

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY FLYING and DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, Lame Deer, Mont.

*Docket No. 96-1472; Submitted on the Record;
Issued March 19, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant sustained an injury in the performance of duty, as alleged.

The Board has duly reviewed the case record and finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on September 5, 1995, as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act 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 the Act, that the claim was filed within the applicable time limitation of the Act, 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.¹ 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.²

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. 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.³ 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.⁴

¹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

² *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

³ *Robert J. Krstyen*, 44 ECAB 227, 229 (1992); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁴ *Id.*

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on a claimant's statements. The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁵ However, 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

On May 30, 1995 appellant, then a 46-year-old detention supervisor, filed a claim alleging that on May 22, 1995 he injured his left leg and lower calf muscle when he struck the tissue holder that was protruding from the wall in the restroom. He stopped working midday on May 30, 1995.

Appellant submitted medical evidence to support his claim, consisting of a left lower extremity venogram dated May 30, 1995 showing clots in the deep venous system, a normal x-ray dated May 30, 1995, a medical report from Dr. Charles R. McClave, a Board-certified internist, dated May 30, 1995, a hospital dismissal summary from Dr. R. Anderson dated June 6, 1995, and a medical report from Dr. Michael Bush, Board-certified in emergency medicine, dated May 30, 1995. In his May 30, 1995 report, Dr. McClave described appellant's history of injury as appellant "banged his calf into a toilet on May 22, 1995 and noticed immediate pain and swelling." In his May 30, 1995 report, Dr. Bush described appellant's history, stating that appellant bumped into a toilet paper holder one week ago while he was moving and he and his wife apparently had been moving into a new home.

By decision dated January 24, 1996, the Office denied appellant's claim, stating that the evidence of record failed to establish that the injury occurred in the performance of duty.

In the present case, appellant has not submitted sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. Although appellant alleges that he injured his leg and left lower calf at work on May 22, 1995, he did not seek medical attention for over a week. Dr. Bush's statement in his May 30, 1995 report that appellant injured his leg while he was moving into a new home with his wife contradicts appellant's assertion that the injury occurred in the performance of duty. In his May 30, 1995 report, Dr. McClave does not address where appellant's leg injury occurred. No other evidence of record addresses the history of appellant's injury. There is insufficient evidence which confirms appellant's assertion that he injured his leg at work and Dr. Bush's report containing the history of appellant's injury directly contradicts his assertion. On appeal, appellant alleges that he had two witnesses with knowledge of the employment incident immediately after it occurred. Appellant did not submit such evidence, nor may the Board

⁵ *Linda S. Christian*, 46 ECAB 598, 600-01 (1995); *George V. Lambert*, 44 ECAB 870, 875-76 (1993).

⁶ *Linda S. Christian*, *supra* note 5 at 601; *Virgil F. Clark*, 40 ECAB 575, 584-86 (1989).

consider such evidence under its rules for the first time on appeal.⁷ Appellant has not presented sufficient evidence to establish his claim.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 24, 1996 is affirmed.

Dated, Washington, D.C.
March 19, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁷ 20 C.F.R. § 501.2(c).