United States Department of Labor
Employees' Compensation Appeals Board

K.J., Appellant	)	
	)	**Docket No. 12-232**
and	)	**Issued: May 23, 2012**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Conroe, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 22, 2011 appellant filed a timely appeal from a September 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant sustained an injury on November 21, 2010 in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant submitted new medical evidence on appeal but the Board has no jurisdiction to review evidence for the first time on appeal.[2] He may submit the new evidence and any new argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

FACTUAL HISTORY

On August 4, 2011 appellant, then a 57-year-old rural carrier, filed a traumatic injury claim alleging that on November 21, 2010 he sprained his left ankle in the performance of duty. He related I had delivered a certified letter to a customer and was returning to my truck when I thought the customer said something to me. Appellant turned to see what the customer said and he was talking to someone in the house. I stepped off of the deck onto a wooden sidewalk and rolled my left ankle. The employing establishment controverted the claim, stating that appellant alleged that he told his supervisor "on the accident date but the supervisor does not recall him telling him anything about the accident."

By letter dated August 19, 2011, OWCP requested additional factual and medical evidence, including a detailed description of how his injury occurred and a rationalized medical report explaining the relationship between any diagnosed condition and the alleged work incident.

On November 10, 2010 Dr. Andrew P. Kant, a Board-certified orthopedic surgeon, evaluated appellant for left ankle pain. He stated, "[Appellant] reports that his back gave out yesterday, and then the left ankle." Dr. Kant diagnosed an ankle sprain.[3]

In a report dated June 2, 2011, Dr. David Navid, an osteopath, related that appellant "apparently initially injured his ankle while slipping off his porch back on November 10, 2010. Ever since then, he has been having problems with his ankle."[4] Dr. Navid diagnosed posterior tibial tendinitis of the left ankle, an osseous contusion of the subtalar joint or possible early degenerative arthritis and early Achilles' insertional tendinopathy of the left ankle.[5]

In a statement dated September 3, 2011, appellant related that he advised his supervisor, Sonny McNatt, of the injury he received "leaving a delivery of a certified letter" on the date of the incident. He told Mr. McNatt that he was going to see the doctor but could not get an appointment until the next day. Appellant's ankle did not improve. When he told his supervisor about his continued ankle problem a few weeks after the incident his supervisor told him that it was too late to file for workers' compensation. A union steward later advised appellant that he could still file a claim.

By decision dated September 26, 2011, OWCP denied appellant's claim after finding that he had not established that he sustained an injury as alleged. It determined that the evidence

[3] In a report signed November 16, 2010, Dr. Kant placed appellant in a brace. On March 2, 2011 he noted that appellant's ankle had not improved. Dr. Kant diagnosed peroneal tenosynovitis and recommended diagnostic studies. In a progress report dated May 25, 2011, he diagnosed minimal tenosynovitis of the posterior tendon.

[4] An August 19, 2011 magnetic resonance imaging (MRI) scan study of the left ankle revealed an area of "subcortical marrow edema and subcortical cystic changes in the calcaneum at the medial aspect of the posterior subtalar joint" most likely due to degenerative changes or old trauma and an exostosis in the distal fibula.

[5] On September 1, 2011 Dr. Navid diagnosed a traumatic cyst of the left foot at the subtalar joint and found that appellant could resume work on August 31, 2011 without restrictions. In a progress report of the same date, he recommended further diagnostic studies in six months.

contained inconsistencies sufficient to cast doubt that the work incident occurred at the time, place and in the manner alleged.

On appeal appellant argues that he injured his ankle delivering a certified letter. When he stepped off the customer's porch he turned his ankle and strained his back.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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 filed within the 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.[7] 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.[8]

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[9] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[10] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[11]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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 which is alleged to have occurred.[12] 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[13] An employee

[6] *Supra* note 1.

[7] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[8] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[9] *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

[10] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[11] *Id.*

[12] *See Louise F. Garnett*, 47 ECAB 639 (1996).

[13] *See Betty J. Smith*, 54 ECAB 174 (2002).

has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[14] 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.[15] However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[16]

ANALYSIS

On August 4, 2011 appellant filed a traumatic injury claim alleging that on November 21, 2010 he sprained his ankle when he stepped off a customer's deck after delivering a letter. OWCP denied his claim finding that he did not demonstrate that the specific event occurred at the time, place and in the manner described.

The initial question presented is whether appellant has established that the November 21, 2010 employment incident occurred as alleged.

The Board finds that appellant has not established the occurrence of the alleged November 21, 2010 work incident. Appellant did not file a claim for an injury until almost nine months after the incident. While he maintained that he advised his supervisor on the date of the incident, his supervisor did not remember being informed of an accident on that date. The record contains medical reports but none of the reports provide November 21, 2010 as the date of injury. Additionally, the medical evidence does not contain a history of injury consistent with appellant's description of the alleged work event. In a report dated November 10, 2010, which predates the date of the alleged incident, Dr. Kant indicated that he related a history of his back and then his ankle "giving out" the day before. On June 2, 2011 Dr. Navid noted that appellant hurt his ankle when he slipped off his porch on November 10, 2010. These inconsistencies in the history of injury cast serious doubt on the validity of his claim.[17] As appellant failed to provide evidence sufficient to establish that the November 21, 2010 incident occurred at the time, place and in the manner alleged, he has not met his burden of proof.[18]

On appeal appellant maintains that he sustained an injury when he stepped off a customer's porch. As discussed, however, he did not submit any evidence corroborating his allegation.

[14] *Id*.

[15] *Linda S. Christian*, 46 ECAB 598 (1995).

[16] *Gregory J. Reser*, 57 ECAB 277 (2005).

[17] *See S.P.*, 59 ECAB 184 (2007); *Michael A. Danowski*, 34 ECAB 706 (1983).

[18] *See D.A.*, Docket No. 10-2112 (issued May 11, 2011).

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on November 21, 2010 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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