U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

---

In the Matter of FREDERICK H. SCHENCK and U.S. POSTAL SERVICE,
POST OFFICE, Bridgewater, NJ

*Docket No. 98-606; Submitted on the Record;*
*Issued January 13, 2000*

---

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained an injury in the performance of duty.

On May 15, 1995[1] appellant, then a 35-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that in October 1994 while taking the hamper down the ramp he bruised his toe, which later became infected and was amputated.

In support of his claim, appellant submitted a statement from James E. Mobley describing the accident in October 1994[2] and an accident report noting that appellant filed a claim in May 1995.

By letter dated October 20, 1995, the Office informed appellant that the evidence of record was insufficient to establish that he sustained an injury in the performance of duty. The Office then advised appellant of the medical evidence needed to support his claim.

In response to the Office's request, appellant submitted disability notes dated May 18 and July 18, 1995 from Dr. Gary A. Drascher,[3] an April 28, 1995 note that appellant had been hospitalized since April 22, 1995, an August 31, 1995 letter from Dr. Drascher indicating that he had been caring for appellant "following surgery for gangrene of his great right toe, resulting in an amputation of his great toe following a femeropoplitieal bypass."

---

[1] On an additional CA-1 form, the date of reporting the injury is noted as July 27, 1995.

[2] On September 30, 1996 the Office of Workers' Compensation Programs received another undated statement from Mr. Mobley.

[3] An attending Board-certified surgeon.

In a decision dated November 21, 1995, the Office denied appellant's claim on the basis that the evidence was insufficient to establish that appellant sustained an injury in the performance of duty. The Office found that the delay in reporting and filing his claim raised doubts as to the validity of the witness statements such that doubt was cast as to whether the incident occurred. The Office also found that the medical evidence was insufficient to establish that any disability resulted from the alleged injury.

Appellant requested a hearing before an Office hearing representative in an undated letter received by the Office on December 21, 1995.[4]

In an undated letter received February 12, 1996, appellant stated that he did lose time due to the accident which was witnessed by four people.[5] Appellant also indicated in the letter that the accident occurred in either October or November 1994. He also noted that he had lost his left toe in 1993 due to a build up of fungus under the nail. Appellant also submitted a May 25, 1995 report from Dr. Kishor Jobanputra,[6] an August 31, 1995 note from Dr. Drascher, a May 18, 1995 discharge summary and operation reports by Dr. H. Goldson dated April 24 and 28, 1995.

The April 24, 1995 operation report noted removal of appellant's right big toe due to gangrene. In the April 28, 1995 operation report, Dr. Goldson noted that appellant had a right femoral popliteal bypass.

In the discharge summary, it was noted that appellant was brought in on April 24, 1995 and that he "underwent big toe amp (sic) and debridement of the medial foot."

In the May 25, 1995 report, Dr. Jobanputra indicated that appellant was admitted on April 22, 1995 for gangrene of his left foot. He further noted that appellant "had injured his right foot at work several weeks prior to admission and had developed gangrene of the right great toe." Dr. Jobanputra also noted:

> "In reviewing this case, it is important to note the multiple, complex problems that this gentleman had. [Appellant] had severe peripheral vascular disease and diabetes and had several complications following the amputation of his toe, resulting in two more surgeries during his stay. He also had problems with infection, as there was pus collecting under the graft and his surgical wounds were reddened. He remained on IV [intravenously] antibiotics through his discharge on May 18, 1995, including the day in question. Clearly, this is a gentleman with several serious health problems who required acute services through discharge."

In an August 31, 1995 report, Dr. Drascher stated that he had been treating appellant following his surgery for gangrene of the great right toe.

---

[4] The Office received another undated letter from appellant on February 12, 1996 requesting a hearing.

[5] There appears to be two pages designated as 32 with this page in between the two pages noted as "32."

[6] An attending physician Board-certified in family practice and geriatric medicine.

In a letter dated December 12, 1995, Dr. Drascher noted that appellant was admitted to the hospital on April 22, 1995, which was "several weeks following an injury to his right foot." Dr. Drascher stated that appellant reported "this injury occurred at work several weeks prior to admission" and that appellant had gangrene of the great right toe at the time of admission.

In a note dated August 21, 1996, Ms. Sandra Hulse stated that appellant was injured when his cart tipped over the metal grating at the end of the ramp.

In a report dated August 28, 1996, Dr. Drascher stated that appellant was admitted in April 1995 due to gangrene of his great right toe. He stated, based upon his recollection, that appellant told him that he had injured his foot at work and that the injury had never healed. In conclusion, Dr. Drascher noted that due to appellant's diabetes and severe peripheral vascular disease, "his medical condition is consistent with his history."

In a letter dated September 11, 1996, Dr. Drascher stated that appellant injured his right leg and foot in November 1995.[7] Dr. Drascher opined that, while appellant "had preexisting diabetes and peripheral vascular disease, the injury to his toe clearly precipitated infection and gangrene, which led to amputation of his toe."

In another letter dated September 11, 1996, Dr. Drascher noted that appellant is a diabetic with peripheral vascular disease and that appellant "was reported to have an injury to his right leg and foot in November of 1995" and that appellant sought medical treatment in April 1995. The physician further noted that appellant's second toe was also amputated due to a "recurrent wound infection at the site of the great toe amputation."

A hearing was held on July 8, 1998 at which appellant was represented by counsel and allowed to testify and submit evidence. The evidence submitted by appellant consisted of a copy of appellant's medical record, reports dated December 12, 1995 through September 1996, statements from Ms. Hulse and Mr. Mobley, a copy of appellant's CA-1 form and appellant's statement.

By decision dated September 19, 1997, the hearing representative affirmed the November 21, 1995 decision denying benefits.

An employee seeking benefits under the Federal Employees' Compensation Act[8] 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 timely 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.[9] These are essential

[7] This appears to be a typographical error as the year should be 1994 not 1995 since appellant sought medical attention in April 1995.

[8] 5 U.S.C. §§ 8101-8193.

[9] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[10]

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. 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.[11] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[12] An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.[13] The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.[14] 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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.[15] However, 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.[16]

Appellant's claim is consistent with the facts of the case and his subsequent course of action and there are no discrepancies, inconsistencies or contradictions in the evidence, which create serious doubt that appellant sustained an injury in the performance of duty in October 1994. Appellant repeatedly alleged in the factual statements he provided in support of his claim that he injured his toe and shin in October 1994 when the wheel of the hamper got caught and flipped over. Further, he has submitted statements from Mr. Mobley and Ms. Hulse whose statements support that the incident occurred as alleged by appellant in October 1994. There is no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged.[17] In view of this, the Board finds that the claimed October 1994 incident occurred as alleged.

---

[10] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *See John J. Carlone*, 41 ECAB 354 (1989).

[12] *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

[13] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

[14] *Elaine Pendleton, supra* note 9.

[15] *Merton J. Sills*, 39 ECAB 572, 575 (1988).

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

[17] *See Thelma Rogers*, 42 ECAB 866, 870 (1991).

Notwithstanding the fact that appellant has established that the incident occurred, the Board also finds that appellant has submitted insufficient evidence to establish a causal relationship between his gangrene and the October 1994 employment incident. To establish causal relationship, appellant must submit a physician's report, in which the physician reviews the factors of employment identified by appellant as causing his injury and, taking these into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his opinion.[18]

In support of his claim, appellant submitted various medical records. However, none of them were based on an accurate employment injury history. Furthermore, none of the reports provides a rationalized opinion explaining the causal relationship between appellant's amputation of his right toe and the October 1994 employment injury.

Dr. Drascher's opinions are insufficient as his reports contain inconsistent histories of the injury. He initially noted that appellant had sustained an employment-related accident a few weeks prior to the amputation of his toe on April 22, 1995 and in his reports of September 11, 1996 states that appellant injured his foot in November 1995. The Board has held that medical conclusions based on an inaccurate history of the injury are of little probative value.[19] Dr. Drascher has stated that appellant injured his foot either a few weeks prior to seeing him in April 1995 or in November 1995 when appellant stated the injury occurred in October 1994. Dr. Drascher also failed to note the nature of the injury, besides noting in two letters dated September 11, 1996 that appellant injured his leg and foot in an employment accident in November 1995. Furthermore, Dr. Drascher failed to provide a rationalized opinion explaining how appellant's employment injury caused the gangrene in his toe.

As none of the remaining medical opinion evidence contains a rationalized opinion addressing the causal relationship of appellant's injury to his October 1994 employment injury, appellant has failed to establish fact of injury. As appellant has failed to establish fact of injury, he is not entitled to compensation.

[18] *See Woodhams*, *supra* note 10.

[19] *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete).

The September 19, 1997 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Dated, Washington, D.C.
January 13, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member