

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROXANNE L. TULLY and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 98-1126; Submitted on the Record;
Issued December 9, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether appellant met her burden of proof to establish fact of injury on November 13, 1997 as alleged.

The Board finds that appellant did not meet her burden of proof to establish fact of injury on November 13, 1997 as alleged.

An employee who claims benefits under the Federal Employee's Compensation Act¹ 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.² 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.³ An employee has not met 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.⁴ 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.⁵ However, an employee's

¹ 5 U.S.C. §§ 8101-8193.

² *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

³ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁴ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁵ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

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.⁶

On November 21, 1997 appellant, then a 46-year-old clerk and assistant, filed a traumatic injury claim alleging that she injured her left foot at work on November 13, 1997. Appellant stated, “[I] went to sit down in chair, the chair slip[ped] and [I] tr[ied] to break the fall by putting the weight on left foot.” Appellant stopped work on November 25, 1997. By decision dated February 18, 1998, the Office denied appellant’s claim that she sustained an injury in November on the grounds that she did not establish the fact of injury.

The Board notes that there are sufficient inconsistencies in the evidence to cast doubt on the validity of appellant’s claim and therefore she did not establish fact of injury on November 13, 1997. Appellant reported that she sustained an injury on November 13, 1997 but she did not adequately explain why she apparently worked without difficulty for 12 days before stopping work on November 25, 1997. Nor did she explain why she delayed until November 19, 1997 to inform a supervisor about her injury and why she delayed until November 21, 1997 to file a claim. The earliest medical report of record is dated November 24, 1997, which indicates that appellant was first examined on November 19, 1997, and appellant did not sufficiently explain why she delayed in seeking medical treatment.⁷ Appellant indicated that she did not know she had an injury because her diabetic condition masked her pain, but she did not provide adequate support for this statement or otherwise explain why she delayed in addressing the potential effects of the incident. The record contains copies of statements in which coworkers indicate that appellant was injured on November 13, 1997, but the record does not contain originals of these statements and one of them has an altered date.

In response to the Office’s request for additional factual evidence in support of her claim, appellant submitted a statement which added further inconsistencies to her account. In a statement dated November 27, 1997, appellant indicated that she had visited the podiatrist on November 11, 1997, *i.e.*, two days before the claimed November 13, 1997 injury, and was told that she had a broken foot. Appellant did not provide any explanation of this further inconsistency and the record does not contain any medical reports dated November 11, 1997.

For these reasons, appellant did not meet her burden of proof to establish fact of injury on November 13, 1997 as alleged.⁸

⁶ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

⁷ Several reports of record list the date of injury as November 13, 1997, but it should be noted that these were all dated after appellant filed her claim on November 21, 1997.

⁸ Appellant submitted additional evidence after the Office’s February 18, 1998 decision, however, the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated February 18, 1998 is affirmed.

Dated, Washington, D.C.
December 9, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member