

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VAN D. SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, TN

*Docket No. 98-1734; Submitted on the Record;
Issued April 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on January 9, 1998; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On January 12, 1998 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim alleging that on January 9, 1998 he hyperextended his right knee and twisted his right ankle when he "missed [the] last step going down the stairs." On the reverse side of the claim form, the employing establishment controverted the claim, noting that appellant had prior leg injuries and was "an avid racquetball player."

In support of his claim, appellant submitted a medical report dated January 12, 1998 from Dr. Gene A. Hannah, who is Board-certified in family practice. He indicated that appellant reported injuring his right knee and ankle on January 9, 1998 and stated:

"At the time of his injury appellant was coming down some steps at a house and missed the last step of the stairway. He everted his right ankle he thought and twisted and hyperextended his right knee. Appellant had a popping sensation in the knee. He had pain primarily around the medial side of the ankle and posterior aspect of the knee but says the pain was not great at first. In fact he was able to finish his route. When appellant got back to work he says that no one was there to report the injury to. Over the weekend the ankle and knee both got progressively more stiff."

Dr. Hannah diagnosed a probable ligament injury of the right knee.

By letter dated February 10, 1998, the Office requested that appellant respond to a list of factual questions regarding his claim for an employment injury on January 9, 1998. The Office provided appellant 30 days to respond to the request for additional factual information. Appellant, however, did not respond within the time allotted.

By decision dated March 12, 1998, the Office denied appellant's claim on the grounds that he did not establish fact of injury. The Office found that it could not determine whether the employment incident occurred at the time, place and in the manner alleged due to appellant's failure to submit the requested factual information.

In a letter dated April 8, 1998, appellant requested reconsideration of his claim. Appellant contended that he did not receive the Office's February 10, 1998 letter requesting additional information.

By decision dated April 22, 1998, the Office denied merit review of its prior decision. The Office noted that it was sending appellant a copy of the February 10, 1998 letter.

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

An employee who claims benefits under the Federal Employees' 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 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 his or her burden of proof 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.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 doubt on an employee's statements in determining whether a *prima facie* case has been established.⁵ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.⁶

In the present case, while the employing establishment controverted appellant's claim on the grounds that he had prior leg injuries and played racquetball frequently, this does not constitute evidence sufficient to cast serious doubt on appellant's version of the employment incident. Appellant filed his claim on January 12, 1998, three days after the employment incident and stated that he had injured his right knee and ankle when he missed the last step going down stairs. Appellant sought medical treatment on January 12, 1998 and related a history of injury to his physician of injuring his right knee and ankle on January 9, 1998 when he "missed the last step of a stairwell." The Board finds that appellant's consistent history of injury on the claim form and in the January 12, 1998 narrative report, as well as his general course of

¹ 5 U.S.C. §§ 8101-8193.

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

³ *Charles B. Ward*, 38 ECAB 667 (1989).

⁴ *Tia L. Love*, 40 ECAB 586 (1989).

⁵ *Merton J. Sills*, 39 ECAB 572 (1988).

⁶ *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

action, lends credence to his claim. Further, the record contains no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged.⁷

Under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence. The Board, therefore, finds that the evidence of record is sufficient to establish that the January 9, 1998 incident occurred at the time, place and in the manner alleged by appellant. The case will be remanded to the Office for appropriate consideration of the medical evidence submitted by appellant and a *de novo* decision on his claim for compensation.⁸

The decisions of the Office of Workers' Compensation Programs dated April 22 and March 12, 1998 are hereby set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
April 7, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ See *Thelma Rogers*, 42 ECAB 866 (1991).

⁸ In view of the Board's disposition of the merits of the case, the issue of whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 is moot.