United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 11-535**
	)	**Issued: October 5, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Louisville, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 30, 2010 appellant, through her attorney, filed a timely appeal from a November 9, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 that her right hip condition is causally related to a June 8, 2009 employment incident, as alleged.

FACTUAL HISTORY

On February 17, 2010 appellant, then a 44-year-old clerk, filed a traumatic injury (Form CA-1) alleging that on June 8, 2009 she sustained a right hip injury while pushing a cart to collect dispatch mail in the performance of duty. She indicated that her right hip joint

[1] 5 U.S.C. § 8101 *et seq.*

"spammed" and her right leg gave out which caused her to twist her right foot and injure her right hip as a result.

In a letter dated February 19, 2010, the employing establishment noted that appellant's injury was not reported on a Form CA-1 within 30 days and she never filed an accident report for any injury regarding her hip or leg. It stated that she reported hurting her leg while working in her garden at home and not at work.

By letter dated March 5, 2010, OWCP notified appellant that the evidence submitted was insufficient to support her claim and requested additional factual and medical information. It allotted her 30 days to submit evidence and respond to its inquiries.

In a March 1, 2010 medical report, Dr. Jeffrey B. Selby, a Board-certified orthopedic surgeon, diagnosed right hip pain.

In a March 3, 2010 letter, appellant notified her supervisor that she needed six more weeks of physical therapy. She attached a release to return work at a seated-duty position only and asked her supervisor if there was one available.

On March 5, 2010 the employing establishment controverted appellant's claim based on performance of duty, fact of injury and causal relationship. It reported that she made a statement that she injured her hip while working in her garden and that the injury was a nonoccupational, preexisting physical condition.

Appellant submitted a work excuse note for the period June 8 to 10, 2009 and an emergency room medical report advising that she was seen for right hip pain that she reported had been sore for one week prior to June 8, 2009, which popped after she turned her foot that morning.

In a March 3, 2010 narrative statement, appellant reported that she started having pain in her right groin area in late May 2009 and walked with a limp. She alleged that on June 8, 2009 at approximately 9:00 a.m. she went outside to collect the dispatch mail and upon entering the building at the rear entrance, her foot turned and she heard a popping sound. Appellant continued working but the pain increased and she notified her supervisor. She sought medical attention and then returned to work with crutches and performed her regular duties.

On November 6, 2009 appellant was prescribed an adjustable aluminum cane.

Appellant submitted a work excuse note for December 9, 2009 to January 11, 2010. Bill Adkisson, a physician's assistant, provided a work excuse note dated January 29, 2010 for the next four weeks.

On March 22, 2010 appellant submitted a response to the employing establishment's controversion of her claim. She stated that she became stuck in the mud in her garden the day before the June 8, 2009 employment incident, but came to work without a limp and worked until her foot turned and something in her leg popped. Appellant noted that her right hip problem was going on well before the garden incident and she did not mention the garden because she had no

idea that something serious had happened. She alleged that getting stuck in the garden could not have caused the damage that would be found in a hip arthroscopy in January 2010.

In a March 24, 2010 statement, the employing establishment reiterated that appellant's injury was not employment related. It noted her acknowledgement of having a medical issue in May 2009. On March 25, 2010 the employing establishment submitted witness statements that appellant stated that she was injured while working in her garden at home.

In a March 18, 2010 statement, appellant noted that she was not aware that she had to give written notice of the injury; rather, she verbally reported it and left work for medical attention. She had been gathering outside dispatch mail which involved squatting, lifting and turning to put it in a cart. Upon entering the building, appellant's foot rolled and her right leg gave out. She was in the back of the building alone when her leg spasmed and she experienced extreme pain in the groin and her leg began to draw. Appellant reported that she sustained another right hip injury on November 5, 2009.

By decision dated April 9, 2010, OWCP denied appellant's claim finding that the factual and medical evidence submitted was insufficient to establish fact of injury. It found that she failed to establish that the June 8, 2009 employment incident occurred as alleged. Further, there was insufficient medical evidence that appellant's right hip condition was caused by the claimed incident.

On April 15, 2010 appellant, through her attorney, requested an oral hearing and submitted additional evidence.

In a December 9, 2009 report, Dr. Mathew A. Nicholls, a Board-certified orthopedic surgeon, diagnosed right hip pain and dysfunction after rotating/traction injury. He obtained a history of right groin pain since the past summer when appellant was working in her garden. Appellant's foot became stuck in the mud and had a suctioning type effect as she lifted and twisted. Given the mechanism of injury, her intermittent symptoms of pain, localized to the hip joint itself, combined with magnetic resonance imaging (MRI) scan evidence of joint effusion and a negative bone scan, his concern was of a labral tear.

In a December 16, 2009 progress report, Dr. Nicholls diagnosed right hip labral tear and persistent pain. Due to the manner in which the injury occurred, appellant's persistent complaints of groin pain with feeling like there was something in the hip joint, as well as lack of significant arthritis, evidence of a labral tear on MRI scan, Dr. Nicholls opined that she would benefit from a right hip arthroscopy. Dr. Nicholls advised her to stay off work.

In a December 21, 2009 report, Dr. Selby diagnosed right hip labral tear and possible right femoral hernia. He reported that appellant was in her garden when her right foot got caught in mud and as she turned to walk away her foot got stuck and her hip turned, resulting in pain in the anterior hip area. Dr. Selby stated that it was fairly minor pain at the time, but intensified over the next few days when she tried to return to work.

In a January 4, 2010 report, Dr. John E. Merryman, III, a Board-certified general surgeon, indicated that upon examination of the right groin in both the standing and supine positions he

felt no mass or bulge or impulse even with Valsalva and no tenderness. He indicated that it was a normal examination with no signs of hernia.

In a January 11, 2010 report, Dr. Selby indicated that appellant was status post evaluation for right hip labral surgery. In a January 19, 2010 operative report, he reported that he performed right hip diagnostic arthroscopy with labral debridement and femoral acetabular chondroplasty. Dr. Selby indicated that the preoperative diagnosis was right hip pain and the postoperative diagnosis was right hip femoral acetabular chondromalacia with posterior labral degenerative tear. In a January 29, 2010 progress report, he indicated that appellant had no pain with log-rolling of her hip and had full pain-free range of motion after surgery.

Appellant submitted a physical therapy note dated February 2, 2010.

In a March 1, 2010 medical report, Dr. Selby indicated that appellant had mild pain with internal rotation of the hip. Appellant had hip flexion to 120 degrees, external rotation to 45 degrees and internal rotation to 30 degrees. Dr. Selby restricted her from heavy lifting and twisting at work for six weeks.

Appellant submitted a work excuse note restricting her to a seated position with no twisting or lifting heavy loads for six weeks.

In a March 26, 2010 medical report by Mr. Adkisson, appellant reported a significant amount of pain. Upon clinical examination, she had no pain with log-rolling of her hip, had no calf tenderness and her Homan's test was negative. Appellant walked with a limp without any ambulatory aids. Mr. Adkisson opined that infection was not a source of her pain and recommended two weeks off from physical therapy before slowly starting it again.

In an April 4, 2010 attending physician's report, Dr. Selby indicated that appellant's date of injury was June 8, 2009. He diagnosed right acetabular chondromalacia with labral tear. Dr. Selby opined that the condition was caused or aggravated by the employment incident.

In two April 12, 2010 radiological reports, Dr. Todd Meister, a Board-certified radiologist, noted negative pelvis and right hip x-rays.

On July 22, 2010 a telephonic hearing was held before an OWCP hearing representative. Appellant testified that the garden incident did not injure her right hip and occurred at the end of June 2009 after the employment incident on June 8, 2009. She stated that her hip had already been hurting from the employment incident at the time of the gardening incident. After the employment incident, appellant returned to work on June 11, 2009 and continued working until November 5, 2009 when she sustained another injury. Dr. Selby performed an arthroscopic procedure on January 19, 2010 and a total right hip replacement on May 13, 2010. The hearing representative granted appellant's request to hold the case open for 30 days for submission of additional medical evidence.

In an August 11, 2010 letter, the employing establishment disputed appellant's injury and how it occurred. In an August 10, 2010 statement, appellant's supervisor noted that appellant reported for duty on June 8, 2010 and was limping so badly she could barely walk across the

floor without stopping. When asked what happened, appellant stated that she hurt her leg while working in her garden and that her leg had been painful for some time prior to June 8, 2009.

In an August 16, 2010 medical report, Dr. Selby advised that he had cared for appellant for over a year. Appellant continued to have severe pain after arthroscopy and the diagnosed chondromalacia and arthritis required a total hip arthroplasty. While it was possible that she had arthritis preexisting to the injury, it was more likely than not that the injury exacerbated the preexisting arthritis. In Dr. Selby's opinion, appellant was at a young age to develop arthritis so rapidly and the labral tear was certainly a catalyst.

In a September 15, 2010 radiological report, Dr. John N. Simmons, a Board-certified radiologist, who reported that a right hip x-ray showed the right hip arthroplasty hardware in the expected position without any evidence of hardware failure or loosening.

In a September 15, 2010 progress report, Dr. Selby diagnosed status post right total hip arthroplasty and sciatic pain. He reported that appellant returned to work on August 21, 2010. Appellant understood that she would have a primarily sitting job. However, she was doing a lot of bending and lifting which caused her pain. Dr. Selby opined that the posterior pain with radiation was coming from appellant's sciatic nerve, which was likely irritated with the bending that she was doing, which could also be exhibited as groin pain as well. He provided her a work excuse note for two weeks and released her to return with the following restrictions: no lifting greater than 10 pounds.

By decision dated November 9, 2010, an OWCP hearing representative affirmed the April 9, 2010 decision finding that the evidence was insufficient to establish that the June 8, 2009 incident occurred as alleged. She explained that appellant's delay in filing the claim, together with the inconsistent history in the emergency room report, the fact that she returned to work following the emergency room visit and the nonwork-related injury lead her to the ultimate conclusion.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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, that an injury[3] 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.[4]

[2] 5 U.S.C. §§ 8101-8193.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388 (2008). *See Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[6] 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 doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.[7] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, 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 and persuasive evidence.[8]

ANALYSIS

The Board finds that appellant did not meet her burden of proof in establishing that on June 8, 2009 she sustained a right hip injury while pushing a cart to collect dispatch mail. As noted above, the first element of fact of injury requires that appellant submit evidence establishing that an incident occurred at the time, place and in the manner alleged. In a March 18, 2010 narrative statement, appellant reported that she was alone in the back of the building when the injury occurred. As she was alone at the time the incident occurred and there were no eyewitnesses, her statement alleging that an injury occurred at a given time and in a given manner is of great probative value.[9] However, the Board finds that there are such inconsistencies in the evidence to cast doubt upon the validity of appellant's claim.

There are unresolved discrepancies regarding the order of employment and nonemployment incidents and appellant's medical condition at the time of the alleged incident. On March 3, 2010 appellant reported that she started having pain in her right groin area in late

[5] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[6] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[7] *See R.T.* Docket No. 08-408 (issued December 16, 2008).

[8] *See Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

[9] *Id.*

May 2009 and walked with a limp. On March 22, 2010 she stated that she got stuck in the mud in her garden the day before the June 8, 2009 employment incident, but came to work without a limp. In a July 22, 2010 oral hearing, appellant testified that the garden incident occurred at the end of June 2009, after the employment incident on June 8, 2009. On August 10, 2010 appellant's supervisor stated that appellant reported for duty on June 8, 2010 and was limping so badly she could barely walk across the floor without stopping. The supervisor's statement and appellant's own statements are inconsistent with the surrounding facts and circumstances.[10] Appellant has not reconciled these contradictions in the record.

Moreover, appellant did not file a claim until February 17, 2010, more than eight months after the June 8, 2009 incident, which constitutes late notification of injury. She did visit an emergency room to seek medical attention for right hip pain on June 8, 2009, but the medical report indicated that she had been sore for one week prior and then she returned to work with crutches and performed her regular duties.

The evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant's claim. Accordingly, the Board finds that she has not met her burden of proof in establishing that she experienced an employment-related incident at the time, place and in the manner alleged.[11]

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 submitted sufficient evidence to establish that the June 8, 2009 employment incident occurred as alleged.

[10] *Cf. S.A.*, Docket No. 10-1786 (issued May 4, 2011) (where the Board found that appellant established that the incident occurred as alleged, as there were no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident).

[11] Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. *See Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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