United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 12-892**
	)	**Issued: January 14, 2013**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2012 appellant filed a timely appeal from the February 21, 2012 Office of Workers' Compensation Programs' (OWCP) decision which found that he did not sustain an injury in the performance of duty. 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on July 13, 2011.

FACTUAL HISTORY

On July 14, 2011 appellant, then a 37-year-old transitional employee, filed a traumatic injury claim alleging that on July 13, 2011 he stepped in a hole on a lawn while delivering mail

[1] 5 U.S.C. § 8101 *et seq.*

and hurt his right knee. He stopped work on July 14, 2011. The employing establishment controverted the claim. It noted that appellant changed his story about what happened and when the incident happened.

In e-mail correspondence dated July 15, 2011, Pamela Davis, the officer in charge, controverted the claim as appellant reported to work on July 14, 2011 with a noticeable limp. She asked him how he was doing and he responded, "Oh, my knee hurts but other than that, I'm ok." Appellant alleged that he stepped in a hole covered by grass. Ms. Davis explained that an onsite investigation was conducted by Tamara Jones and Peggy Moeller, his supervisors, but they" could not see how this was possible." She stated that it appeared "the carrier may have jumped from the retaining wall on to the driveway and according to the supervisor there was no reason for the employee to be on the grass if he took the obvious short cut." Ms. Davis stated that pictures were taken of the alleged accident location. She explained that appellant had been issued a notice of removal for failure to maintain a regular work schedule. When questioned, appellant gave conflicting information about when the accident occurred. He told one supervisor that it happened on July 14, 2011 but told another supervisor that it occurred the day prior but he aggravated it on July 14, 2011. Ms. Davis stated that "[i]f the scenario is accurate, the employee failed to report the accident timely and we can[not] be assured this happened at work at all." She noted that appellant worked as a disc jockey (DJ) on the weekends and that she had statements from Ms. Jones and Ms. Moeller.

In a July 20, 2011 controversion letter, the employing establishment noted that on July 13, 2011 appellant alleged that he sustained an injury to his right knee when he stepped in a hole; however, he gave conflicting details to management. Ms. Jones, his supervisor, noted that on July 14, 2011 appellant called to report an injury but his traumatic injury claim listed the date of injury as July 13, 2011. She noted that he was very familiar with his route. Ms. Davis, another supervisor, indicated that she greeted appellant on July 14, 2011 and noticed that he had a limp. Appellant informed her that "Oh my knee hurts, but other than that, I'm OK." The employing establishment was uncertain that the alleged injury happened while at work. On May 20, 2011 appellant had been issued a notice of removal for failure to maintain a regular work schedule. The employing establishment advised that he had a second job as a DJ on weekends. July 14, 2011 statements from Ms. Jones and Ms. Davis accompanied the controversion.

In reports dated July 14, 2011, Dr. Terry Hoehne, Board-certified in family medicine, indicated that appellant stepped into a hole and sustained a twisting injury to the right leg. He diagnosed a right distal femur fracture.

In a July 15, 2011 report, Dr. Matthew P. Melander, an osteopath, Board-certified in sports medicine, stated that appellant reported that he stepped into a hole while walking across a yard on his route. Appellant related that "his body went to the right, felt a buckling and small pop in his knee with what sounds like a valgus moment." Dr. Melander advised that the injury occurred on July 13, 2011 and appellant was seen and evaluated by a physiatrist. He diagnosed an anterior cruciate ligament (ACL) tear of the right knee and medial collateral ligament sprain of the right knee. A July 15, 2011 physical capability from Dr. Melander advised that appellant could return to work with restrictions on July 15, 2011. In a July 28, 2011 attending physician's report, Dr. Melander diagnosed right knee ACL tear and medial collateral ligament sprain of the

right knee. He checked a box "yes" on the form report indicating that appellant's condition was employment related.

By letter dated August 1, 2011, OWCP advised appellant that additional factual and medical evidence was needed. It noted that the employing establishment controverted his claim as he provided varying accounts of how he was injured.

In an August 10, 2011 statement, appellant identified the street address where he was delivering mail on July 13, 2011. At approximately 11:30 a.m., he was walking toward the next address and stepped into a hole approximately 6" by 6" in size. Appellant fell to his right, his knee went to the left and he felt a small pop on the right side of his right knee. At that point, his knee was slightly swollen and when he stood, he felt pain in his right knee. Appellant looked at the hole which was barely noticeable because the grass was level with the rest of the yard. He stated that the incident happened on July 13, 2011 and that he did not initially report the incident due to the fact that he did not realize the nature of his injury. Appellant finished his route that day and later that night put ice on his knee to keep the swelling down. The next morning, he woke up to pain and continued icing his knee. When he reported to work on July 14, 2011, appellant walked with a noticeable limp and was greeted by Ms. Davis, who asked him how he was doing and he responded that his knee was painful and other than that "he was okay (meaning my health was good)." He also noted that other employees noticed his limp. Despite being in pain, appellant commenced work delivering mail, but his knee pain increased and he needed medical attention. At approximately 2:40 p.m., he spoke to Ms. Jones and informed her that he had fallen when he stepped into a hole and hurt his knee. Appellant requested medical attention. Ms. Jones advised him that he needed to return to the employing establishment and then seek medical attention. Upon his return, appellant was met by Ms. Jones and Ms. Moeller. He filled out paperwork and drove himself to the urgent care center.

By decision dated August 31, 2011, OWCP denied appellant's claim on the grounds that he did not establish a traumatic incident as alleged. It found that his actions following the claimed incident were inconsistent.

In reports dated August 26, 2011, Dr. Melander noted that appellant was seen for follow up. He noted that the right knee swelling had decreased but he still had posterior medial joint line tenderness. Dr. Melander reviewed diagnostic tests and noted that they revealed an undersurface tear of the posterior horn of the medial meniscus. He diagnosed a medial meniscal tear of the right knee.

On February 13, 2012 appellant requested reconsideration.[2] He reiterated that his injury occurred on July 13, 2011 while performing his job duties. Appellant noted that he had limited rights as a transitional employee, and it was easy for the employing establishment to terminate him. He believed that the employing establishment was intent on "firing" him and needed a reason. Appellant initially believed his injury was not serious and pressed on with his duties to see if the soreness would go away. On July 14, 2011 he was only able to complete half of his route before the pain caused him to seek medical attention. Appellant telephoned Ms. Jones and

[2] On October 1, 2011 appellant requested a hearing and OWCP denied the request as the request was not timely filed. He did not appeal this decision.

told her that he had fallen in a hole and hurt his knee. He noted that she did not ask him when he did it. Appellant explained that Ms. Jones only assumed that he injured himself immediately before the telephone call was made. He explained that he never told her that he "jacked up" his ankle and exclaimed "I have no idea why she claimed that I did." Appellant noted that the only reason he waited was that he initially did not believe his injury was serious. He also indicated that he was afraid of being terminated from his job as he had missed a considerable amount of time due to a chronic kidney condition and his supervisors were already unhappy with him.

By decision dated February 21, 2012, OWCP denied modification of the August 31, 2011 decision.

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[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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 or she actually experienced the employment incident at the time, place and in the manner alleged.[6] 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.[7]

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 or her subsequent course of action.[8] 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.[9] Such circumstances as late notification of injury, lack of confirmation of injury,

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

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

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

[6] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[7] *See John J. Carlone*, 41 ECAB 354 (1989). For a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(ee).

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

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

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.[10] 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,[11] 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.[12]

ANALYSIS

The Board finds that this case is not in posture for decision. Appellant alleged that on July 13, 2011 he stepped in a hole on a front lawn while delivering mail and sustained a twist or strain to his right knee. OWCP found that there was insufficient evidence that the incident occurred as alleged. The employing establishment generally asserted that appellant provided varying accounts of the incident and did not promptly report injury. The Board notes that the employing establishment provided e-mail correspondence dated July 15, 2011 from Ms. Davis controverting that the incident occurred as alleged. Ms. Davis stated that an onsite investigation was conducted by Supervisors Jones and Moeller who determined that the incident as described by appellant was not possible. She stated that she had statements from Ms. Jones and Ms. Moeller. While the record contains a statement from Ms. Jones, it does not pertain to the onsite investigation and there are no statements of record from Ms. Moeller. The Board notes that OWCP should have requested a copy of any investigative reports or statements that were provided to the investigation, including Ms. Moeller's statement and any other statements from Ms. Jones. As Ms. Davis' July 15, 2011 correspondence indicates that there is additional investigative material and statements relevant to the claimed incident that are not a part of the record, the Board is presently unable to make fully informed adjudication.

The case will be remanded to OWCP for further development of the evidence. Following this and such other development as it deems necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

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

[11] *Id.*

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

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision.

Issued: January 14, 2013
Washington, DC

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

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

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