

**United States Department of Labor
Employees' Compensation Appeals Board**

D.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Bloomfield, MI, Employer**

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**Docket No. 08-2282
Issued: May 22, 2009**

Appearances:

*Alan J. Shapiro, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 25, 2008 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated January 4 and July 25, 2008 denying his claim for compensation for an employment-related injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on October 17, 2006, as alleged.

FACTUAL HISTORY

On November 17, 2007 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim alleging that, on October 17, 2006, while walking down the handicap ramp he slipped and fell while in the performance of duty and sustained a torn meniscus of the left knee. He alleged that his supervisor told him not to report the accident or he would not become a 204b supervisor. In a statement by appellant, received by the Office on December 20, 2007, he

indicated that, on October 17, 2006 at 14:10 hours, he slipped and fell on a handicap ramp platform that was wet and covered with leaves. He noted that, upon returning from the field to report the accident, he was approached by Tom Bertucchi who told him that, if he filed a report about the accident, he would not become a 204b supervisor. Appellant noted that he did not file right away because he felt threatened and concerned that he may not get the 204b position or even lose his job if he filed a claim.

On November 16, 2006 appellant began treatment with Dr. Norman E. Walter, a Board-certified orthopedic surgeon, whose report indicates that on that date appellant complained of painful knees and noted that his left knee bothered him the most. Dr. Walter noted no history of injury but rather that appellant had increasing difficulty with his knee especially while squatting. He ordered a magnetic resonance imaging (MRI) scan.

On November 20, 2006 appellant had an MRI scan of his knee which was interpreted as showing a Grade 2 tear of the body and posterior horn of lateral meniscus and chondromalacia patella.

In a December 21, 2006 report, Dr. Walter indicated that appellant was markedly improved on diclofenac and that he was also taking glucosamine and chondroitin sulfate. He told appellant to avoid squats and deep knee bends and talked with him about arthritis. In an April 23, 2007 report, Dr. Walters indicated that, although appellant thought therapy was working at first, he reported that he was getting worse and that he had an effusion. He noted that he would proceed with arthroscopic surgery.

On May 1, 2007 appellant had a left knee arthroscopy, partial lateral meniscectomy, excision plica and partial synovectomy. On May 7, 2007 his stitches were removed and Dr. Walters noted no complications from the surgery. Dr. Walters released him to return to work at his desk job and indicated that he would see him on an as needed basis. In a May 24, 2007 report, he indicated that appellant fell, noting that he indicated that his "left knee kind of twinged" on Tuesday. Dr. Walters noted that appellant was treated at the after-hours clinic, that a diagnosis of a fractured distal radius was made and appellant was placed in a splint. He noted that x-rays showed a comminuted interarticular fracture involving the distal left radius and that he placed appellant in a cast. In an August 6, 2007 report, Dr. Walters noted that appellant was again bothered by crepitation and some pain in his knee. He extended sick leave until October 1, 2007 unless appellant's employer could provide him work within his restrictions. In a September 17, 2007 note, Dr. Walters indicated that appellant was ready to go back to work, but provided him a restriction against prolonged standing and that he should avoid stairs.

In a medical report dated December 17, 2007, Dr. Walter noted that appellant told him on that date that his original history he gave was erroneous. He noted that appellant told him that he did have an injury approximately one month earlier when he slipped and fell on a handicap ramp thereby sustaining a painful swollen knee. Dr. Walters concluded that the described slip and fall where there was hyperflexion and striking the knee certainly could have caused the plica or the torn meniscus which was substantiated later on MRI scan and later with arthroscopy surgery.

By decision dated January 4, 2008, the Office denied appellant's claim for the reason that he had not met the requirements for establishing that he sustained an injury as defined by the

Act, noting factual deficiencies, with regard to the reason for his delay in filing a claim, and medical deficiencies in the evidence.

In a statement dated January 13, 2008, Thomas Bertucchi, a maintenance manager for the employing establishment, noted that, on October 19, 2006, appellant informed him that he hurt his right knee and he asked him to follow him to the conference room. Once there, Mr. Bertucchi indicated that he told appellant to start completing the forms. He noted that appellant asked if this would hurt his chances on transferring or being a 204b, and that he replied that attendance and safety records would be reviewed. Mr. Bertucchi noted that appellant did not file at that time and went to talk to his doctor. He indicated that at no time did he tell appellant not to file a claim or seek medical attention. Bertha H. Newman, a Tour II supervisor, also submitted a statement corroborating Mr. Bertucchi's statement.

By letter dated January 30, 2008, appellant, through his attorney, requested a telephonic hearing. At the hearing, appellant testified that he started working for the employing establishment in August 2005, that he never injured his knee before October 17, 2006, described the circumstances of the alleged work-related slip and fall on October 17, 2006, noted that he saw Dr. Ahmed one week after the fall and then he sent him to Dr. Walters for treatment. Appellant testified that he did not initially tell Dr. Walters about the work injury, and that when he told him after the surgery he was very upset.

By decision dated July 25, 2008, the Office hearing representative affirmed as modified the Office's January 4, 2008 decision and found that appellant had established the factual circumstances surrounding his injury. The hearing representative, however, affirmed the Office's prior decision, finding that appellant had not submitted medical evidence establishing a causal relationship between this incident and his condition.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,² including that she is an "employee" within the meaning of the Act³ and that she filed her claim within the applicable time limitation.⁴ The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.⁵

¹ 5 U.S.C. §§ 8101-8193.

² *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁴ *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁵ *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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 or she actually experienced the employment incident at the time, place and in the manner alleged.⁶ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

In order to satisfy the burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.⁸ Neither the fact that the condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.⁹

ANALYSIS

In the instant case, the Office hearing representative found that the employment incident occurred as alleged, *i.e.*, that on October 17, 2006 appellant slipped and fell while walking down a ramp. However, she denied appellant's claim as the medical evidence was not sufficient to establish a diagnosed condition which could be connected to the established event. Appellant submitted numerous medical records from his treating, Board-certified, orthopedic surgeon, Dr. Walter, who initially saw appellant on November 16, 2006, one month after the October 17, 2006 work-related slip and fall. However, Dr. Walter did not note that appellant had sustained a traumatic injury at that time. In fact, in his initial report, he indicated that there was no history of injury but that appellant was having increasing difficulty with his knee. Dr. Walter proceeded to treat appellant and perform surgery on May 1, 2007. At no time during this treatment period did Dr. Walter note a traumatic injury that occurred on October 17, 2006. It was not until December 17, 2006, over one year after the October 17, 2006 incident, that Dr. Walter first noted the work injury. At that time he noted that appellant told him for the first time that he had an injury approximately one month before his initial appointment with Dr. Walter, who did note that this could have caused the plica or the torn meniscus.

The Board finds that the medical evidence is insufficient to meet appellant's burden of proof to establish a diagnosis connected with the accepted work incident. Although appellant initially saw him only one month after the work incident, he failed to mention it to Dr. Walter at that time. Dr. Walter did not connect the two until over one year after the incident, despite numerous visits. At that time, he only indicated that the incident "could have caused the plica or the torn meniscus. . . ." This conclusion, phrased in speculative language and without supporting medical rationale, is insufficient to meet appellant's burden.

⁶ *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

⁷ *T.H.*, 59 ECAB ____ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁸ *Gary L. Fowler*, 45 ECAB 365 (1994).

⁹ *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.¹⁰ There is insufficient medical evidence to establish that appellant sustained a work-related injury on October 17, 2006. Accordingly, the Board finds that appellant failed to meet his burden of proof.¹¹

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on October 17, 2006, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated July 25, 2008 and that of the Office dated January 4, 2008 are affirmed.

Issued: May 22, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁰ *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 57 (1979).

¹¹ The Board notes that appellant submitted additional evidence to the record following the July 25, 2008 decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501(c).