

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

E.M., Appellant)
)
and)
)
DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
Newark, NJ, Employer)
_____)

**Docket No. 13-1947
Issued: May 6, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 23, 2013 appellant filed a timely appeal from an August 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim. 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.

ISSUE

The issue is whether appellant has established that she sustained a traumatic right knee injury in the performance of duty.

On appeal, appellant contends that she promptly reported her injury and that her physician's reports were sufficient to establish causal relationship.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 5, 2013 appellant, then a 52-year-old customs and border protection officer, filed a claim for traumatic injury (Form CA-1) alleging that on May 28, 2013 she sustained a right knee injury during defensive tactics recertification. She stated that, during the “red man” scenario, she used her knee to make the subject comply with her orders. Appellant asserted that on May 29, 2013 her right knee became sore and swollen. She did not stop work at the time of her claim. The employing establishment controverted appellant’s claim, asserting that there were no witnesses to the claimed injury, that she delayed reporting the injury for several days and that the training scenario was “not that physical.”

In support of her claim, appellant submitted June 10, 2013 reports from Dr. John Lee Berger, an attending Board-certified orthopedic surgeon, who related her account of twisting her right knee at work on May 28, 2013 during defensive tactics training. Dr. Berger obtained right knee x-rays within normal limits. On examination, he noted tenderness in the posterior aspect and over the medial joint line and limited flexion and extension. Dr. Berger diagnosed post-traumatic synovitis of the right knee with internal derangement, rule out meniscal injury and rule out chondromalacia. He administered a cortisone injection and prescribed medication and physical therapy.

In a June 28, 2013 letter, OWCP advised appellant of the additional evidence needed to establish her claim, including factual information substantiating the May 28, 2013 incident. It also emphasized the importance of submitting a report from her attending physician explaining how and why the May 28, 2013 incident would cause the claimed right knee injury. OWCP afforded appellant 30 days to submit additional evidence.

In response, appellant submitted a July 3, 2013 report from Dr. Berger, noting that her right knee improved significantly following the June 10, 2013 cortisone injection. She had full range of motion, normal contour and full weight bearing. Dr. Berger released appellant to full duty as of July 8, 2013 and discharged her from care. Appellant also submitted June 20 and 26, 2013 physical therapy notes.

By decision dated August 5, 2013, OWCP denied appellant’s claim on the grounds that fact of injury was not established. It found that appellant did not establish that the May 28, 2013 training incident occurred at the time, place and in the manner alleged. OWCP noted that even if the May 28, 2013 incident was established as factual, the medical evidence did not explain how and why the event would cause the diagnosed right knee injuries.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 the 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.² 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.³

In order to determine whether an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.⁴ 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.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 The employee’s statement, however, must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his 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

Appellant claimed that she sustained a right knee injury on May 28, 2013 in a “red man” scenario during defensive tactics recertification. OWCP denied the claim by August 5, 2013 decision, finding both that she failed to establish the May 28, 2013 incident as factual and that the medical evidence was insufficient to establish causal relationship.

In her June 5, 2013 claim form, appellant explained that she used her right knee to make the “red man” comply with her orders. She did not describe the physical requirements of the scenario or explain how she believed the exercise physically caused the claimed injury. The probative quality of appellant’s account of events was also called into question by the employing establishment’s contention that the training scenario was “not that physical.” OWCP advised her by June 28, 2013 letter of the additional factual evidence needed to establish her claim, including corroboration that the “red man” incident occurred at the time and in the manner alleged.

² *Joe D. Cameron*, 41 ECAB 153 (1989).

³ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁴ *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ *Deborah L. Beatty*, 54 ECAB 340 (2003).

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).

However, appellant did not submit such evidence. The Board therefore finds that OWCP properly denied the claim due to a lack of factual evidence.⁸

As appellant did not meet the threshold requirement of establishing the May 28, 2013 incident as factual, it is not necessary to address the medical issue of causal relationship.

On appeal, appellant contends that she reported her injury promptly and that her physician's reports were sufficient to establish causal relationship. As stated, she submitted insufficient evidence to establish that the claimed May 28, 2013 incident occurred as alleged. It is therefore premature to address the medical issue of causal relationship.

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 has not established that she sustained a traumatic right knee injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 5, 2013 is affirmed.

Issued: May 6, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁸ Gary J. Watling, *supra* note 4.