United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 16-1114**
	)	**Issued: October 25, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Newcastle, DE, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 4, 2016 appellant, through counsel, filed a timely appeal of a March 22, 2016 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.

ISSUE

The issue is whether appellant met her burden of proof to establish a traumatic injury in the performance of duty on February 19, 2015.

[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.*

FACTUAL HISTORY

On March 13, 2015 appellant, then a 49-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 19, 2015 he stepped on a snow-covered brick while working and fractured his left ankle. The employing establishment controverted the claim. Appellant's supervisor, Donna Smalls, indicated that she noticed appellant walking with a limp before the date of injury. She questioned whether appellant had a preexisting injury. Appellant stopped work on February 19, 2015.

In a March 19, 2015 letter, the employing establishment again controverted the claim. Ms. Smalls explained that she walked with appellant on his route on February 2, 2015 and noticed that he was walking with a limp then.

By letter dated April 2, 2015, OWCP informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days. Included with the letter was a questionnaire in which OWCP asked appellant to describe in detail how the claimed injury occurred and why he waited three weeks to report his injury to the employing establishment and to seek medical treatment.

In a February 9, 2015 report, Dr. Cynthia Good, a Board-certified family practitioner, noted that an x-ray of the left ankle revealed a sprain/strain. She advised that they would keep a splint on it for three weeks. Dr. Good recommended an orthopedic surgeon if the ankle did not heal.[3] In another February 9, 2015 report, she advised that appellant "stepped in hole in yard one week ago" and still had moderate left ankle medial pain. Dr. Good diagnosed ankle sprain/strain and noted ankle swelling on examination.

In a February 26, 2015 report, Dr. Anthony M. Caristo, a podiatric surgeon, noted that appellant presented with pain for about one month in the left ankle and lateral foot. He indicated that appellant was a mail carrier and injured the left ankle twice over the last month, but denied hearing a snap or crack. Dr. Caristo diagnosed degenerative joint disease (DJD), limb pain, tenosynovitis of the foot and ankle, and capsulitis. February 27, 2015 left foot x-rays revealed no evidence of fracture, dislocation, or osteomyelitis. In a March 2, 2015 report, Dr. Caristo advised that appellant presented with left lateral foot and ankle pain of one month's duration. Appellant noted that his right foot was painful due to him favoring his left foot. Dr. Caristo diagnosed bursitis, tibialis tendinitis, DJD, and limb pain. On March 3, 2015 he stated that right foot x-rays showed no evidence of fracture, dislocation, or osteomyelitis. Dr. Caristo saw appellant on March 9, 2015 and found tibialis tendinitis, ankle sprain, limb pain, and DJD.

In a March 12, 2015 progress note, Dr. Caristo stated that appellant presented with complaints of left ankle and foot pain for more than six months. He noted that it was aggravated by any physical activity. Dr. Caristo noted that appellant was a mail carrier and injured his left ankle two times over the past month, but denied hearing a pop, snap or crack. He diagnosed stress fracture of tibia or fibula, capsulitis, limb pain, and foot and ankle tenosynovitis. Dr. Caristo prescribed a removable cast.[4] In a March 19, 2015 attending physician's report, he

[3] A February 9, 2015 left ankle x-ray read by Dr. Lloyd D. Wagner, a Board-certified diagnostic radiologist, revealed no acute bone abnormality.

[4] A March 10, 2015 magnetic resonance imaging (MRI) scan report found a fracture of the distal end of the tibia that was either a nondisplaced fracture or insufficiency fracture with prominent surrounding marrow edema.

advised that there was no preexisting injury. Dr. Caristo diagnosed stress fracture and placed appellant off work for six to eight weeks. He saw appellant on April 9, 2015 and noted that appellant related that he had almost 60 percent improvement with the removable cast from his last visit. Dr. Caristo continued to treat appellant.

In an April 27, 2015 letter, appellant explained that he believed that he had a bad sprain and reported it to his supervisor, who gave him a week off for rest. He indicated that there was no improvement with a week off and he sought treatment, which revealed a fracture to the left ankle. Appellant explained that he had no other injuries and that he reported that he twisted his ankle in a hole two weeks prior on the job. He advised that he stepped on a snow-covered brick while delivering mail and his ankle twisted. Appellant advised that he continued to work thinking it was only a bad sprain. He indicated that he had been off work since February 19, 2015, as his physician had not cleared him to return to work.

By decision dated May 12, 2015, OWCP denied appellant's claim, finding that he had not established the factual component of his claim. It noted that the evidence was insufficient to establish the specific event or events that he was claiming. OWCP noted that appellant, on his claim form, identified his injury as occurring on February 19, 2015, but that Dr. Good saw him on February 9, 2015 for an injury to his ankle while Dr. Caristo indicated that he had pain in his foot and ankle for over six months before the reported injury. It explained that it appeared that he had a preexisting injury.

On May 20, 2015 counsel requested a telephonic hearing, which was held before an OWCP hearing representative on January 12, 2016. During the hearing, appellant explained that he recalled stepping on a brick at work on February 19, 2015, while being with his supervisor, and he did not want to report it because he was new on the job and he thought it was just a bad sprain. He explained that his reason for not going to the hospital was that he would see if it would get better. On questioning by the hearing representative with regard to the February 9, 2015 date of injury reported by doctors on February 9, 2015, appellant indicated that he was unsure of the date. He was informed that there were inconsistencies regarding his date of injury.

Dr. Caristo continued to treat appellant and submit reports. He released appellant to full duty with no restrictions on May 22, 2015. OWCP also received copies of previously submitted reports.

In a March 22, 2016 decision, an OWCP hearing representative affirmed the May 12, 2015 decision. She found that the evidence did not refer to any injury occurring on February 19, 2015. The hearing representative explained that the medical evidence referred to pain beginning from three days to a week prior to February 9, 2015. However, appellant did not report the injury until March 13, 2015. The hearing representative also noted that, while appellant reiterated at the hearing that the incident occurred on February 19, 2015 he had no explanation for the medical evidence dated before that. She found that because of the inconsistencies in the medical and factual evidence appellant did not meet his burden of proof to establish an injury as claimed.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA[5] and that an injury was sustained in the performance of duty.[6] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[8] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[9] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[10]

An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[11] A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[12] 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 statements in determining whether a *prima facie* case has been established.[13] Although 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,[14] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[15]

[5] *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (August 2012).

[9] *John J. Carlone*, 41 ECAB 354 (1989).

[10] *See id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(ee).

[11] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[12] *Id*. at 255-56.

[13] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[14] *Id.*

[15] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

ANALYSIS

The Board finds that appellant has not established fact of injury due to inconsistencies in the evidence that cast serious doubt as to whether the specific traumatic incident occurred at the time, place, and in the manner alleged on February 19, 2015.

The Board finds that appellant's statements are insufficient to establish the claimed incident due to the conflicting evidence regarding when the claimed injury occurred. On the March 13, 2015 traumatic injury claim form, appellant indicated that on February 19, 2015 he injured his left ankle when he stepped on a snow-covered block. However, the employing establishment controverted the claim and Ms. Smalls advised that she noticed that appellant had been walking with a limp prior to that date. Ms. Smalls explained that on February 21, 2015 she walked with him and she suggested that his medical history should be reviewed. She also indicated that appellant drove a car with a handicap permit and it was possible that appellant had a prior injury before he came to the employing establishment. Ms. Smalls further noted in a March 19, 2015 letter that she had walked his route on February 2, 2015 and noticed that at that time he was walking with a limp then.

On April 27, 2015 appellant explained that he believed he had a bad sprain and reported it to his supervisor, who gave him a week off for rest. He indicated there was no improvement with a week off and he sought treatment which revealed a fracture. Appellant explained that he had no other injuries and that he reported that he twisted his ankle two weeks prior on the job, noting that he stepped on a snow covered brick and his ankle twisted. He was questioned during the January 12, 2016 hearing and explained that he recalled stepping on a brick at work on February 19, 2015, while being with his supervisor, and he did not want to report it because he was new on the job and he thought it was just a bad sprain. Appellant reiterated that he did not seek medical treatment sooner because he wanted to see if it would improve. However, when OWCP's hearing representative questioned him with regard the February 9, 2015 date of injury reported by doctors on February 9, 2015, appellant indicated that he was unsure of the date. The Board notes that the contemporaneous medical evidence suggests that appellant had an injury before February 9, 2015. For example on February 9, 2015 appellant was examined by Dr. Good, who noted that appellant "stepped in hole in yard one week ago" and continued to have left ankle pain. In a February 26, 2015 report, Dr. Caristo noted that appellant had presented with left ankle pain for about one month. The Board notes that these statements and supporting documents show inconsistencies regarding the date of injury and with regard to appellant's account of how the claimed injury occurred and events occurring near the time of the claimed injury.

The circumstances of this case, therefore, cast serious doubt upon the occurrence of a February 19, 2015 incident in the manner as described by appellant. Given the inconsistencies in the evidence regarding how he sustained his injury, the Board finds that there is insufficient evidence of record to establish that appellant sustained a traumatic incident in the performance of duty on February 19, 2015, as alleged.[16] As appellant has not established that the claimed

[16] *See Matthew B. Copeland*, 6 ECAB 398, 399 (1953) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty); *see also Mary Joan Coppolino*, 43 ECAB 988 (1992).

incident occurred, it is not necessary to consider the medical evidence with respect to causal relationship.[17]

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 this appellant did not meet his burden of proof to establish that he sustained a traumatic injury in the performance of duty on February 19, 2015.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *S.P.*, 59 ECAB 184 (2007) (where a claimant did not establish an employment incident alleged to have caused his or her injury, it was not necessary to consider any medical evidence).