

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

J.M., Appellant

and

**U.S. POSTAL SERVICE, MIDWAY POST
OFFICE, San Diego, CA, Employer**

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**Docket No. 11-651
Issued: October 25, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 19, 2011 appellant filed a timely appeal of a January 6, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3(d), 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 left foot injury in the performance of duty.

FACTUAL HISTORY

On November 17, 2010 appellant, then a 30-year-old mail handler, filed a traumatic injury claim (Form CA-1) for a left foot injury sustained at 9:15 p.m. on November 15, 2010 when he opened a latch on a postal container. A bar fell, striking his left foot. Appellant

¹ 5 U.S.C. § 8101 *et seq.*

developed pain 15 minutes after the incident. On the reverse of the form, Supervisor B stated that appellant did not report injury when it first occurred. In an interview on an unspecified date, appellant allegedly “indicated nothing fell or struck his foot. When he filed the claim he alleges a piece of metal fell striking his foot.”

In a November 17, 2010 report, Dr. Keith Everett, an attending podiatrist, diagnosed a metatarsal fracture of the left foot. He listed November 15, 2010 as the date of injury.

On November 18, 2010 appellant stated that at 9:15 p.m. on November 15, 2010, he opened the latch on a postal container and a bar struck his left foot. He experienced swelling and left foot pain similar to a muscle pull 15 minutes later. Appellant told his coworkers about the situation with his foot. He told Supervisor M at the end of his shift. On November 16, 2010 he told Supervisor B that his foot was swollen and that he would go to see his podiatrist the following day.

In a November 18, 2010 statement, Supervisor B noted that, earlier that day, appellant reported to the union office with his left foot in a cast. Appellant stated that he was injured on November 15, 2010 when a postal container bar struck his foot. He did not immediately report the injury as he thought it was only a muscle strain. The supervisor recalled that, on November 16, 2010, he asked appellant “how he felt, and [appellant] stated that he was ok just a little muscle strain.” The supervisor moved appellant to outsize operation for the day to reduce weight bearing activities. Two unnamed coworkers allegedly recalled that appellant reported on November 15, 2010 that he hurt his foot before he struck it with the container bar. Supervisor B concluded that appellant opened the container in an unsafe manner as he should have held the bar while releasing the latch.

In a December 3, 2010 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including witness statements corroborating his version of events, an explanation of why he waited two days to report the injury, and a report from his physician explaining how and why the alleged incident would cause the claimed injury.

In a December 10, 2010 statement, appellant reiterated that on November 15, 2010 at 9:15 p.m., he unlatched a postal container bar and the bar dropped down, striking his left foot. He did not notice pain or swelling until 9:30 p.m. Appellant explained that he delayed reporting the injury to Supervisor B until November 16, 2010 as he initially thought it was only a sprain or strain. He noted that in August 2010, he underwent surgical amputation of his left great toe as a fracture of that toe became infected. In September 2010 appellant had surgery to revise tendons in his left foot and was released from treatment in October 2010.

In a December 2, 2010 report, Dr. Everett related appellant’s account of a metal bar falling on his left foot on November 15, 2010. He then developed soreness but continued to bear weight. Dr. Everett noted that appellant had a “surgically absent left great toe.” He diagnosed a left foot metatarsal fracture and held appellant off work through February 24, 2011.

In a November 18, 2010 report, Dr. Kian Raiszadeh, an attending orthopedic surgeon, related appellant’s account of an object falling on his foot at work on November 15, 2010. He noted that appellant had been on dialysis since 2008 for renal failure and had peripheral

neuropathy blunting sensation in both feet. On examination, Dr. Raiszadeh noted significant neuropathy of the left foot as appellant had no tenderness to palpation at the fracture site. He diagnosed a closed, comminuted fracture of the second metatarsal of the left foot. Dr. Raiszadeh recommended surgical reduction following preoperative dialysis.

On November 23, 2010 Dr. Craig Stevenson, an attending Board-certified orthopedic surgeon, performed an open reduction and fixation of a Lanfranc fracture of the left foot. He limited weight bearing for six months. Dr. Stevenson submitted progress notes through December 2, 2010. He noted that appellant had peripheral neuropathy due to chronic renal failure.

By decision dated January 6, 2011, OWCP denied the claim on the grounds that fact of injury was not established. It found that appellant did not submit sufficient evidence to establish that the claimed incident occurred at the time, place and in the manner alleged. OWCP found that there were too many inconsistencies surrounding the fact of injury to accept appellant's version of events. In particular, it was not clear why "being hit on the foot by a bar would lead [appellant] to believe [he] had a muscle strain."

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; 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.² 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.³

In order to determine whether an employee sustained a traumatic 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 that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.⁴ 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.⁵

An employee's statement 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.⁶

² *Joe D. Cameron*, 41 ECAB 153 (1989).

³ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁴ *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ *Deborah L. Beatty*, 54 ECAB 340 (2003).

⁶ *Gregory J. Reser*, 57 ECAB 277 (2005).

Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden in 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. Circumstances such 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 statement in determining whether a *prima facie* case has been established.⁷

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

ANALYSIS

Appellant claimed that on 9:15 p.m. on November 15, 2010 he unlatched a postal container bar, which fell downward and struck his left foot. He did not develop pain or swelling until 9:30 p.m. Initially, appellant thought he sustained only a muscle strain, but nevertheless reported the incident to Supervisor B on November 16, 2010. Dr. Raiszadeh, an attending orthopedic surgeon, explained on November 18, 2010 that appellant had blunted pain sensation at the fracture site due to peripheral neuropathy in the left foot.

On the claim form, Supervisor B stated that on November 16, 2010, he asked appellant how he felt and appellant then mentioned the left foot injury and his belief that it was just a muscle strain. Supervisor B did not dispute that the container bar struck appellant in the left foot. Instead, he alleged that appellant sustained the left foot injury because he unlatched the bar improperly. Supervisor B referred to an interview with appellant and two coworkers on unspecified dates allegedly disputing appellant's account of events, but did not provide these statements or other corroboration. OWCP denied appellant's claim on January 6, 2011, finding that there were inconsistencies regarding fact of injury, and there was no explanation as to why appellant would have mistaken a fracture for a strain.

The Board finds, however, that there is sufficient evidence of record to establish the November 15, 2010 incident as factual. Supervisor B corroborated that appellant reported the left foot injury on November 16, 2010. He did not dispute that the container bar struck appellant's foot. Although Supervisor B alluded to coworker statements and an interview with appellant providing an alternate account of events, he did not provide these documents. Regarding OWCP's finding that it was not apparent why appellant mistook a fracture for a lesser

⁷ *Betty J. Smith*, 54 ECAB 174 (2002).

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

injury, the Board notes that the medical record documents impaired pain sensation in appellant's left foot due to peripheral neuropathy.

As appellant has established the November 15, 2010 incident as factual, the medical evidence must be reviewed to determine whether he has established causal relationship between that incident and the left foot fracture. He submitted reports from Dr. Raiszadeh, Dr. Stevenson, an attending Board-certified orthopedic surgeon, and Dr. Everett, an attending podiatrist, all mentioning the November 15, 2010 incident and diagnosing a left metatarsal fracture. The Board finds that, while these opinions are not sufficiently rationalized⁹ to meet appellant's burden of proof in establishing his claim, they stand uncontroverted in the record and they are of sufficient quality to require further development of the case by OWCP.¹⁰ However, OWCP did not undertake further development of the medical record as it denied the case finding that appellant had not established the first component of fact of injury -- that the claimed incident occurred. As the incident giving rise to the claimed injury has been established, OWCP must now conduct appropriate development of the medical evidence with regard to the medical component of fact of injury -- whether the employment incident caused an injury.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹¹ The case must be remanded to OWCP for preparation of a statement of accepted facts and referral of the matter to an appropriate medical specialist, consistent with OWCP's procedures, to determine whether appellant may have sustained a left metatarsal fracture as a result of the November 10, 2010 incident. Following this and any other development deemed necessary, OWCP shall issue an appropriate decision in the case.

CONCLUSION

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

⁹ See *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 280 (1978).

¹¹ *Jimmy A. Hammons*, 51 ECAB 219 (1999); *Marco A. Padilla*, 51 ECAB 202 (1999); *John W. Butler*, 39 ECAB 852 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 6, 2011 is set aside and the case remanded to OWCP for further development consistent with this decision and order.

Issued: October 25, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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