

**United States Department of Labor
Employees' Compensation Appeals Board**

M.L., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Alexandria, LA, Employer

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**Docket No. 14-524
Issued: May 21, 2014**

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 31, 2013 appellant, through her attorney, filed a timely appeal from a November 15, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 established an injury on July 25, 2011 in the performance of duty.

FACTUAL HISTORY

On April 23, 2012 appellant, a 76-year-old medical clerk, filed a claim for traumatic injury to her left hip, both knees and hands on July 25, 2011 when she tripped over a floor tile.

¹ 5 U.S.C. § 8101 *et seq.*

The employing establishment controverted the claim; the form contained a statement from appellant's supervisor, Amy Lesniewski, who asserted that her secretary had called one morning during the year prior and told her that appellant had fallen at home and broken her hip. Ms. Lesniewski also stated that appellant did not report or file a claim for the alleged injury within 30 days.

By letter dated May 9, 2012, OWCP advised appellant to submit additional factual and medical evidence in support of her claim. It asked that she submit the requested information in 30 days.

A July 26, 2011 hospital report received by OWCP on June 1, 2012 from Dr. Roberto Garcia, a specialist in internal medicine, noted that appellant was admitted on July 26, 2011 with a fractured left hip, which she sustained after falling due to chronic vertigo. On July 27, 2011 Dr. Garcia stated that appellant was having vertigo while sitting by her bed when she fell and landed on her left side. He advised that she had left hip pain.

In a hospital report dated July 26, 2011, Dr. Robert M. Taylor, a specialist in physical medicine and rehabilitation, advised that appellant was status post fall in her home and sustained a left hip fracture. He related that she was sorting some items at her bedside in her home when she fell and fractured her left hip.

On December 12, 2011 Dr. Benjamin T. Drury, a specialist in orthopedic surgery, stated that he had treated appellant since she underwent a hemiarthroplasty for a femoral neck fracture on July 26, 2011. Appellant was progressing well from the procedure and had a full range of motion. Dr. Drury advised that she also underwent a right shoulder arthroscopy on November 3, 2011 for a right rotator cuff tear and subacromial bursitis. He related that appellant was attending physical therapy to work on range of motion and strengthening. Dr. Drury stated that she was unable to perform her usual job and was uncertain as to when she could return to work.

In an August 5, 2011 report, Dr. Taylor stated that appellant was admitted to the hospital on July 26, 2011 following a fall with a left hip fracture. Appellant was admitted to the physical rehabilitation unit on July 30, 2011 for occupational therapy and was scheduled for discharge on August 13, 2011.

In a September 12, 2011 report, Dr. Garcia reiterated that appellant was disabled for work and that her current disability began on July 25, 2011 when she fractured her hip. He submitted periodic reports which documented his treatment of appellant.

In a report dated May 29, 2012, Dr. Garcia reiterated that appellant was treated for a left hip fracture. He examined her in follow-up appointments on October 26, 2011, February 13 and April 27, 2012.

By decision dated June 20, 2012, OWCP denied appellant's claim. It found that she failed to establish that she fell on July 25, 2011 at work, as alleged.

By letter dated September 13, 2012, appellant requested reconsideration.

In a July 17, 2012 report, Dr. J. David De Lapp, a specialist in orthopedic surgery, stated that appellant sustained a fall on July 25, 2011 while at work in a nursing office. Appellant related that she took a hard fall to her left hip down the hallway at the employing establishment. She went home to try to “tough out” the pain and got into bed. When appellant woke up the next morning and stood up out of bed, she felt severe pain in her hip and fell to her knees. The following day her daughter drove her to the hospital, where physicians diagnosed a fractured left hip. Dr. De Lapp opined that, during her injury at the employing establishment, “in which she took such a big fall,” appellant could have injured the left hip, torn her right rotator cuff, injured her right knee and reinjured her lumbar spine. He asserted that she sustained a significant injury during her fall at work on July 25, 2011. Dr. De Lapp concluded that appellant’s fall directly resulted in her current left hip pain, right shoulder pain, right knee pain and lumbar spine pain. He was uncertain as to whether she could return to full duty but stated that she could possibly perform modified light-duty work.

In a July 2, 2013 report, Dr. Drury stated that he initially examined appellant on July 25, 2011 after she sustained a fall at work that resulted in a left femoral neck fracture. Appellant underwent a hemiarthroplasty. Dr. Drury stated that it was a fairly clear-cut chain of events which led from the fall to the surgical procedure and that he wanted to clarify that this was the case.

By letter dated September 30, 2013, the employing establishment controverted appellant’s claim as she reported the injury some nine months after the alleged incident. Further, appellant’s medical providers obtained histories on July 26 and 27, 2011 that she fell while at home. The employing establishment advised that she called the nurse executive secretary on July 26, 2011 (time and attendance record) and requested leave due to a fall.

By decision dated November 15, 2013, OWCP denied modification of the June 20, 2012 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of establishing that 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 was sustained 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.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

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.

² 5 U.S.C. § 8101 *et seq.*

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

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.⁵ The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty,⁷ nor can OWCP find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of FECA. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee’s statements must be consistent with surrounding facts and circumstances and her subsequent course of action.⁸ 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 his or her claim.⁹

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 July 25, 2011 incident occurred at the time, place and in the manner alleged. She did not establish that she fell at work on July 25, 2011. Appellant did not file a claim for injury until April 23, 2012, almost nine months after the alleged incident. In a report dated July 26, 2011, the date after the alleged incident, Dr. Garcia noted a history that she experienced vertigo while sitting by her bed at home. Appellant fell over and landed on her left side. On July 26, 2011 Dr. Taylor’s hospital report stated that she was status post fall in her home and sustained a left hip fracture due to the fall. He related that appellant was sorting some items at her bedside at her home when she fell and fractured her left hip. The contemporaneous accounts from the physicians contradict statements from appellant and the reports from Drs. De Lapp and Drury, dated July 17, 2012 and July 2, 2013. In addition, appellant’s supervisor stated on the CA-1 claim form that her secretary advised that appellant called one morning within the past year prior and informed her that she had fallen at home and broken her hip. The employing establishment also submitted a September 30, 2013 statement asserting that, according to its time and attendance records, appellant called the nurse executive secretary on July 26, 2011 and requested leave due to a fall.

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

⁶ *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(e)(e).

⁷ *Pendleton*, *supra* note 3.

⁸ See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

⁹ See *Constance G. Patterson*, 42 ECAB 206 (1989).

Based on the evidence of record, there are such discrepancies in the accounts of injury appellant provided to raise uncertainty as to the time, place and in the manner in which she fell. Appellant allegedly injured her left hip, neck, both knees and both hands during the July 25, 2011 work incident, but according to her supervisors she did not provide notification of a work injury to the employing establishment almost nine months, and after initially advising that she had injured her left hip during a fall at home.¹⁰ The record does not support that Drs. De Lapp and Drury had an accurate history of the July 25, 2011 incident as they related differing accounts of how the injury occurred or indicate any awareness that appellant had initially related that she injured her left hip during a fall at home on July 25, 2011.¹¹

The Board also notes that appellant failed to submit to OWCP a corroborating witness statement in response to its request. This casts doubt on her assertion that she injured her left hip in a fall at work on July 25, 2011. OWCP requested that appellant submit additional factual and medical evidence explaining how she sustained injury to her left hip, neck, both hands and both knees on the date in question. Appellant failed to submit such evidence. Given the inconsistencies in the evidence regarding how she sustained her injury, the Board finds that there is insufficient evidence to establish an injury in the performance of duty as alleged.¹²

For the reasons stated above, the Board finds that appellant did not meet her burden of proof to establish fact of injury. 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 OWCP properly found that appellant failed to meet her burden of proof to establish that she sustained an injury in the performance of duty on July 25, 2011.

¹⁰ *Id.*

¹¹ See *Geraldine H. Johnson*, 44 ECAB 745 (1993).

¹² See *Mary Joan Coppolino*, 43 ECAB 988 (1992) (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).

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2014
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