United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 13-244**
	)	**Issued: May 13, 2013**
DEPARTMENT OF ENERGY, Oak Ridge, TN, 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 November 14, 2012 appellant, through her attorney, filed a timely appeal from an October 15, 2012 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 the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a right leg injury in the performance of duty.

FACTUAL HISTORY

On June 26, 2011 appellant, then a 62-year-old accountant, filed a traumatic injury claim alleging that, on June 22, 2011 at 7:35 a.m., she injured her right leg while walking into work. She asserted that she "was walking into work, stepped down to the side walk & slipped & turned

[1] 5 U.S.C. §§ 8101-8193.

leg & heard something pop in my right leg – went into building & worked." Appellant stopped work on June 22, 2011 and did not return. Hughie A. Thomas, her supervisor, stated that he first had notice of the claimed injury on June 27, 2011. Appellant did not mention a cause of injury when she notified him of a physician's appointment.

In an undated statement, Yvonne Dias-Bowie, an employee health nurse, noted that at 4:00 p.m. on June 22, 2011 appellant telephoned the employee health station to report an injury. Appellant stated:

> "[I]t was about 7:35 a.m. when I pulled into work, I got out of my car and I was starting to walk down to the sidewalk and I hurt, I pulled my knee. I heard something pop. I went on into work and I sat there until about 12 something and I made a doctor's appointment cause I have been crying and it was swelling.... I got back from the doctor ... but they say I fractured my knee or my leg, said I have a broke leg, it's a fracture.... they don't want me to come back to work for six weeks." The nurse asked if appellant tripped or if anything happened to cause her knee to pop. Appellant stated that "no, when I started walking down the side walk and when I put pressure on it, walking down it popped. I just noticed it popped and I didn't think nothing about it."

Ms. Dias-Bowie asked appellant if she tripped and appellant stated that she did not trip or twist but that she was walking normally. She further inquired if appellant twisted her leg and appellant replied "Well, the doctor said the way it looked I had probably twisted it a little bit when I started to come down off that knoll against the side walk."

By letter dated July 14, 2011, OWCP advised appellant of the factual and medical evidence needed to establish her claim and requested that she submit such evidence.

A July 14, 2011 conference memorandum advised that an OWCP claims examiner telephoned Melanie Kent, an employing establishment human resources specialist, to determine if appellant was in the performance of duty on June 22, 2011. The claims examiner requested clarification as to the location where the claimed injury occurred. Ms. Kent advised that, at the time of the claimed injury, appellant was on the premises owned and operated or controlled by the employer. The parking area had two separate levels and there was a short grass area between the parking lot and building and a designated walking area. The grassy area was not the designated walking area.

Appellant submitted a June 21, 2011 return to work status report from a physician whose signature is illegible. It diagnosed a fracture of the tibial plateau and noted that she may not return to work for six weeks.

In a July 19, 2011 letter, Patricia Howse-Smith, director of the employer's human resources division, controverted the claim. She noted that the initial Form CA-1 filed by appellant stated that she "was walking into work, stepped down to sidewalk and heard something pop in my leg – went into building and worked." Later that afternoon, appellant amended her CA-1 form noting "was walking into work, stepped down to sidewalk and slipped and turned leg and heard something pop in my right leg – went into building and worked." She further noted

that the June 21, 2011 physician's statement which diagnosed a tibial fracture was dated the day before the alleged incident. Ms. Howse-Smith stated that in a conversation with the employing establishment nurse, appellant reported that she was walking across the grass or knoll and was injured when she stepped down to the sidewalk. She asserted that appellant's statements were inconsistent and there was no clear evidence to support that appellant slipped as claimed.

In a statement dated July 19, 2011, appellant indicated that on June 22, 2011 she drove to the employing establishment parking lot, got out of her car and was carrying things in both hands. She stepped down onto the grass and slipped when she heard a pop and felt pain in her right leg. Appellant continued to step across the sidewalk to the next parking area. On June 22, 2011 she informed her supervisor that she injured her leg and was seeking medical attention. Appellant reported having prior arthroscopic surgery on her right knee in 1997. At the time of the injury, she was in the employing establishment parking lot, crossing the lot to perform her regular assigned duties when she slipped and broke her right leg. Appellant did not deviate from the walking area as there was no designated walking area.

Appellant submitted a June 22, 2011 report from a physician's assistant who noted that she had ongoing problems with her right knee. She reported walking across a parking lot and misstepped and felt a pop in her knee with immediate pain. Appellant was diagnosed with fracture of the tibial plateau right knee and osteoarthritis of the bilateral knees. In a July 5, 2011 report, Dr. John J. Crawford, an orthopedic surgeon, noted that she injured her right tibia approximately two weeks prior when she slipped while walking down a grassy embankment. Appellant began having shortness of breath and was also diagnosed with acute pulmonary embolus. On July 13, 2011 she was treated by Dr. Mathew A. Rappe, an orthopedic surgeon, who noted that on June 22, 2011 she was diagnosed with degenerative joint disease and lateral tibial plateau fracture. A July 5, 2011 x-ray of the right knee revealed severe arthritis changes with mild cortical depression at the lateral tibial plateau, possibly acute or chronic.

In a decision dated August 17, 2011, OWCP denied appellant's claim finding that the evidence was not sufficient to establish that the employment incident occurred as alleged on June 22, 2011.

On September 12, 2011 appellant requested a telephone hearing that was held on August 17, 2012. She stated that on June 22, 2011 she got out of her vehicle in the employee parking lot and stepped across a curb on to the grass to step down to the sidewalk. Appellant reported slipping and turned to catch herself. She slipped and twisted around to the right and caught herself with a container of tea in her right hand which kept her from falling down. Appellant asserted that she did not amend the CA-1 form; rather, she was unsure how specific her description needed to be and the form provided limited space. She noted that the medical records from her orthopedic surgeon also contained a typographical error and that the date of treatment was June 22, 2011, not June 21, 2011 as listed. Appellant submitted hospital admission records dated July 4 to 6, 2011. She was diagnosed with acute pulmonary embolism, tibia/fibular fracture and hypertension. Appellant also submitted physical therapy notes dated August 25, 2011. She reported sliding down a grassy knoll and felt a pop in her lower leg. In a return to work status report dated August 31, 2011, Dr. Rappe diagnosed tibial fracture and returned her to sedentary work on September 12, 2011. In a September 12, 2012 report, he diagnosed degenerative joint disease of the right knee. Appellant reported a history of a lateral

tibial plateau fracture that occurred when she got out of her car at work and twisted her knee when she stepped over a piece of concrete in the parking lot. Dr. Rappe noted that she was out of work from June 22 to September 12, 2011.

In a decision dated October 15, 2012, an OWCP hearing representative affirmed the August 17, 2011 decision, finding that appellant submitted inconsistent evidence to establish that the claimed work incident occurred, as alleged.

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 filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury."[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[3]

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.[4] In some traumatic injury cases this component can be established by an employee's uncontroverted statement on the Form CA-1.[5] 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 her subsequent course of action.[6] 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.[7] 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.[8] Although an employee's

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[4] *Elaine Pendleton*, *supra* note 2.

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

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

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

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

statement alleging that, an injury occurred at a given time and in a given manner is of great probative valued and will stand unless refuted by strong or persuasive evidence,[9] 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.[10]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[11]

ANALYSIS

Appellant filed a claim on June 26, 2011 alleging that on June 22, 2011 she was walking into work, stepped down to the sidewalk and slipped, turned her right leg and heard something pop. The Board finds that there are such inconsistencies in the evidence which cast serious doubt upon the validity of the claim. The Board finds that the claimed employment incident did not occur, as alleged.

The Board notes that appellant submitted differing statements with regard to how her right knee injury occurred. Appellant initially stated on the CA-1 form that, on June 22, 2011, she was walking into work, stepped down to the sidewalk and slipped and turned her leg and heard something pop in her right leg. At 4:00 p.m. on June 22, 2011 she reported her injury to an employee health station nurse and stated that "it was about 7:35 a.m. when I pulled into work, I got out of my car and I was starting to walk down to the sidewalk and I hurt, I pulled my knee. I heard something pop." Appellant stated that she did not trip or twist but was walking normally. She stated: "...the doctor said the way it looked I had probably twisted it a little bit when I started to come down off that knoll against the side walk." In a July 19, 2011 statement, appellant indicated that on June 22, 2011 she drove to the employing establishment parking lot and got out her car while carrying items things in both hands. She stepped down to the grass and slipped and heard a pop and felt pain in her right leg. Appellant noted that she continued to step across the sidewalk to the next parking area walking to work. On August 17, 2012 however she testified at the oral hearing that on June 22, 2011 she was getting out of her vehicle in the employee parking lot and, for the first time, reported that she stepped across a curb on to the grass to step down to the sidewalk and slipped and turned and caught herself. Appellant noted slipping and twisting around to the right and caught herself with a container of tea in her right hand which kept her from falling down. Consequently, the circumstances of confirmation of the claimed incident and inconsistencies about the manner of how she was injured cast serious doubt upon the validity of the claim.

[9] *Robert A. Gregory*, 40 ECAB 478 (1989).

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

[11] *See Richard A. Weiss*, 47 ECAB 182 (1995); *John M. Tornello*, 35 ECAB 234 (1983).

The medical evidence also offers varying histories of injury. A June 22, 2011 report from a physician's assistant noted that appellant reported that in the morning she was walking across a parking lot and misstepped and felt a pop in her knee with immediate pain. In a July 5, 2011 report, Dr. Crawford noted that she injured her right tibia approximately two weeks prior when she slipped while walking down a grassy embankment. Likewise, a September 12, 2012 report from Dr. Rappe noted a history of a lateral tibial plateau fracture that occurred when appellant got out of her car at work and twisted her knee while she stepped over a piece of concrete in the parking lot. A June 21, 2011 return to work status report from a provider whose signature is illegible, diagnosed fracture of the tibial plateau and noted that appellant could not return to work for six weeks. This indicates that appellant had a fracture on the day before the claimed injury. Although she subsequently asserted that this was a typographical error, she did not submit any evidence from the healthcare provider to substantiate her assertion.

Additionally, there were no witnesses to the alleged injury and no contemporaneous statements from persons present at the employing establishment supporting that the incident occurred as alleged. While 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, the employee's statement must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. These notes do not relate a consistent history of injury.

The circumstances of confirmation of the claimed incident and inconsistencies about the manner in which the injury occurred cast serious doubt upon the validity of the claim. For these reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged. As appellant has not established that the June 22, 2011 incident occurred as alleged, it is not necessary for the Board to consider the medical evidence regarding causal relationship.[12] Consequently, she has not met her burden of proof in establishing her claim.

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 failed to establish that she sustained an injury on June 22, 2011 in the performance of duty, causally related to factors of her federal employment.

[12] *See S.P.*, 59 ECAB 184 (2007).

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2013
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