



## **FACTUAL HISTORY**

On April 24, 2012 appellant, then a 46-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that he broke his left foot on February 17, 2011. He was walking down the steps and twisted his left foot on a rubber or vinyl mat which was not lying flat on the stairwell. Appellant stated, "I grabbed onto the railing after experiencing immediate pain."

In a letter dated May 16, 2012, OWCP informed appellant that additional factual and medical evidence was necessary to meet his burden of proof to establish his traumatic injury claim. It requested an additional description of the employment event as well as supporting medical evidence. OWCP afforded appellant 30 days to respond.

The employing establishment controverted appellant's claim on May 30, 2012. It asserted that his employment incident could not have occurred as alleged as the steps were covered with nonskid strips. The employing establishment included a photograph of the steps. It noted that appellant did not report his injury during the seven weeks that he worked following the alleged incident.

On September 13, 2010 the employing establishment granted appellant's request for leave under the Family Medical Leave Act (FMLA) due to excision of bone secondary to osteomyelitis, gas gangrene, fasciotomy, surgical syndactyly, skin graft, and hyponatemia rendering appellant incapable of weight bearing on his right lower extremity. Appellant returned to full duty with no restrictions from his prior, personal injury on February 17, 2011.

The employing establishment provided a memorandum dated November 15, 2011 which indicated that appellant had used excessive leave due to the diagnosed condition of Charcot's arthropathy of the left foot. It requested medical documentation regarding his ability to perform his job duties and noted that a decision would be made regarding his status and his ability to work on a full-time basis.

In an e-mail dated April 11, 2012, the occupational safety and health specialist noted that appellant was not sure what caused his broken foot as he had multiple medical issues including uncontrolled diabetes.

On November 21, 2011 Dr. David Millili, a podiatrist, indicated that he first examined appellant for a diabetic right foot infection resulting in gas gangrene. This condition required reconstructive and limb salvage procedures. Dr. Millili diagnosed appellant with diabetic Charcot neuropathic disorder in his left foot in April 2011. He noted that this condition resulted in multiple midfoot fractures of appellant's left lower extremity. Dr. Millili concluded that appellant's conditions had completely resolved as of November 2011 with no work restrictions.

On March 6, 2012 Dr. Millili noted that appellant was experiencing pain and discomfort in his foot as he was not permitted to wear his walker boot at work. He opined that appellant's foot condition was aggravated by wearing only his boots. Dr. Millili did not specify the impacted foot, but indicated that appellant could return to work on March 14, 2012. He found that on April 17, 2012 appellant was totally disabled awaiting a brace. On June 6, 2012

Dr. Millili noted that appellant could return to work once his lower extremity bracing was in place.

In a decision dated June 15, 2012, OWCP denied appellant's traumatic injury claim. It found that appellant, a federal employee, had filed a timely claim, but had failed to meet his burden of proof to establish the factual component of his traumatic injury claim. OWCP stated that the evidence of record failed to establish that the described event occurred or occurred as appellant had described. It noted that Dr. Millili did not mention the alleged employment incident and that appellant had not submitted the requested information to support his claim.

Appellant submitted a narrative statement dated May 21, 2012, but which OWCP received on June 25, 2012. He asserted that on February 17, 2011 at 7:00 a.m. he was walking down a stairwell and twisted his left foot due to the fact that the rubber or vinyl matting was not lying flat on the stairwell. Appellant grabbed onto the railing and experienced immediate pain. His foot then began to swell. Appellant's supervisor noted his limp as well as everyone else at the employing establishment. Appellant iced his foot at home and wrapped it in a bandage. He did not report to his doctor because his foot swelled frequently due to his diabetes. Appellant sought treatment from Dr. Millili on or about April 8, 2011 and informed him that he had tripped at work. He alleged that Dr. Millili informed him that his foot was broken and cast his foot. Appellant initially returned to work in September 2011 and continued through March 10, 2012 when he stopped work due to pain. Dr. Millili found that appellant was totally disabled until his brace was completed. Appellant submitted additional medical reports from his treating physician.

Dr. Millili treated appellant on April 7, 2011 for an "episode in his left foot" as reported by appellant. Appellant indicated that his left foot had become red, hot, and swollen, but denied any gross trauma to the area. He denied discomfort. Dr. Millili found that appellant presented with clinical findings suspicious for a Charcot neuropathic collapse with overt cellulitis. In a note dated April 14, 2011, he noted that he examined appellant on April 7, 2011 due to his left foot which was extremely swollen, red, hot, and cellulosic. Dr. Millili opined that appellant's condition was consistent with a Charcot collapse. He examined x-rays and found a complete midfoot collapse and fracture. Dr. Millili placed appellant in a cast and directed him to stay off his foot. X-rays dated April 8, 2011 demonstrated "Charcot (neuropathic) foot with chronic Lisfranc injury."

Dr. Millili reexamined appellant on May 5, 2011 and diagnosed a midfoot collapse with multiple fractures. He indicated that appellant could begin partial weight bearing, but continued to be totally disabled. On June 9, 2011 Dr. Millili diagnosed a Charcot collapse of the left foot. He continued to find appellant totally disabled. Dr. Millili examined appellant on July 21 and August 4, 2011 diagnosing multiple fractures associated with a Charcot collapse. In a note dated September 1, 2011, he again diagnosed complete midfoot Charcot collapse on the left.

Dr. Millili examined appellant on March 6, 2012 due to increased pain levels in the left foot. He noted that appellant denied any recent traumatic event and reported that appellant previously had a complete collapse of the midfoot during his working activities. Appellant underwent x-rays on March 7, 2012 which demonstrated findings consistent with "mild foot neuroarthropathy (diabetic?)." On June 5, 2012 Dr. Millili noted that appellant had an event in

February where his foot demonstrated collapse during his working activities at the airport. He continued to diagnosed Charcot neuropathic collapse. In a note dated June 26, 2012, Dr. Millili indicated that appellant could return to light-duty work.

OWCP reissued the June 15, 2012 decision on December 5, 2012. Counsel requested an oral hearing from the Branch of Hearings and Review on December 11, 2012.

Appellant testified at the oral hearing on March 14, 2013. He again described the events on February 17, 2011 noting that he was walking down the stairwell and tripped on the steps which were covered in matting. Appellant testified that he tripped and twisted his left foot under instantly feeling pain. He grabbed the handrail to prevent himself from falling all the way down the stairs. Appellant limped following this event and his supervisor asked if he needed to write a report regarding his injury. He replied that he did not know, as he was not familiar with procedures. Appellant testified that he was diabetic and that he first sought medical treatment on April 7, 2011 for his left foot condition. He noted that he had just returned to work following his right foot surgery for a nonemployment injury. Appellant stated that he was terminated from the employing establishment.

In a decision dated May 30, 2013, OWCP's hearing representative found that factual evidence was insufficient to establish that the alleged incident of February 17, 2011 occurred, as alleged. She noted that appellant delayed filing the claim for more than a year, that he continued working, and that he did not seek medical attention until two months after the alleged incident. The hearing representative further found that the medical records did not provide a history of the alleged work incident or indicate that appellant's left foot condition was due to his employment.

Counsel requested reconsideration in a letter dated and received by OWCP on May 29, 2014. In support of this request, he submitted a report dated March 25, 2014 from Dr. Norman B. Stempler, an osteopath who is Board-certified with the American Osteopathic Association in orthopedic surgery. Dr. Stempler reported that on February 17, 2011 appellant sustained a slip and fall while coming down stairs at work hyperflexing his left ankle and foot. He reviewed appellant's x-rays and diagnosed neuro-Charcot or neuropathic left foot with associated chronic Lisfranc tarsometatarsal injury. Dr. Stempler further noted that appellant had pes planus of the left foot with deformity. He stated, "It is my professional opinion, within a reasonable degree of medical certainty, that there is direct causal relationship between all of [appellant's] complaints, my diagnosis, and the incident related."

By decision dated January 13, 2015, OWCP denied modification of its May 30, 2013 decision, finding that appellant had not established an employment incident as alleged due to factual inconsistencies in the record.

### **LEGAL PRECEDENT**

OWCP defines 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.”<sup>2</sup> In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.<sup>3</sup> The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

With respect to the first component of fact of injury, the employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. 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, but the employee’s statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his or her burden of proof of 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. 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, if otherwise unexplained, cast sufficient doubt on an employee’s statements in determining whether a *prima facie* case has been established. 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 or persuasive evidence.<sup>4</sup>

### ANALYSIS

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained a traumatic injury on February 17, 2011, as alleged.

Appellant filed his claim for a February 17, 2011 traumatic injury on February 24, 2012. He stated that he injured his foot walking on stairs at the employing establishment. There are no witnesses to this alleged incident. Appellant’s statement that he sustained a traumatic injury on February 17, 2011, although entitled to great weight, is contradicted by his subsequent actions. He did not seek medical treatment until April 7, 2011 almost two months after the alleged traumatic injury. Appellant did not file his Form CA-1 for over a year, on February 24, 2012. He alleged that his supervisor was aware of his left foot injury, but there is no evidence in the record of such notification.<sup>5</sup> Furthermore, there is no supported explanation in the record for appellant’s delay in seeking medical attention or failing to file the claim. Finally, Dr. Millili, appellant’s attending physician, indicated that appellant described an “episode in his left foot” during his initial examinations in April 2011. Appellant informed Dr. Millili that his left foot

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<sup>2</sup> 20 C.F.R. § 10.5(ee).

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *D.B.*, 58 ECAB 464, 466-67 (2007). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.3 (August 2012).

<sup>5</sup> *P.T.*, Docket No. 09-2289 (issued August 16, 2010).

had become red, hot, and swollen, but denied any gross trauma to the area. Dr. Millili consistently diagnosed Charcot neuropathic collapse due to appellant's underlying diabetes. It was not until March 6, 2012 that Dr. Millili suggested that appellant's left foot condition had occurred during his working activities. This delayed suggestion in the medical evidence that appellant's left foot condition arose at work is not sufficiently detailed to support appellant's allegation of a work-related traumatic incident.

Appellant submitted a report dated March 25, 2014 from Dr. Stempler who listed appellant's history of a slip and fall at work on February 17, 2011 coming down stairs which hyperflexed his left ankle and foot. Dr. Stempler diagnosed neuro-Charcot or neuropathic left foot with associated chronic Lisfranc tarsometatarsal injury. This report was written almost three years after the alleged employment incident and cannot provide the contemporaneous medical evidence to support that the employment incident occurred as alleged.

The Board finds that circumstances surrounding appellant's account of an employment incident, including his delay in reporting the incident and his delay in seeking medical attention cast doubt on his claim.<sup>6</sup> Appellant has failed to establish fact of injury as he did not submit sufficient evidence to establish that he actually experienced an employment incident at the time, place, and in the manner alleged.<sup>7</sup> The Board finds that appellant has not established the first component of fact of injury in a traumatic injury claim, that the employment incident occurred as alleged, and that as he did not establish the factual aspect of his claim, it is not necessary to discuss the probative value of the medical reports.<sup>8</sup>

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 a traumatic injury in the performance of duty on February 17, 2011.

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<sup>6</sup> *C.B.*, Docket No. 14-0671 (issued August 24, 2015).

<sup>7</sup> *P.T.*, Docket No. 09-2289 (issued August 16, 2010).

<sup>8</sup> *Tracey P. Spillane*, 54 ECAB 608 (2003).

**ORDER**

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

Issued: December 22, 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