek medical treatment for this alleged injury until March 21, 2001.¹⁰ The employing establishment stated that the medical evidence submitted failed to establish a causal relationship between appellant's alleged injury and factors of his employment. Further, the employing establishment noted that it was interesting that appellant only had six hours of annual leave and four hours of sick leave.

An injury does not have to be confirmed by eyewitnesses in order to establish 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 subsequent course of action. 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 cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹¹

In his traumatic injury claim form, appellant stated that he twisted his right knee when he tripped over a flat tub after retrieving change from his coat. The medical evidence of record corroborates the history provided by appellant. In his medical reports, Dr. Summers consistently provided a history that on November 16, 2000 appellant tripped over a flat tub and twisted his right knee. The treatment notes dated December 18, 2000 and, August 31 and October 1, 2001

⁷ *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) ("traumatic injury" and "occupational disease" defined, respectively).

⁸ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

⁹ *Charles E. Evans*, 48 ECAB 692 (1997).

¹⁰ The Board notes that the accident report is not in the record.

¹¹ *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

duty status reports from physicians whose signatures are illegible provided a history that on November 11, 2000 appellant fell over a tub at work and hurt his right knee.

Although the employing establishment contended that appellant did not sustain an injury on November 16, 2000, the Board finds that the above-noted medical reports and treatment notes provide a consistent history of incident. Accordingly, the Board finds that the evidence of record supports the Office's finding that the incident occurred at the time, place and in the manner alleged.¹²

The Board, however, finds the medical evidence of record insufficient to establish that the November 16, 2000 employment incident caused an injury. Although several of Dr. Summers' reports and the reports from physicians whose signatures are illegible provided a history of the November 16, 2000 employment incident and diagnoses, which included arthrofibrosis, medial meniscus tear, arthritis, degenerative joint disease and a bruise of the right knee, the physicians failed to address whether the diagnosed conditions were caused by the accepted employment incident.

Further, Dr. Summers' disability certificates which revealed that appellant's right knee had been treated and that he could return to light-duty work with certain physical restrictions are insufficient to satisfy appellant's burden because he failed to provide a diagnosis and to discuss how the diagnosed condition was caused by the November 16, 2000 employment incident.¹³ Similarly, the treatment notes and the FMLA form from physicians whose signatures are illegible regarding appellant's right knee and Dr. Summers' August 31, September 7 and 21, 2001 duty status reports failed to provide a diagnosis and to address whether the diagnosed condition was caused by the accepted employment incident. Further, Dr. Secrist's MRI scan report which revealed a negative examination of appellant's left knee did not provide a diagnosis causally related to the accepted employment incident.

Based on the foregoing, appellant has failed to submit sufficient rationalized medical evidence to establish that he sustained an injury caused by the November 16, 2000 employment incident.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury while in the performance of duty.

¹² *Louise F. Garnett*, 47 ECAB 639, 643-44 (1996); *Constance G. Patterson*, 41 ECAB 206 (1989); *Julie B. Hawkins*, 38 ECAB 393 (1987).

¹³ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member