United States Department of Labor
Employees' Compensation Appeals Board

N.F., Appellant	)	
and	)	**Docket No. 15-0895**
	)	**Issued: August 27, 2015**
U.S. POSTAL SERVICE, WAREHOUSE ANNEX, San Antonio, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 17, 2015 appellant, through counsel, filed a timely appeal from a February 13, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 met his burden of proof to establish that he sustained an employment-related injury on October 3, 2012.

On appeal counsel asserts that the February 13, 2015 decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 5, 2012 appellant, then a 48-year-old mail handler, filed a traumatic injury claim alleging that at 6:10 a.m. on October 3, 2012 he injured both legs, his neck, and his lower back while at work. The employing establishment noted that appellant had not submitted his claim form until October 23, 2012. In an attached statement, appellant reported that on October 3, 2012 at approximately 6:10 a.m. as he bent and turned to place a stack of mail trays onto a pallet, he felt a stabbing pain in his left knee radiating down to his foot, and a sharp tight stabbing pain in his lower back. He related that he slowly walked to the office of his supervisor, Mary Mack, and explained to her that he was in pain and needed to leave immediately. Ms. Mack asked that he bring a physician's note for his absence.

In an October 5, 2012 report, Dr. James Key, an orthopedic surgeon, reported the history as described by appellant. Physical examination findings included tenderness to palpation of the lumbar spine, left knee, and left shin, muscle spasms of the back, and diminished lumbar spine and left knee range of motion. Straight leg raising test was positive bilaterally. Dr. Key diagnosed left knee sprain and strain, possible internal derangement of the left knee, and lumbar sprain. He recommended magnetic resonance imaging (MRI) scan studies of the lumbar spine, left knee, and shin, as well as an electrodiagnostic study of the lower extremities.

The Office of Inspector General (OIG) of the employing establishment conducted an investigation regarding the claim. The investigative report, dated November 15, 2012, indicated that appellant was interviewed by OIG agents on November 13, 2012 and questioned about the claimed October 3, 2012 injury. The report noted that the claim had been faxed to the employing establishment by Alamo Work Ready. The report stated that appellant explained that Alamo Work Ready faxed the Form CA-1 and attached statement to his supervisor because he did not want to deal with her. He dictated his statement to Alamo Work Ready, they typed it for him, and he signed it. The investigative report continued that appellant explained he sustained a previous injury on July 7, 2012 when he smashed his left leg into a pallet, for which he filed a Form CA-1 in September 2012, and that appellant received medical care and physical therapy at Alamo Work Ready under that claim. Appellant told the investigators that when he arrived at work on October 3, 2012, he was already experiencing pain in his left leg/knee area from his July 2012 injury. He stated that, after an employee meeting in the break room, he told Ms. Mack that he was in a lot of pain and had to leave, but did not tell her the specifics of the pain, such as its location. Appellant denied telling Ms. Mack that his stomach hurt and that he had diarrhea as she contends. He stated that he then walked past her office onto the workroom floor and started doing trays and emptying equipment for approximately five minutes at the most, that the pain worsened, and he felt a pop or burning sensation. Appellant related that he then went to Ms. Mack's office, completed a Form 3971 leave slip, and was told by her that she had to record the leave as "personal."

Ms. Mack completed a sworn and signed statement dated October 24, 2012 in which she related that on October 23, 2012, when she arrived at work at 6:00 a.m., she found a CA-1 and typewritten statement signed by appellant that appeared to have been faxed the previous day from Alamo Work Ready. She continued that appellant did not report an accident to her on October 3, 2012. Ms. Mack stated that appellant attended the morning meeting in the break room on October 3, 2002, and that, as soon as it was over, he told her he had to go home because

he was sick. She had him wait while she started her machine. Appellant then told her that he ached all over, had a stomach ache, and diarrhea. Ms. Mack gave him a 3971 form; which he filled out for personal sick leave, gave it to her, and she requested documentation to support this absence. She advised that appellant did not perform any work before he went home that day and did not say he hurt himself at work before he left.

Documents attached to the statements including a fax transmittal sheet indicating that six pages were sent to the employing establishment by Alamo Work Ready on October 22, 2012, and an absence request, completed by appellant and signed by Ms. Mack, indicating that he was requesting sick leave at 6:00 a.m. on October 3, 2012. An employing establishment time and attendance form indicated that on October 3, 2012 appellant signed in at 6:06 a.m. and signed out at 6:39 a.m.

In correspondence dated November 27, 2012, the employing establishment controverted the claim. Sharon Faust, senior health resource management specialist, maintained that appellant's statements regarding the claimed October 3, 2012 injury were not true. She referenced Ms. Mack's statement which she attached, and provided two coworker statements. In a November 14, 2014 statement, Alex Ramirez advised that on October 3, 2012 he asked Ms. Mack if she had seen appellant and was told that he went home sick. In a second statement dated November 14, 2012, Carlene M. Clements stated that after the morning meeting on October 3, 2012, she did not see appellant on the workroom floor and did not see him do any work at all, relating that appellant went home sick after the morning meeting.

On December 7, 2012 OWCP informed appellant of the evidence needed to support his claim. The letter quoted Ms. Mack's statement and asked appellant to substantiate the factual elements of his claim. The employing establishment was also asked to provide information regarding the claim.

On a duty status report dated November 21, 2012, Dr. Key advised that appellant could not work.

In a December 18, 2012 response, appellant maintained that he did work after the morning meeting on October 3, 2012. He stated that he told Ms. Mack that his leg was sore from his previous injury and he did not tell her he had a sick stomach. Appellant again related that he felt a stabbing pain from his left knee down while placing letter trays on a pallet, walked slowly to Ms. Mack's office, and told her he needed to leave immediately. He stated that neither Ms. Ramirez nor Ms. Clements could see him because of the distance of their work areas, and therefore there was no witness to the claimed injury.

By decision dated January 24, 2013, OWCP denied the claim because appellant failed to submit sufficient evidence to establish that he actually experienced an employment incident at the time, place, and in the manner alleged because there were such inconsistencies as to cast doubt on the validity of the claim.

On August 1, 2013 appellant requested reconsideration. He stated that he was injured in the performance of duty on July 7, 2012 and the injury was witnessed by his previous supervisor, Richard Flores. Appellant continued that on October 3, 2012 he had pain from the July 2, 2012

injury, and that before he left work that day, he attempted to work but could not twist, bend, or lift. He implied that he had not sustained a new injury on October 3, 2012. Appellant attached a statement dated July 7, 2012 in which he indicated that he was informing his then supervisor Mr. Flores that he had caught his left leg between a stack of pallets and the riding jack. Appellant related that he was not seeking medical treatment but was merely reporting the injury to his supervisor. Mr. Flores also signed the statement.

A November 19, 2012 electrodiagnostic study was consistent with severe distal sensorimotor peripheral neuropathy of the left lower extremity. A January 22, 2013 magnetic resonance imaging (MRI) scan of the left knee demonstrated an abnormal patella with moderate to severe chondromalacia patellae, mild three-compartment osteoarthritis, and a lateral meniscal cyst.

Dr. Key submitted treatment notes dated January 29 to September 16, 2013 in which he repeated the history of injury, appellant's physical examination findings, and his diagnoses. In a letter of disability dated June 28, 2013, he advised that appellant was considered disabled beginning October 3, 2012 due to an employment injury that day when he felt stabbing pain in his left knee and lower back while in the performance of his regular work duties. Dr. Key also submitted duty status reports dated February 25 to September 16, 2013 in which he advised that appellant could not work.

In September 4, 2013 correspondence, Ms. Faust noted that appellant's July 7, 2012 claim, adjudicated under file number xxxxxx916, was accepted for a left leg contusion and was a closed claim.[2] She maintained that appellant's reconsideration request suggested more inconsistencies about the October 3, 2012 claimed injury, noting that he was now claiming that the injury occurred on July 7, 2012 and that Dr. Key based his findings on an inaccurate work history.

In a merit decision dated October 16, 2013, OWCP denied modification of the prior decision because the evidence submitted did not support that the injury occurred as he described.

Appellant requested reconsideration on November 12, 2013. In treatment notes dated November 4, 2013 to February 10, 2014, Dr. Key reiterated his findings and conclusions. He also advised on a November 14, 2013 duty status report that appellant could not work.

On December 24, 2013 Ms. Faust reiterated that, due to the inconsistencies in the case, appellant had not established fact of injury and causal relationship.

In a merit decision dated February 21, 2014, OWCP again denied modification, finding fact of injury had not been established.

Appellant again requested reconsideration on September 3, 2014. On August 15, 2014 he stated that the supervisor and the coworkers who stated that they did not see him on October 3, 2012 would not have seen the injury occur because they were not in his work area. Appellant

[2] The instant claim was adjudicated under file number xxxxxx214.

indicated that he reviewed a videotape that showed him going to his work area on the date in questions. He stated that he turned right and was thus headed in the direction of his work area.

In a March 3, 2014 report, Dr. Key reiterated his findings and conclusions.

On September 25, 2014 Ms. Faust indicated that both Ms. Mack and Mario Nunez, senior manager of distribution operations, advised that the workroom floor was to the left of the break room, and the supervisor's office was to the right. She indicated that Ms. Mack did not waiver from her previous statement. Ms. Faust attached e-mail correspondence dated September 25, 2014 from Mr. Nunez indicating that when exiting the break room, if you turned right you would be heading to the supervisor's office, and if you turned left, you would be heading to the workroom floor.

In a merit decision dated February 13, 2015, OWCP again denied modification, finding fact of injury not established. It indicated that the evidence submitted on reconsideration did not resolve the discrepancies outlined in the employing establishment challenge letter.

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 timely filed within the applicable time limitation period of FECA, that an injury was sustained 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

OWCP regulations, at 20 C.F.R. § 10.5(ee) 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.[4] To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[5] It is the employee's burden to establish that his or her injury occurred at the time, place, and in the manner alleged.[6]

[3] *Gary J. Watling*, 52 ECAB 278 (2001).

[4] 20 C.F.R. § 10.5(ee) (1999, 2011); *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *Supra* note 3.

[6] *H.G.*, 59 ECAB 552 (2008).

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,[7] and OWCP cannot find 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 surrounding facts and circumstances and his subsequent course of action.[8]

ANALYSIS

The Board finds that appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place, and in the manner alleged. Appellant did not establish that on October 3, 2012 he injured his lower extremities, neck, and back while moving trays of mail.

In a statement dated October 24, 2014, Ms. Mack, appellant's supervisor, related that when she arrived at work at 6:00 a.m. on October 23, 2012 she found a CA-1 and typewritten statement signed by appellant that appeared to have been faxed the previous day. She stated that appellant did not report an accident to her on October 3, 2012. Ms. Mack noted that he attended a morning meeting in the break room and that, as soon as it was over, he told her he had to go home because he was sick. Appellant told her that he ached all over, had a stomach ache, and diarrhea. Ms. Mack gave him a 3971 form which he filled it out for personal sick leave, gave it to her, and she requested documentation to support the absence. She advised that appellant did not perform any work before he went home on October 3, 2012 and did not say he hurt himself at work before he left. Ms. Mack attested to the facts of this statement in a sworn affidavit she signed on October 26, 2012.

In addition, two coworkers provided statements dated November 14, 2014. Mr. Ramirez advised that on October 3, 2012 he asked Ms. Mack if she had seen appellant and was told that he went home sick. Ms. Clements stated that after the morning meeting on October 3, 2012, she did not see appellant on the workroom floor and did not see him do any work at all, relating that appellant went home sick after the morning meeting. Appellant did not submit any corroborating witness statements. This casts additional doubt on his assertion that he sustained an employment-related injury on October 3, 2012.

Appellant submitted a number of reports from Dr. Key, beginning on October 5, 2012. Dr. Key reported the history OWCP injury provided by appellant. As these reports only recite the facts as told to the treating physician and do not offer any further independent evidence that the claimed work incident caused the alleged injury, they are insufficient to establish that the claimed incident or injury occurred.[9]

[7] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *See Joseph H. Surgener*, 42 ECAB 541 (1991).

[9] *See D.T.*, Docket No. 15-143 (issued February 18, 2015).

Lastly, the Board notes that appellant also implied that the pain sustained on October 3, 2012 was caused by a July 7, 2012 employment injury.

The inconsistencies in the evidence described above cast serious doubt as to the validity of appellant's claim. Thus, the Board finds that appellant did not meet his burden of proof to establish fact of injury. As appellant did not establish an incident as alleged, the Board need not discuss the probative value of the medical evidence submitted.[10]

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 did not meet his burden of proof to establish an employment-related injury on October 3, 2012.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2015 is affirmed.

Issued: August 27, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[10] *Paul Foster*, 56 ECAB 208 (2004).