United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 13-339**
	)	**Issued: May 22, 2013**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 27, 2012 appellant filed a timely appeal from a September 25, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim. 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 claim.

ISSUE

The issue is whether appellant established that she sustained a left foot condition in the performance of duty on July 19, 2012, as alleged.

FACTUAL HISTORY

On August 2, 2012 appellant, then a 55-year-old retail/distribution clerk, filed a traumatic injury claim alleging that on July 19, 2012 several scanners fell on her left foot, fracturing her left metatarsal. She stopped work on July 28, 2012. On the claim form, appellant's supervisor

[1] 5 U.S.C. § 8101 *et seq.*

noted that appellant worked July 20 through 22, 2012 without complaint and did not indicate that she was injured until July 26, 2012. The employing establishment controverted her claim. Appellant's supervisor stated that appellant did not tell her on July 19, 2012 that anything had happened in the registry cage.

Appellant stated that on July 19, 2012 she was assigned to work in the registry cage. She stated that there were scanners and keys on the counter and, when she picked up one of the scanners, several other scanners fell on her left foot. Appellant's foot became swollen on July 23, 2012 and she was first able to see her doctor on July 25, 2012. She stated that the x-rays revealed she had a metatarsal fracture.

In notes dated July 25 and August 3, 2012, Dr. Rick J. Delmonte, a podiatrist, stated that appellant was under his care for a work injury that occurred on Thursday, July 19, 2012. He advised that she was being treated for a metatarsal fracture of her left foot. In an August 3, 2012 note, Dr. Delmonte stated that appellant could return to work on August 9, 2012.

In an August 14, 2012 letter, OWCP advised appellant of the deficiencies in her claim. It requested that she provide further factual and medical evidence in support of her claimed employment injury. OWCP allowed her 30 days for a response.

On August 16, 2012 OWCP received an August 8, 2012 note from Dr. Delmonte, who stated that appellant should stay off her foot until further notice.

By decision dated September 25, 2012, OWCP denied appellant's claim on the grounds that the factual element of her claim had not been established. It determined that the evidence was not sufficient to establish that the July 19, 2012 incident occurred as alleged. Further, the medical evidence did not provide a medical diagnosis in connection with the injury or event.

LEGAL PRECEDENT

OWCP defines a traumatic injury as, a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and members or functions of the body affected.[2]

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established. 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.[3] The second component of fact of injury is whether the

[2] 20 C.F.R. § 10.5(ee).

[3] *Michael E. Smith*, 50 ECAB 313 (1999).

employment incident caused a personal injury and generally can be established only by medical evidence.

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee 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. 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. 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.[4]

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

ANALYSIS

Appellant alleged that several scanners fell on her left foot while at work on July 19, 2012 and that she sustained a fracture of a left foot metatarsal. She worked for two days after the alleged injury and notified her employer of the incident on July 26, 2012 after seeing her podiatrist. Appellant filed a claim on August 2, 2012. She submitted a narrative statement and several notes from Dr. Delmonte in support of her claim. Dr. Delmonte mentioned that appellant was injured at work on July 19, 2012 and that she was being treated for a fracture of the left metatarsal; but he did not describe how the alleged incident occurred or resulted in her treatment for a left metatarsal fracture.

The Board finds that the factual evidence is insufficient to establish that the employment incident occurred as alleged, *i.e.*, that appellant's left foot was struck by several scanners on July 19, 2012, as alleged. Appellant apparently worked without difficulty for two days after the alleged incident and only sought medical attention after her foot became swollen some six days after the fact. She has not offered any explanation for these factual inconsistencies in her claim. As noted, such defects in the factual evidence are sufficient to cast doubt on whether the employment incident occurred as alleged.

[4] *D.B.*, 58 ECAB 464, 466-67 (2007).

[5] *J.Z.*, 58 ECAB 529 (2007).

[6] *Michael E. Smith*, *supra* note 3.

Furthermore, the record is devoid of medical evidence providing a firm medical diagnosis in connection with the alleged employment incident. While Dr. Delmonte stated that appellant was being treated for a metatarsal fracture of the left foot, but did not state more specifically which metatarsal was fractured. He did not provide a full history of injury[7] or offer an opinion on how appellant's employment caused or aggravated her condition.[8] Consequently, Dr. Delmonte's notes are of diminished probative value.

Appellant failed to establish fact of injury. She did not submit sufficient evidence to establish that she actually experienced an employment incident at the time, place and in the manner alleged.[9]

On appeal, appellant submitted additional factual and medical evidence in support of her claim; but the Board lacks jurisdiction to review such evidence for the first time on appeal.[10] She 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 not met her burden of proof in establishing that she sustained an injury in the performance of duty.

[7] *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history have little probative value).

[8] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[9] *V.H.*, Docket No. 12-1621 (issued December 21, 2012).

[10] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 22, 2013
Washington, DC

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

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

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