

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

C.O., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer

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**Docket No. 13-224
Issued: June 12, 2013**

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 7, 2012 appellant, through her attorney, filed a timely appeal from a June 18, 2012 merit decision and an October 10, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on or about October 10, 2011, as alleged; and (2) whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel contends that OWCP's decisions were contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 4, 2012 appellant, then a 54-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured the tendons in her left foot as a result of slipping and falling down steps while delivering mail in the performance of duty on or about October 10, 2011. The employing establishment controverted her claim in letters dated May 9 and 10, 2012.

By letter dated May 14, 2012, OWCP notified appellant of the deficiencies of her claim. It allotted 30 days for the submission of additional factual and medical evidence.

Appellant submitted an August 12, 2011 symptom questionnaire noting that she had a sore left foot due to falling down stairs two months prior. She also submitted a statement dated June 2, 2012 from a coworker who recalled having a discussion with her a year prior, after seeing her limp on the workroom floor. The coworker stated that appellant told him she had slipped on stairs while delivering mail.

In a September 13, 2011 report, Dr. Rodney J. Stanley, a Board-certified orthopedic surgeon, diagnosed foot pain and plantar fasciitis of the left foot. He noted that appellant had a history of left foot and heel pain after a fall in April 2011.

By decision dated June 18, 2012, OWCP denied the claim on the basis that the evidence submitted failed to establish that the injury occurred at the time, place and in the manner alleged.

On June 21, 2012 appellant, through her attorney, requested reconsideration. An April 10, 2012 symptom questionnaire indicated that she “fell out back steps (missed last step)” on March 21, 2012. Appellant also submitted reports dated October 24, 2011 through July 26, 2012 from Dr. Kurt Massey, a podiatrist, who obtained a history that she slipped and fell down three stairs and diagnosed left plantar fasciitis and left peroneal tendinitis. In a September 12, 2012 report, Dr. Massey stated that on October 24, 2011 she reported that she had recently fallen down three stairs and injured her heel. On June 25, 2012 appellant reported that her ankle was becoming painful and a magnetic resonance imaging (MRI) scan was obtained. It showed a cystic area in the ankle bone called the talus. Dr. Massey explained that this abnormal area of bone was typically caused by an ankle sprain. He stated that the most recent sprain had occurred in October 2011. Therefore, Dr. Massey attributed appellant’s talus cyst to the fall down the stairs, “which occurred at home.”

By decision dated October 10, 2012, OWCP denied appellant’s request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

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

² 5 U.S.C. §§ 8101-8193.

States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury³ was sustained in the performance of duty, as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁵

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee’s statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁶ 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 a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.⁷ An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. 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 and persuasive evidence.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that she sustained a left foot injury as a result of slipping and falling down steps while delivering mail in the performance of duty. As noted above, the first element of fact of injury requires that

³ OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁴ See *T.H.*, 59 ECAB 388 (2008). See *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁶ See *Mary Jo Coppolino*, 43 ECAB 988 (1992).

⁷ See *R.T.* Docket No. 08-408 (issued December 16, 2008).

⁸ See *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

appellant submit evidence establishing that an incident occurred at the time, place and in the manner alleged.

The evidence is insufficient to establish that appellant fell while in the performance of duty on or about October 10, 2011. Appellant did not report any witnesses to the event. She submitted a June 2, 2012 statement from a coworker recounting a conversation regarding the incident. However, he merely reiterated appellant's statement. As appellant was alone at the time the incident occurred and there were no eyewitnesses, her statement alleging that an injury occurred at a given time and in a given manner is of great probative value;⁹ but there are such inconsistencies in the evidence to cast doubt upon the validity of her claim.

There are unresolved discrepancies regarding the date on which the alleged employment incident occurred. On the claim form, appellant indicated that she slipped and fell on or about October 10, 2011. She submitted an August 12, 2011 symptom questionnaire indicating that she had a sore left foot due to falling down stairs two months prior, which would have been in June 2011. On September 13, 2011 Dr. Stanley listed a history of left foot and heel pain after a fall in April 2011. These accounts are contradictory in nature. Appellant did not provide any explanation as to why she contradicted her own statement or why Dr. Stanley's report was erroneous. The Board finds that the evidence of record is insufficient to establish a traumatic incident, as alleged.

On appeal, counsel contends that OWCP's decisions were contrary to fact and law.

Appellant's statements and Dr. Stanley's report are inconsistent with the surrounding facts and circumstances.¹⁰ She has not reconciled these contradictions. The evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant's claim. Accordingly, the Board finds that appellant has not met her burden of proof to establish that she experienced an employment-related incident at the time, place and in the manner alleged.¹¹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review

⁹ *Id.*

¹⁰ *Cf. S.A.*, Docket No. 10-1786 (issued May 4, 2011) (where the Board found that appellant established that the incident occurred as alleged, as there were no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident).

¹¹ Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. *See Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

an award for or against compensation.¹² OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹³

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁶

ANALYSIS -- ISSUE 2

In support of her June 21, 2012 reconsideration request, appellant submitted reports from Dr. Massey dated October 24, 2011 through September 12, 2012. Although Dr. Massey reported that she fell down stairs and injured her heel on October 24, 2011, he indicated that the fall occurred at home. The Board finds that submission of these documents did not require reopening appellant's case for merit review as they failed to support that the October 10, 2011 incident occurred at the time, place and in the manner alleged, which was the issue before OWCP. Therefore, they do not constitute relevant and pertinent new evidence and are not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also submitted an April 10, 2012 symptom questionnaire indicating that she "fell out back steps (missed last step)" on March 21, 2012. The Board finds that submission of this document did not require reopening her case for merit review. OWCP denied appellant's claim based on the lack of supportive factual evidence establishing that the incident occurred at the time, place and in the manner alleged. This document does not support that she sustained an injury in the performance of duty on or around October 10, 2011. Therefore, the submission of this document is insufficient to require OWCP to reopen the claim for consideration of the merits.

On appeal, counsel contends that OWCP's decisions were contrary to fact and law. For the reasons stated above, the Board finds the attorney's argument is not substantiated.

¹² *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹⁴ 20 C.F.R. § 10.606(b)(2). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Id.* at § 10.608(b).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on or around October 10, 2011, as alleged. The Board further finds that OWCP properly refused to reopen her case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 10 and June 18, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 12, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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