United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 07-2153**
	)	**Issued: February 21, 2008**
U.S. POSTAL SERVICE, LINDEN HILL STATION, Flushing, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2007 appellant, through counsel, filed a timely appeal from the June 21, 2007 decision of the Office of Workers' Compensation Programs denying modification of the decision denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury in the performance of duty on January 14, 2005, as alleged.

FACTUAL HISTORY

On February 3, 2005 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim, Form CA-1, alleging that he tore the cartilage in his left knee on January 14, 2005 as he was getting out of his truck. He caught his right leg on the truck door, causing him to fall and jam his left knee on the ground. The employing establishment controverted appellant's claim on the grounds that he reported the incident two weeks late. It stated that it could not determine

whether appellant was in the performance of duty or whether its own facts and knowledge were in agreement with him because he "kept changing his mind" about the alleged injury.

In a statement dated January 21, 2005, Mike Manganiello, the manager of the employing establishment, stated that he was unable to determine whether appellant was injured as alleged. On Thursday, January 20, 2005,[1] appellant informed him that he hurt his knee on Saturday, January 15, 2005. He did not explain why he did not report the incident immediately after it occurred and appellant refused medical attention. On Friday, January 21, 2005, appellant approached Mr. Manganiello and asked him to complete an accident report for the incident which he now stated occurred on Friday, January 14, 2005. He stated that his shop steward had instructed him to file a report for his accident. Mr. Manganiello informed appellant that he would need to either complete the information for a claim form or sign a statement refusing medical attention. Appellant refused medical attention and did not complete the CA-1 form. The employing establishment submitted a note date stamped January 21, 2005 and signed by appellant, stating that he did not wish to file a CA-1 form at that time for the injury he sustained on January 14, 2005.

On February 3, 2005 an unidentified internist stated that appellant slipped and fell off his truck, landing on and injuring his left knee. The physician diagnosed left knee contusion and placed him on light duty for one week. The physician indicated that appellant's condition was caused by his employment.

On February 9, 2005 the Office informed appellant that further medical and factual evidence was needed to establish that he was injured in the performance of duty.

On February 11, 2005 the employing establishment stated that it was raising an additional challenge to appellant's claim on the grounds that new medical evidence showed that his condition was preexisting and unrelated to his employment.

On February 2, 2005 Dr. Bradley Gerber, a Board-certified orthopedic surgeon, stated that appellant had a history of problems with his left knee. He reported that appellant had a magnetic resonance imaging (MRI) scan one year previously, because of aching in his left knee which revealed a tear of the posterior horn of the medial meniscus. The tear was relatively asymptomatic and had not been repaired. Dr. Gerber stated that appellant injured himself at work on January 14, 2005 when he fell out of his truck and had a hyperflexion injury to his left knee. Following that incident, appellant experienced clicking and popping in the left knee and pain on the medial side. He had stiffness, aching, swelling and loss of range of motion, but no instability, numbness, weakness or tingling. Appellant's employment duties of carrying heavy bags, standing and climbing into and out of his truck aggravated his condition. He had treated himself with medication, ice and a brace since the accident.

On physical examination, Dr. Gerber found that appellant walked with an antalgic gait on the left side and had an effusion of 2+ in the left knee. He found no varus deformity, but noted pain on the medial joint line. The McMurray's test was grossly positive and the medial meniscus

[1] Mr. Manganiello mistakenly stated that Thursday, was January 21, 2005, however, that Board notes that Thursday fell on January 20, 2005.

could be felt moving in and out of the joint line which was the cause of the pain. Appellant's sensations and reflexes were intact and symmetrical. Dr. Gerber reviewed x-rays showing moderate osteoarthritis changes with osteophyte formation and some flattening of the condyle and patella femoral arthritis. The MRI scan from the previous year showed some arthritic changes and a tear of the posterior horn of the medial meniscus and no anterior cruciate ligament (ACL). Dr. Gerber diagnosed left knee pain, left knee moderate tri-compartmental osteoarthritis, symptomatic posterior horn medial meniscus tear, chronic ACL tear and effusion. He recommended left knee arthroscopy because of appellant's mechanical symptoms.

On February 10, 2005 Dr. Gerber stated that appellant's left knee and mechanical symptoms stemmed from his employment injury. He noted that appellant had an old injury to his left knee, but that it had been asymptomatic until he fell out of his truck at work. Dr. Gerber stated that surgery would not have been required if appellant had not injured himself at work. He stated that appellant could work in a light-duty capacity. On a duty status report dated February 11, 2005 Dr. Gerber stated that appellant could return to full duty on February 14, 2000. On February 15, 2005 he removed appellant from work until after his arthroscopy because the available light-duty options did not meet his medical restrictions.

By decision dated March 23, 2005, the Office denied appellant's claim for compensation. It found that he did not provide adequate evidence to establish that an employment incident occurred as alleged. Specifically, the Office found that appellant had not explained the discrepancies between the two dates of injury reported to the employing establishment or the reason he waited 20 days to file his claim or seek medical attention. The Office found that Dr. Gerber's reports were not sufficient to show that appellant's condition was anything other than preexisting or that it was related to his employment.

In a report dated March 14, 2005, Dr. Gerber stated that appellant continued to have pain in his left knee, especially when climbing stairs and was having mechanical symptoms. He noted a positive McMurray's test, ongoing range of motion limits, small effusions and medial and lateral joint line tenderness.

On January 30, 2006 appellant requested reconsideration. He stated that he injured his knee on Friday, January 14, 2005 at 11:00 a.m., as he was delivering mail from his truck to a relay box. The bottom step of his truck was a foot from the ground and had a sliding door track with a lip on either side. Appellant stepped onto the lower step with his left foot and, as he brought his right foot down, tripped over the inner lip of the track, causing him to fall out of the truck. He tried to catch himself with his hands, but his entire weight came down on his left leg, with his "knee jammed up with [his] foot to the top of [his] left hamstring." After the fall, appellant got up and tried to "walk it off" for about 10 minutes. He continued working, but felt a popping movement in his knee. Appellant did not report the incident immediately because the soreness was bearable when he was moving.

On Saturday, January 15, 2005, appellant wore a brace at work because he felt movement on the right side of his left knee. He told his supervisor, Philina, that he could not work late because he had injured his knee the day before. Later, when Philina saw appellant adjusting his brace and asked him about it, he again told her that he had hurt his knee the previous day. The supervisor did not respond to either statement. Saturday afternoon, as he was driving home from

work, appellant began experiencing severe pain and had to call his wife to come pick him up. The following Monday, January 17, 2005, was a federal holiday and he had the day off. Because appellant's knee continued to cause him extreme pain, he made an appointment to see a Dr. Saugy, an orthopedic physician, that day. Dr. Saugy prescribed medication and recommended a knee scope to see how much damage there was to his meniscus cartilage. He told appellant to rest his knee for two days. After returning from Dr. Saugy's office, appellant left a recorded message with the employing establishment, stating that he would not be in the following two days.

When appellant returned to work on Thursday, January 20, 2005, he had documentation with him, but when he attempted to tell Mr. Manganiello about the injury, he was waved away. He wanted a second opinion on his knee and at the recommendation of Mr. Manganiello who had previously had knee problems, contacted an orthopedic surgeon named Dr. Levitz. Because Dr. Levitz could not see appellant for over a month, appellant made an appointment with his associate, Dr. Gerber, for February 2, 2005. At his appointment, appellant told Dr. Gerber that his ACL had been torn 30 years previously and he had undergone physical therapy to rehabilitate the knee rather than operate on it. Dr. Gerber told him that this had no role in his current injury. Appellant stated that he had occasional stiffness and soreness in the knee, which did not impact his employment. On April 27, 2005 appellant underwent a successful arthroscopic surgery. He returned to work in July 2005 and had no problems thereafter. Appellant stated that he did not provide the foregoing information previously because Dr. Gerber had told him that his reports were sufficient to establish the injury.

In Dr. Gerber's April 27, 2005 operative report, he stated that appellant had osteoarthritis in his left knee and a history of a previous knee injury, but had been asymptomatic until his fall at work. Appellant chose to proceed with surgery because his symptoms persisted despite conservative therapy. During the surgery, Dr. Gerber found a large bucket-handle displacement tear of the medial meniscus. He noted that part of the tear was well rounded and appeared to be old, but that there was some fresh tearing on the back side of the meniscus.

By decision dated March 30, 2006, the Office denied modification of the March 23, 2005 decision on the grounds that the new evidence established neither that appellant experienced the employment incident as alleged, nor that his condition was related to this event.

On March 21, 2007 appellant, through counsel, requested reconsideration of the March 30, 2006 decision.[2] Among other things, counsel contended that, because the employing establishment did not have any concrete basis for controverting appellant's claim, the Office should have accepted his version of events as factual. He argued that the 20-day period between the injury and the filing of the claim was legally insignificant because appellant had three years to file a claim. Appellant's counsel stated that the preexisting condition was not a valid basis for denying appellant's claim, because aggravation of existing conditions was compensable and his condition was asymptomatic before his work injury.

[2] Though the request was drafted by appellant's counsel, appellant signed a statement indicating that he had read the document and that the facts contained therein were accurate to the best of his knowledge.

In a report dated February 14, 2007, Dr. Gerber reviewed and commented on his prior reports. He stated that he first saw appellant on February 2, 2005, following an injury at work where he fell out of his truck and had a hyperflexion jury to his left knee. Dr. Gerber reported that an MRI scan conducted in August 2004 showed a tear of the posterior horn of the medial meniscus, but he noted that appellant had been relatively asymptomatic until his January 14, 2005 injury. During the course of the April 27, 2005 surgery, he found an acute tear in appellant's left knee. By October 25, 2005, appellant had returned to his preinjury levels of pain and activity. Dr. Gerber opined that appellant's injury was an aggravation of his preexisting injury. He stated that the findings during the surgery, combined with the fact that appellant had been asymptomatic before falling in January 2005, were the foundation for his opinion that appellant's pain and meniscal tear were caused by and related to his employment injury.

By decision dated June 21, 2007, the Office denied modification of the March 30, 2006 decision. It found that the new medical evidence was not adequate to establish that his injury was causally related to his alleged incident. The Office also found that the inconsistencies in appellant's version of events and the record were substantial enough to raise a serious question as to the occurrence of the employment incident as alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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; that an injury was sustained while in the performance of duty; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4]

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether "fact of injury" has been established. "Fact of injury" consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component of "fact of injury" is whether the incident caused a personal injury and, generally, this can be established only by medical evidence.[5]

An alleged work incident 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 statement must be consistent with the surrounding facts and circumstances and her subsequent course of action. A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident. Such circumstances as late notification of injury, lack of confirmation of injury,

[3] 5 U.S.C. §§ 8101-8193.

[4] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Ellen L. Noble*, 55 ECAB 530 (2004).

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 she has established a prima facie case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantive evidence.[6] An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[7] 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.[8]

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.[9] To be rationalized, the opinion must be based on a complete factual and medical background of the claimant,[10] and must be one of reasonable medical certainty,[11] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS

The Office has accepted neither that an employment incident occurred when appellant fell out of his truck nor that he sustained an injury as a result of the alleged incident. Therefore the issues are whether appellant has established the employment incident as alleged and whether he sustained a compensable injury as a result of that incident.

Appellant alleged that he injured his knee on Friday, January 14, 2005, at 11:00 a.m., as he was descending the steps of his truck to deliver sacks of mail to a relay box. While his left foot was on the bottom step, appellant's right foot caught on the inner lip of the sliding door track, causing him to fall out of the truck. Appellant tried to catch himself with his hands, but his entire weight came down on his left leg with his "knee jammed up with [his] foot to the top of [his] left hamstring." After the fall, appellant walked around for approximately 10 minutes and then continued working. He felt a popping movement in his knee. Appellant did not report the incident immediately because the pain was bearable when he was moving. On January 15, 2005 he wore a brace to work and twice told his supervisor that he had hurt his knee the previous day. That day appellant began developing greater pain in his left knee while driving home after work. On the following Monday which was a federal holiday he went to Dr. Saugy, an orthopedic

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

[7] *Louise F. Garnett*, 47 ECAB 639, 643-44 (1996).

[8] *Constance G. Patterson*, 41 ECAB 206 (1989).

[9] *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[11] *John W. Montoya*, 54 ECAB 306 (2003).

[12] *Judy C. Rogers*, 54 ECAB 693 (2003).

surgeon, who told him to rest for two days. When appellant returned to work on Thursday, January 20, 2005, he informed Mr. Manganiello of his fall and the injury of his left knee. On Friday, January 21, 2005, he completed an accident report with Mr. Manganiello's help and stated that he did not want to file an injury claim at that time. Appellant filed a claim on February 3, 2005 after seeing Dr. Gerber for a second opinion.

The Board finds that appellant has consistently described the incident of falling out of the truck to his employers and physicians. Appellant reported the incident orally to his supervisor the day after it occurred and sought medical treatment two days after that. He formally reported the incident the first day he returned to work after the two days of rest prescribed by his physician. Despite the employing establishment's allegation that he reported two different dates of injury, there is no strong or persuasive evidence in the record that the incident did not occur as alleged. The employing establishment did not present any evidence contradicting appellant's description of the January 14, 2005 incident or his claim that he verbally informed his supervisor of the injury the day after the accident. Based on a review of the records, the Board finds that appellant's statement of the events is not contradicted by contemporaneous factual evidence.[13] Therefore, contrary to the Office, the Board finds that appellant has established that an incident occurred on January 14, 2005, as alleged.

In order to establish fact of injury, appellant has the burden of showing by the weight of the probative medical evidence that he sustained an injury as the result of the accepted incident. The Board finds that the medical evidence of record is insufficient to establish appellant's claim.

On February 2, 2005 Dr. Gerber, a Board-certified orthopedic surgeon, stated that appellant had a history of problems with his left knee. He stated that he had a preexisting tear of the posterior horn of the medial meniscus, which was confirmed by an August 2004 MRI scan. The tear was relatively asymptomatic and had not been repaired. Dr. Gerber stated that appellant injured himself at work on January 14, 2005 when he fell out of his truck and sustained a hyperflexion injury to his left knee that resulted in clicking, popping and pain on the medial side. Appellant's knee had stiffness, aching, swelling and loss of range of motion. On physical examination, Dr. Gerber found an antalgic gait on the left side, an effusion of 2+ in the left knee, and a positive McMurray's test. He felt the medial meniscus moving in and out of the joint line, which was causing pain. Radiographs showed moderate osteoarthritis changes and patella femoral arthritis and an MRI scan from the previous year revealed arthritic changes, a tear of the posterior horn of the medial meniscus and no ACL. Dr. Gerber diagnosed left knee pain, left knee moderate tri-compartmental osteoarthritis, symptomatic posterior horn medial meniscus tear, chronic ACL tear and effusion.

On February 10, 2005 Dr. Gerber opined that appellant's left knee and mechanical symptoms stemmed from his employment injury. He noted that his preexisting meniscus tear had been asymptomatic until he fell out of his truck at work. Dr. Gerber stated that surgery would not have been required if appellant had not injured himself at work. In his April 27, 2005 operative report, he stated that he found a large bucket-handle displacement tear of the medial

[13] *See Caroline Thomas*, *supra* note 4 (finding that the record of evidence was sufficient to establish that appellant experienced the alleged incident because there was "no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged").

meniscus during the surgery. He noted that part of the tear was well wounded and appeared to be old, but that there was some fresh tearing on the back side of the meniscus. On February 14, 2007 Dr. Gerber opined that appellant's injury was an aggravation of his preexisting injury. He stated that the findings during the surgery, combined with the fact that appellant had been asymptomatic before falling in January 2005 were the foundation for his opinion that appellant's pain and meniscal tear were caused by and related to his employment injury.

The Board finds, however, that Dr. Gerber's reports are insufficient to establish that appellant sustained a compensable injury related to falling out of his truck. The only analysis that he provided for his opinion of causal relationship was that appellant was asymptomatic before falling and that he found evidence of fresh tearing on his left medial meniscus during the surgery. The Board has held that the fact that a claimant was asymptomatic before the injury is insufficient, without supporting rationale to establish a causal relationship.[14] Likewise, the fact that appellant had fresh tearing of the meniscus does not establish the cause of the tearing. Because Dr. Gerber did not explain how appellant's fall from his truck resulted in meniscal tearing or a hyperflexion injury in the left knee his reports are of diminished probative value.

Appellant stated that he was examined by Dr. Saugy, an orthopedic surgeon, a few days following the employment incident. He indicated that Dr. Saugy prescribed medication and recommended a knee scope to determine the extent of the damage to his meniscus. However, the Board is unable to consider this evidence because no medical reports from this examination are contained in the record.

The Board finds that appellant has not met his burden of proof to establish that he was injured in the performance of duty.

CONCLUSION

The Board finds that appellant has established that the employment event occurred at the place, time and in the manner alleged. However, he has not established that he sustained an injury in the performance of duty on January 14, 2005, as alleged.

[14] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 21, 2007 is affirmed, as modified.

Issued: February 21, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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