

FACTUAL HISTORY

On December 1, 2011 appellant, then a 41-year-old police officer, filed a traumatic injury claim alleging that on May 12, 2011 he tore the medial meniscus of his right knee as a result of running 1.5 miles during a physical fitness test (PFT). The employing establishment controverted his claim stating that the alleged injury was not reported within 30 days.

In an undated statement, appellant explained that on May 12, 2011 he was required to perform a PFT that included running 1.5 miles. After the run, he felt pain in his right knee and complained about it to his coworkers, supervisor and family members. Appellant thought that the pain would eventually go away. On September 19, 2011 he was examined at Occupational Health and advised to see his own physician if there was still pain after two weeks. Thereafter appellant was examined by his personal physician, who diagnosed a meniscus tear of his knee. He was treated by other physicians and underwent a magnetic resonance imaging (MRI) scan, which verified that he sustained an acute tear of the medial meniscus of the knee.

In a September 19, 2011 occupational health report, a provider with an unknown signature noted that appellant was seen for complaints of right knee and leg pain after a May 12, 2011 injury. He authorized appellant to return to work without limitations.

In a November 1, 2011 progress note, Dr. Frank George Guellich, a Board-certified orthopedic surgeon, listed appellant's complaint of right knee pain after he fell and twisted it several months prior. He related that an x-ray was reported as normal. Appellant stated that he continued to have pain and occasional swelling in the medial aspect of the knee with use. Upon examination of the right knee, Dr. Guellich observed abnormal meniscus and tenderness of the medial joint line. Range of motion and alignment were normal. No effusion, lateral collateral ligament (LCL) laxity and medial collateral ligament (MCL) laxity were noted.

In a November 1, 2011 report, Dr. Michael Seeger, a Board-certified family practitioner, related appellant's complaints of a right knee injury that occurred on May 12, 2011 when he fell and twisted his right knee. He stated that appellant was seen by his workers' compensation carrier and x-rays were reportedly normal. Dr. Seeger diagnosed right knee pain and disorder of the right meniscus.

In a November 29, 2011 report, Dr. Guellich related appellant's complaints of right knee pain following a May 12, 2011 injury. He diagnosed right knee tear of the medial meniscus and noted that appellant was planning for knee surgery.

In a November 29, 2011 work status report, Dr. Guellich advised that appellant was placed off work from November 29, 2011 through January 3, 2012 and would be able to return to full duty on January 4, 2012.

In a December 13, 2011 report, Dr. Jeffrey Gates, a Board-certified orthopedic surgeon, related appellant's complaints of right knee pain, instability and locking for the past seven months. He noted that after a PFT for work on May 12, 2011 appellant noticed some soreness, which never went away. Examination revealed tenderness to palpation and no swelling, effusion or ecchymosis. Dr. Gates diagnosed right knee derangement of the medial meniscus and medial

meniscus tear. He noted that a November 17, 2011 x-ray revealed small calcification at the posterior femur and that a November 17, 2011 MRI scan revealed tear of the posterior horn of the medial meniscus and small suprapatellar effusion.

On December 27, 2011 OWCP advised appellant that he had submitted insufficient evidence to support his claim. It requested additional evidence. OWCP requested a more detailed description of the May 12, 2011 incident and a medical report from his treating physician with a diagnosis of his condition and an explanation of how his medical condition was caused or aggravated by the alleged work event.

In a January 7, 2012 letter, appellant related that on May 12, 2011 he completed a 1.5 mile run as part of his PFT and told many of the participants and the training officer that his knee hurt. Since the injury, he complained about right knee pain and, in August, went Occupational Health. Appellant was also examined by his own physician and underwent an MRI scan. The results of the MRI scan showed that he should have surgery.

In a December 1, 2011 statement, David A. Landry, a police officer, explained that on May 12, 2011 the mid-shift conducted their physical fitness training. During the run, appellant stayed with his pace. Mr. Landry came in second while appellant was a close third behind him by a few seconds. He explained that, after the run, appellant walked with a limp and stated that he might have pulled a muscle in his leg. A few days after the PFT, Mr. Landry noticed that appellant was limping and appellant told him that his knee still hurt. Later that week, appellant told Mr. Landry that he got his knee examined and needed an operation.

In a January 11, 2012 statement, Terrance C. Daly, a police officer, noted that he observed appellant the day of the physical abilities test and after the test. Before the test on May 12, 2011, appellant was not limping and appeared to be walking normally. Mr. Daley reported that they had 20 minutes to stretch before they did push-ups and ran 1.5 miles. During the run, appellant was right behind him and appeared to be running very well and keeping up with him. On about the fourth lap, Mr. Daley stated that appellant slowed down and appeared to be in pain. When he asked appellant if he was ok, appellant replied that his right knee hurt and he stopped running and started to walk with a limp. After the run, appellant told his supervisor that his right knee was very sore and painful, and his supervisor told him to give it a few days. Mr. Daley noted that appellant walked with a noticeable limp and appeared to be grimacing in pain. After that day, appellant was always limping, appeared not to be able to put a lot of weight on his right knee and complained about the pain.

In an undated statement, Kenneth J. Quinata, a patrol officer, reported that their mid-watch section received last minute notice that they were to have their annual PFT on May 12, 2011. He noticed that the other guys, including himself, were having problems and struggling due to their legs cramping up and hurting. Mr. Quinata noted that, when appellant passed him while running, he mentioned that his right knee hurt. When they were all walking back to their cars, appellant was limping and spoke of his knee pain. Mr. Quinata noted that appellant continued to complain of pain in his knee.

In an undated statement, Lieutenant Randy J. Arbuckle, appellant's supervisor, related that on May 12, 2011 appellant underwent a mandatory PFT while on duty. He noted that the

day after the test, appellant stated that his knee was sore from the run. Mr. Arbuckle noted that appellant continued to complain of pain in his knee for a few months after the PFT. Appellant's supervisor sent him to occupational health, where he was advised to see his personal physician. In November, appellant informed Mr. Arbuckle that his personal physician diagnosed a more severe injury and that he might need surgery.

In a December 29, 2011 work status report, Dr. Gates noted the date onset of condition as December 13, 2011. He authorized appellant to return to modified duty from January 3 to February 7, 2012.

In a January 13, 2012 preoperative examination report, Dr. Gates related that appellant was scheduled for right knee arthroscopy on January 16, 2012. He listed a date of injury of May 12, 2011. Examination revealed tenderness to palpation and mild pain with valgus stress. McMurray's testing was positive on the medial for significant pain. Dr. Gates noted that a November 7, 2011 x-ray of the right knee revealed small calcification at posterior femur likely incidental but no obvious evidence of fracture, dislocation, tumor or congenital abnormality. He diagnosed tear of the posterior horn of the medial meniscus of the right knee and small suprapatellar effusion.

In a January 24, 2012 report, Dr. Seeger stated that he first examined appellant on November 1, 2011 for complaints of right knee pain and swelling after injuring his knee at work a few months earlier. He related that appellant was seen by another physician and that x-rays were unremarkable. Dr. Seeger noted that a November 18, 2011 MRI scan revealed a tear in the posterior horn of the medial meniscus. On January 16, 2012 appellant underwent a right knee arthroscopy with partial medial meniscectomy.

In a January 26, 2012 report, Dr. Gates noted a history of right knee arthroscopy on January 16, 2012. Examination revealed soft tissue swelling and normal range of motion. Dr. Gates diagnosed right knee complex posterior horn medial meniscus tear and small medial plicae. He authorized appellant to return to modified duty on January 26, 2012 with restrictions of desk work only and no standing or running until March 14, 2012.

In a February 24, 2012 occupational health record, appellant noted a date of injury of May 12, 2011. It was recorded that he was seen for postknee surgery and updated modified duty. Appellant was returned to limited duty with restrictions of administrative/desk work only.

In a decision dated April 20, 2012, OWCP denied appellant's claim finding insufficient factual evidence to establish that the May 12, 2011 employment incident occurred at the time, place and in the manner alleged. It also found that the medical evidence was insufficient to establish that his right knee condition was causally related to the alleged incident.

On May 14, 2012 appellant requested a review of the written record. He contended that the statement by Mr. Landry was accurate and explained that Mr. Landry was a 55-year-old man whose pace was not a full speed run. Appellant stopped running due to pain in his right knee. He noted that he was submitting occupational health permits that established that his department acknowledged that he sustained an occupational injury during the required fitness test run and

that at no time was the injury questioned due to the witnesses present. He resubmitted the occupational health records and other medical reports by Drs. Seeger, Guellich and Gates.

In a March 5, 2012 occupational health permit, a provider with an illegible signature noted that appellant was a police officer and a date of injury of May 12, 2011. He diagnosed medial meniscus tear and repair authorized appellant to return to full duty on March 4, 2012.

By decision dated September 24, 2012, an OWCP hearing representative affirmed the April 20, 2012 decision finding insufficient evidence to establish that the May 12, 2011 incident occurred as alleged or that appellant sustained a right knee condition as a result of the alleged incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,³ including that he or she is an “employee” within the meaning of FECA⁴ and that he or she filed his or her claim within the applicable time limitation.⁵ The employee must also establish that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁶

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.⁷ 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.⁸ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁹

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place, and in the manner alleged or whether the alleged injury was in the performance of duty,¹⁰ nor can it find

² 5 U.S.C. §§ 8101-8193.

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁴ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951).

⁵ *R.C.*, 59 ECAB 42 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954).

⁶ *G.T.*, 59 ECAB 447 (2008); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

⁷ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁸ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁹ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Elaine Pendleton*, 40 ECAB 1143 (1989).

fact of injury if the evidence fails to establish that the employee sustained an injury within the meaning of FECA. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.¹¹ 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 cause doubt on an employee's statements in determining whether he has established his claim.¹²

ANALYSIS

Appellant alleged that on May 12, 2011 he sustained a right knee injury as a result of running 1.5 miles during a PFT. As part of his burden of proof, he must establish that he experienced the May 12, 2011 incident at the time, place and in the manner alleged. By decisions dated April 20 and September 24, 2012, OWCP denied appellant's claim finding insufficient evidence to establish that the May 12, 2011 incident occurred as alleged or that his right knee condition resulted from the alleged incident. The Board finds that the evidence fails to establish that he sustained an injury in the performance of duty on May 12, 2011.

The Board notes that the evidence submitted is insufficient to establish fact of injury because inconsistencies in the record do not support that the specific event or incident occurred at the time, place and in the specific manner alleged. Appellant alleged on appeal and in his Form CA-1 that on May 12, 2011 he tore his right knee medial meniscus as a result of running 1.5 miles during a mandatory PFT. In Dr. Guellich's November 1, 2011 medical report, however, he listed a history that appellant's right knee pain started several months prior when he fell and twisted his right knee. In a November 1, 2011 report, Dr. Seeger stated that on May 12, 2011 appellant fell and twisted his right knee. Dr. Gates also noted a date of onset as December 13, 2011. As noted, fact of injury is not established if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged.¹³ The Board notes that Dr. Guellich and Seeger's description of falling down and twisting his knee contradicts appellant's statement that he ran 1.5 miles during a PFT. The reports of the physicians do not support that the May 12, 2011 employment incident occurred as alleged. Moreover, appellant did not provide prompt notification of injury. He waited until December 1, 2011 to file his claim form and did not seek medical treatment until September 2011. Although numerous witness statements note that the May 12, 2011 PFT occurred, they are insufficient to establish that he sustained any right knee injury during the fitness test. Mr. Landry related that, after the run, appellant told him that he might have pulled a muscle in his leg. Later that week, appellant told him that he had his knee examined and needed a knee operation. This statement is not consistent with appellant's statements that he waited until August to seek medical attention because he believed his knee

¹¹ *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

¹² *Constance G. Patterson*, 41 ECAB 206 (1989).

¹³ *Pendleton*, *supra* note 10.

pain would resolve. The Board finds that the inconsistencies in the evidence cast serious doubt as to whether the specific May 12, 2011 event occurred at the time, place and in the manner alleged. Accordingly, appellant did not meet his burden of proof to establish fact of injury.¹⁴

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.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a right knee injury in the performance of duty on May 12, 2011.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁴ See *A.J.*, Docket No. 11-1912 (issued March 22, 2012).