United States Department of Labor
Employees' Compensation Appeals Board

K.R., Appellant	)	
and	)	**Docket No. 08-1248**
INTERNAL REVENUE SERVICE, Ogden, UT, Employer	)	**Issued: March 17, 2009**

Appearances:
Jimmy Roberts, representative, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 24, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated December 21, 2007 in which an Office hearing representative affirmed the denial of her claim. Under 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 met her burden of proof in establishing that she sustained an injury to her right fibula on December 19, 2006.

FACTUAL HISTORY

On January 23, 2007 appellant, then a 54-year-old clerk, filed a Form CA-1, traumatic injury claim, alleging that she sustained an injury to her left fibula on December 19, 2006 when her ankle twisted while she was walking on an uneven floor. She felt a sharp pain but did not think it was anything serious. When the pain persisted, appellant sought medical attention a few

days later from NowCare where fractures were diagnosed.[1] The employing establishment controverted the claim on the grounds that it was untimely filed and did not happen at work. Appellant's supervisor, Brian Wood, stated that she "was simply walking in a corridor and said that she fell." Appellant stopped work on or about January 19, 2007.

By letter dated January 29, 2007, the Office advised appellant of the factual and medical documentation needed to establish her claim. It requested that she submit comprehensive medical reports from a treating physician which included a reasoned explanation as to how the alleged incidents caused her claimed injury.

In a February 2, 2007 statement, appellant's husband noted that, on December 19, 2006 as they were traveling home, she told him that she had twisted her ankle when she stepped on a transition plate at the edge of the carpet while walking in a hallway leading to the Boyer Building. Appellant did not think her injury was serious at the time. However, on December 23, 2006 x-rays showed three fractures on her fibula. Mr. Roberts advised the physician that the injury had occurred at work. When he inquired about completing a CA-1 form, the physician informed him that she did not know if workers' compensation would accept the injury because of appellant's low bone density. He also told appellant's physician, Dr. Richter, a Board-certified orthopedic surgeon, that appellant had injured herself at work but had not yet reported it. Appellant subsequently filed a claim on January 19, 2006 with her supervisor, Mr. Wood, by e-mail. When she went to work on January 20, 2007 to get some personal items from her desk, she alleged that Mr. Wood had become hostile about the CA-1 claim form.

In a February 9, 2007 statement, appellant's husband maintained that the claim was timely filed; appellant initially received treatment at NowCare from a registered nurse practitioner and she was in pain until she received medical care on December 23, 2006. He confirmed there were no witnesses to appellant's injury.

In a February 9, 2007 statement, appellant related the events which transpired on January 20, 2007 with Mr. Woods. The clinic notes from NowCare dated December 23 and 26, 2006, noted a history of right ankle pain for four days and diagnosed a stress fracture and low bone density. An undated Calton Harrison Clinic form noted a December 19, 2007 date of injury and a history of "at work stepped on crack in pavement -- stumbled, limped around for 4 days."

In a January 19, 2007 report, Dr. Richter advised that appellant was being followed for a right distal fibular fracture which she apparently sustained on December 19, 2006. He noted that appellant was referred to the orthopedic trauma clinic for medical management. A January 19, 2007 x-ray report was enclosed.

The employing establishment submitted a January 23, 2007 witness statement from coworker Lori Taylor and a February 10, 2007 statement from Mr. Wood. Ms. Taylor noted that she had a conversation with appellant regarding her broken foot during the week of January 8, 2007. Appellant told her that she thought she hurt her ankle by twisting it when she had slipped on snow and ice at her home. She did not think it was broken as she did not fall down and continued to walk on it for several days before seeing a physician.

[1] Appellant's husband was designated as her authorized representative on January 19, 2007.

Mr. Wood was not aware of the alleged work injury until he received a CA-1 form. He maintained that appellant had not considered filing a claim until she learned that surgery might be needed. Mr. Wood questioned appellant about the incident and asked her to sign the CA-1 form. They discussed her leave balances, the time she needed to be off work and possible accommodations upon return to work. Mr. Wood acknowledged that he had been advised that her injury had occurred at her home.

By decision dated March 12, 2007, the Office denied the claim on the grounds that the evidence did not establish that appellant's injury occurred as alleged.

In letters dated April 11 and 25, 2007, a representative from the NowCare billing office advised that appellant was seen from December 23, 2006 to January 15, 2007 under her health insurance. In an April 26, 2007 NowCare form, a physician with an illegible signature advised that it was "undetermined" whether appellant's ankle condition was the result of an industrial injury or exposure as "patient informed clinic after initial visit that incident had occurred at work."

On April 11, 2007 appellant requested a hearing that took place on September 19, 2007. She noted that she was working full time with physical restrictions which the employing establishment accommodated. Appellant had filed an Equal Employment Opportunity (EEO) complaint based on an initial failure to accommodate her restrictions and noted that she filed a grievance on February 2, 2007 over her annual performance appraisal.

In a March 14, 2007 e-mail, Lisa Sargent, a coworker recalled that appellant stated that she was not sure where she had hurt her leg. She noted that if appellant had commented on workers' compensation it would only be if she had hurt herself on the job.

In a September 19, 2007 statement, appellant's husband contended that Mr. Wood had attempted to sabotage her claim. He indicated that appellant did not slip and fall at home on December 19, 2006 as the weather records submitted from the Farmers' Almanac had no measurable snow in the Ogden area during the period December 15 through 19, 2006.

On October 3, 2007 Mr. Woods denied that he had questioned the validity of appellant's claim due to her grievance of her performance appraisal. He indicated that appellant filed a grievance on February 2, 2007, two weeks after he had received her workers' compensation claim. Mr. Wood noted that appellant's grievance was ultimately dismissed as untimely. As he had not been appellant's supervisor for 60 days at the time of the evaluation, her appraisal was based on evaluations provided by her previous managers. Mr. Woods noted that appellant took her prescheduled annual/vacation leave on December 20 and 21, 2006 and did not call in sick those days. Appellant only worked half the night on December 22, 2006 before going home sick. Mr. Wood advised that appellant had been accommodated since she returned to work in early May 2007. He acknowledged that the employing establishment had requested medical documentation regarding her ability to ambulate and, when she did not provide such information, she was sent home until such medical documentation was provided. Mr. Wood noted that she later filed an EEO complaint, claiming that the employing establishment failed to accommodate her work restrictions. He also discussed the weather conditions from December 10 to 15, 2006.

On November 12, 2007 appellant's husband reiterated that appellant did not slip and fall on ice while at home. He disputed Mr. Wood's comments regarding the weather conditions during the period in question.

By decision dated December 21, 2007, an Office hearing representative affirmed the March 12, 2007 decision denying appellant's claim.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his 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 period 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.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[5] An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition related to the employment incident.

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. 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.[6] 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.[7] 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

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

[5] *Shirley A. Temple*, 48 ECAB 404 (1997).

[6] *See Betty J. Smith*, 54 ECAB 174 (2002).

[7] *Id.*

prima facie case has been established.[8] However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[9]

ANALYSIS

The Office denied appellant's traumatic injury claim on the grounds that she did not establish that the December 19, 2006 incident occurred as alleged. Appellant alleged that she twisted her ankle as she was walking on an uneven floor at the employing establishment on December 19, 2006. The record establishes that she first sought medical attention on December 23, 2006. Although appellant sought medical treatment shortly after the alleged incident, her claim cannot be accepted if her statements are not consistent with the surrounding facts and circumstances and her subsequent course of action. As noted, a claimant has not established an employment incident where there are inconsistencies in the evidence that cast serious doubt as to the validity of the claim. In this case, there are a number of inconsistencies in the evidence that cast doubt on the validity of her claim.

Appellant stopped work on January 19, 2007, 30 days after the alleged work incident of December 19, 2006. However, she did not provide the employing establishment any notice of her alleged injury until she stopped work on that date. The record does not provide a clear explanation as to why there was a 30-day delay in giving the employing establishment notice of the alleged injury. The record reflects that she worked on December 19, 2006 and was subsequently on scheduled leave on December 20 and 21, 2006 she apparently worked half her shift on December, 22, 2006 before going home sick.

Appellant sought medical treatment a few days after the alleged incident of December 19, 2006. However, appellant told him the medical evidence does not clearly address any history of an injury sustained at work. Appellant's husband asserted, appellant told him of her injury while traveling home on December 19, 2006 and that he told her physicians that the injury occurred at work. However, none of the medical notes from NowCare or Dr. Richter provided a history of injury or address how her ankle condition was the result of her work duties. In an April 26, 2007 NowCare form, an unidentified physician advised that it was "undetermined" whether appellant's ankle condition was the result of a work injury as "patient informed the clinic after initial visit that incident had occurred at work." Although the record contains an undated Calton Harrison Clinic Fracture Form, which notes the December 19, 2007 date of injury, the history of injury on the form -- "stepped on crack in pavement" -- is not consistent with appellant's account that she stepped on an uneven floor.

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[8] *Linda S. Christian*, 46 ECAB 598 (1995).

[9] *Gregory J. Reser*, 57 ECAB 277 (2005).

Furthermore, appellant had conversations with her family and coworkers about her ankle condition but failed to advise her supervisor of an injury at work until January 19, 2007, 30 days after the alleged incident.[10] The record contains statements from appellant's husband and her daughters, which are generally supportive of her claim. However, other statements from appellant's coworkers are not consistent with a history of injury while at work. Ms. Sargent recalled that appellant was not sure where she hurt her leg. Ms. Taylor, stated that appellant told her that she injured herself at home, when she slipped on snow and ice. Appellant submitted excerpts from The Farmer's Almanac for December 15 to 23, 2006 and various photographs, to support her contention that there was no snow or precipitation on the ground during this period. However, this alone does not establish that her injury occurred at work, as claimed. The statements from appellant's coworkers, combined with her failure to report the alleged injury until January 19, 2007, after her ankle condition worsened, or to clarify the reasons for her delay in notifying the employing establishment, cast serious doubt on the validity of her claim. Although appellant alleged bias by the employing establishment and the coworkers, she did not submit any evidence confirming her contentions.[11]

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a right fibula injury on December 19, 2006, as alleged.

[10] Appellant's contentions regarding Mr. Wood's response to her filing of this claim, or the employing establishment's actions taken with respect to her performance appraisal and removal from work because of the need for medical documentation are not germane to whether the December 19, 2006 injury occurred at the time, place and in the manner alleged.

[11] As appellant did not establish an employment incident alleged to have caused her injury, it is not necessary to consider any medical evidence. *Bonnie A. Contreras*, 57 ECAB 364 (2006).

ORDER

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

Issued: March 17, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board