

representative further contends that the testimony of Phillip Jett, an employee, is consistent with appellant's description of the May 18, 2011 incident. He argues that a photograph taken by appellant, but not contained in the case record establishes that a leg on a chair from which she fell was bent. The representative notes that, while an investigative memorandum indicates that photographs of the chair were taken, these pictures are not part of the record. He asserts that the testimony of a nurse practitioner and the fact that appellant sought medical treatment immediately following the May 18, 2011 incident establishes that she sustained a work-related left ankle injury. The representative states that appellant did not receive a copy of all of the evidence upon which OWCP relied in making its determination. Lastly, he asserts that the December 27, 2011 medical report of Dr. Mathew J. Abraham, a Board-certified physiatrist, establishes that appellant sustained an injury causally related to the May 18, 2011 incident.

FACTUAL HISTORY

On May 18, 2011 appellant, then a 56-year-old transportation clerk, filed a traumatic injury claim alleging that on that date she hurt her lower back, buttocks and left ankle when she fell while trying to sit in a chair in the food service area at work.

By letter dated June 6, 2011, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit factual and medical evidence, including a rationalized medical opinion from an attending physician describing a history of injury and providing dates of examination and treatment, findings, test results, a diagnosis together with an explanation as to how the reported work incident caused or aggravated her medical condition.

In a June 8, 2011 progress note, Dr. Natacha S. Falcon, a Board-certified physiatrist, noted appellant's complaint of back pain and provided a history of her medical, family and social background. She listed findings on physical examination and diagnostic testing. Dr. Falcon diagnosed L4-5 disc protrusion with left greater than right foraminal stenosis, L5-S1 disc protrusion with B foraminal stenosis and S1 compression and a positive slump sit on the right.

In a July 8, 2011 decision, OWCP denied appellant's claim, finding that the evidence established that the May 18, 2011 incident occurred as alleged, but that the medical evidence did not establish a condition causally related to the accepted employment incident.

By letter dated July 21, 2011, appellant requested an oral hearing before an OWCP hearing representative.

Unsigned x-ray reports dated May 18, 2011 contained the typed name of Dr. Scott R. Akers, a Board-certified radiologist, and stated that there was no evidence of a fracture or dislocation of the left ankle or coccyx.

An employee injury report dated May 18, 2011 from the employing establishment health unit provided a history that appellant sat down in a broken chair which collapsed. She bruised her left side and twisted her ankle. Following an examination, appellant was diagnosed as having an exacerbation of underlying sciatica, herniated disc strain/sprain of the lumbosacral

spine and strain/sprain of the left deltoid ligament. Discharge instructions dated May 18, 2011 from the health unit stated that appellant should leave work due to severe illness or injury.

In a May 25, 2011 report, Dr. Falcon obtained a history that the onset of pain in appellant's right buttock with radiation into the right and left posterior thighs and posterior leg and left foot occurred suddenly after a fall from a chair at work on May 18, 2011. She also obtained a history of her medical treatment, family and social background. Dr. Falcon listed findings on physical and psychological examination. She diagnosed right lumbar radicular pain and positive slump sit on the right pending imaging. In progress notes dated June 8 and 24 and August 8, 2011, Dr. Falcon reiterated these diagnoses. In a June 8, 2011 report, she advised that appellant could not work while undergoing medical treatments. On June 9, 2011 Dr. Falcon reported that appellant should return to her office in three weeks for follow-up and reevaluation. In a June 24, 2011 report, she advised that appellant could not return to work until reevaluation in four weeks. In progress notes dated July 12 and 15, 2011, Dr. Falcon indicated that appellant received a transforaminal epidural steroid injection at right L5-S1 to treat her back condition. In an August 8, 2011 report, she requested that appellant be excused for treatment of her lower lumbar pain.

In a June 8, 2011 report, Dr. Nancy M. Major, a Board-certified radiologist, reported that a magnetic resonance imaging (MRI) scan of the lumbar spine showed questionable disc protrusion from L5-S1 to the left S1 neural foramen at the lateral recess. She noted, however, that the evaluation was limited due to motion artifact and advised correlation with a physical examination. The MRI scan also showed multilevel degenerative change of the lumbar spine at L4-5 and L5-S1. There was moderate narrowing of the neural foramina bilaterally at L5-S1.

In a July 12, 2011 report, Dr. Christopher Plastaras, a Board-certified physiatrist, advised that appellant had degeneration of the lumbar or lumbosacral intervertebral disc. Also, on July 12, 2011 he stated that she received a transforaminal epidural steroid injection at right L5-S1 to treat her back condition.

In a July 26, 2011 report, Dr. Mia Everett, a Board-certified psychiatrist, obtained a history that in May 2011 appellant fell while on duty at work. She listed findings on psychological examination. Dr. Everett diagnosed a single moderate episode of major depressive disorder on Axis I, personality disorders and mental retardation on Axis II, sciatica, lumbosacral disc protrusion and stenosis on Axis III, psychosocial and environmental stressors which included occupation, chronic pain and bereavement on Axis IV and a global assessment functioning score of 65 on Axis V.

Also, on July 26, 2011 Dr. Mahendra Takashi Bhati, a Board-certified psychiatrist, reviewed and agreed with Dr. Everett's findings. Appellant had moderate major depressive disorder in the context of pain and disability. She also had chronic sciatica pain with a history of orthopedic injuries.

In progress notes dated September 6, 2011, Dr. Seth A. Schran, a Board-certified physiatrist, obtained a history that appellant had experienced low back pain since her May 18, 2011 work injury. He listed findings on physical examination and reviewed diagnostic test results. Dr. Schran diagnosed L4-5 disc protrusion with left greater than right foraminal stenosis,

L5-S1 disc protrusion with B foraminal stenosis and S1 compression and positive slump sit on the right.

In a December 27, 2011 report, Dr. Abraham stated that he first saw appellant on May 25, 2011 following an incident which occurred at the employing establishment. She had pain in her back which radiated into the right leg down to the foot. Dr. Abraham stated that a lumbar MRI scan showed a disc bulge at L4-L5 and L5-S1 with bilateral foraminal stenosis at L5-S1. Prior to this injury, appellant had pain in her back that radiated into the left leg which was treated with injections and therapy. This injury had resolved at the time of the May 2011 incident. Based on his evaluation of appellant, Dr. Abraham advised that her right-sided back and leg symptoms were a result of her May 18, 2011 fall. Also, she sustained a recurrence of her left-sided symptoms since the May 18, 2011 fall. Dr. Abraham opined that these symptoms were aggravated by the fall. On December 28, 2011 he reported physical examination findings and reviewed diagnostic test results. Dr. Abraham diagnosed L4-5 disc protrusion with left greater than right foraminal stenosis, L5-S1 disc protrusion with B foraminal stenosis and S1 compression and positive slump sit on the right.

An August 15, 2011 police report prepared by Eric Fellows, an employing establishment investigative officer, included interviews from employees and appellant regarding the May 18, 2011 incident. Tierney E. Stanley stated that appellant was facing administrative removal action. Pending an investigation of the charges against her, she was scheduled to report to a detail assignment in the food and nutrition section on May 18, 2011 and she allegedly fell out of a chair prior to the start of work.

Ms. Sherman, a food service supervisor, related that prior to the start of work on May 18, 2011 appellant was asked to sit in a conference room to wait for an assignment. She was informed by appellant at 7:15 a.m. that her legs went out from under her when she stood up. Appellant caught herself and sat back down in a chair. At 8:00 a.m. Nadine Richardson, a work leader, informed Ms. Sherman that appellant had fallen somewhere in the kitchen. Ms. Sherman asked appellant about this incident and she responded that she had fallen and was picked up by an employee. Appellant did not know what time she fell. Ms. Sherman asked everyone in the kitchen if they saw her fall and no one witnessed the incident. Appellant complained that everything hurt and Ms. Sherman instructed her to write down a description of the incident. Ms. Sherman notified her own supervisor, Troy Thompson, about the incident.

Officer Fellows reported that following the May 18, 2011 incident appellant was treated at employee health and was released to go home. Based on his investigation, he determined that the evidence did not rise to the level to effectively prosecute her for fraud beyond a reasonable doubt. However, it was at least likely that appellant's official statement was not credible.

In a follow-up report dated May 26, 2011, Officer Fellows interviewed Ms. Sherman again on May 23, 2011. She did not witness the May 18, 2011 incident. Ms. Sherman stated that it was not probable for someone to fall unnoticed in the kitchen between 7:00 a.m. and 8:00 a.m. because there were too many people in there at that time of the morning. She incorrectly stated during her prior interview that Ms. Richardson came to her at 8:00 a.m.

On May 26, 2011 Mr. Thompson, a food service supervisor, stated that he did not observe appellant fall out of a chair on May 18, 2011. He checked the chair she was sitting in and it appeared to be in good working order.

On May 27, 2011 Ms. Richardson, a co-employee, stated that around 10:00 a.m. on May 18, 2011 she saw appellant sitting in a chair in the conference room. Appellant told her that she had fallen and a man helped her get up. She was trying to get herself together. Appellant refused medical treatment, stating that she had a sciatic nerve and her leg would give out. She also had tape on her toes. Ms. Richardson notified her supervisor about the incident. She did not see appellant fall.

On June 17, 2011 Mr. Jett, a co-employee, stated that on May 18, 2011 he saw appellant sitting in the break room. While in an office next to the break room, he heard a slight noise that sounded like the back of a chair had hit the wall. Mr. Jett returned to the break room where he saw appellant in a crouched position attempting to get back into her chair. He did not see her on the floor. Appellant refused Mr. Jett's help and asked him not to touch her. She placed herself into the chair.

During a June 23, 2011 interview, appellant stated that she had a prior sciatic nerve condition. She was preparing to sit in a chair when she experienced a sharp pain in her left buttocks that shot down to her left foot. Appellant tried to brace herself by holding onto the arms of two chairs, but fell to the floor. She hurt her right side and left ankle. No one saw appellant fall. An unknown man walked past her after the fall and helped her get back into a chair. After the fall appellant saw that the chair leg was bent. She took a picture of the chair with her cell phone. Appellant was treated at the employing establishment's health unit.

During an interview on May 24, 2011, Sarah Foster-Chang, an employing establishment nurse practitioner, stated that appellant was treated on May 18, 2011. She obtained a history that when appellant sat in a chair, the chair collapsed and she landed on the floor on her coccyx and twisted her ankle. Nurse Foster-Chang advised that appellant could have hurt her ankle as it was swollen slightly in an area explained by her description of it buckling underneath her. Her prior medical condition could have been worsened by this injury but, Nurse Foster-Chang could not determine the extent of her injuries because she would not submit to a full examination due to being sensitive to touch.

Officer Fellows stated that photographs of the area where appellant fell and chairs were taken. He determined that no employee saw her fall or on the floor after the fall. An examination of the chairs involved in the incident showed them in good working order. There were no safety issues in the area of the alleged fall. Officer Fellows reiterated his prior conclusion that there was no evidence of fraud and that appellant's official statement was likely not credible.

In a February 23, 2012 decision, an OWCP hearing representative affirmed the denial of appellant's claim as modified to reflect that the claim was denied on the grounds there was no evidence to establish that the May 18, 2011 incident occurred as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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 FECA; that the claim was filed within applicable time limitation; that an injury was sustained while 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 These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged. 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's statement 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.⁶ Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden 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. Circumstances such 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 statement in determining whether a *prima facie* case has been established.⁷

ANALYSIS

The Board finds that appellant established that she fell onto the floor as she attempted to sit on a chair on May 18, 2011 at work. As noted, an employee's statement alleging that an incident 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 Appellant's account of the May 18, 2011

² *Id.*

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 3.

⁵ *T.H.*, 59 ECAB 388 (2008).

⁶ *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

⁷ *Betty J. Smith*, 54 ECAB 174 (2002).

⁸ *See cases cited, supra* note 6.

incident was consistent throughout the case record. Her narrative paralleled the medical histories obtained by the employing establishment's health unit, Nurse Foster-Chang and Drs. Falcon and Everett.⁹ Furthermore, appellant filed her traumatic injury claim promptly on May 18, 2011 and received subsequent contemporaneous medical attention. Although Ms. Sherman contended that appellant did not sustain the May 18, 2011 fall as neither herself nor any employees, which included Mr. Thompson, Ms. Richardson and Mr. Jett, witnessed the incident, she acknowledged that appellant reported the incident to her on the date of injury and that she then reported the incident to her own supervisor, Mr. Thompson. Mr. Stanley contended that the May 18, 2011 fall incident did not occur as appellant was facing administrative removal action pending an investigation. This contention is not substantiated by the case record. In view of the totality of the evidence, the Board finds that an employment incident occurred on May 18, 2011, as alleged. Thus, appellant has met the first component of fact of injury.

Regarding the second component of fact of injury, as OWCP had not evaluated the medical evidence due to not finding a compensable factor, the Board will remand the case to OWCP for review of the medical records and a determination as to whether the established employment incident resulted in a compensable injury. Following this and any further development deemed necessary, it shall issue a *de novo* decision on the merits of the claim.

CONCLUSION

The Board finds that appellant has established that the May 18, 2011 incident occurred at the time, place and in the manner alleged. The case is remanded to OWCP for proper review of the medical evidence of record to determine whether appellant sustained an employment-related injury and her entitlement to any compensation benefits.

⁹ See *Caroline Thomas*, 51 ECAB 451 (2000) (a consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can be evidence of the occurrence of the incident).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision.

Issued: August 5, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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