

the cause of the claimed injury, he stated, “loading and unloading truck, pulling pallets up and down hallway which caused pressure on lower back and leg.” On the same form, appellant’s supervisor stated that he received notice of the claimed October 16, 2012 injury on November 20, 2012. Appellant stopped work on October 16, 2012 and returned to work on November 8, 2012.

In support of his claim, appellant submitted an October 22, 2012 report in which Dr. Edward R. McDevitt, an attending Board-certified orthopedic surgeon, indicated that appellant reported having sciatica for three weeks.² Dr. McDevitt stated that straight leg testing reproduced back and left leg pain, but that the remainder of the motor and sensory examination was normal. He diagnosed lumbar syndrome with left radiculopathy. In an October 22, 2012 note, Dr. McDevitt diagnosed left sciatica and noted that appellant reported having this condition for six weeks.

Dr. McDevitt referred appellant for physical therapy treatment and an initial report of treatment, dated October 22, 2012, listed the diagnosis of left sciatica with a duration of two to four weeks. The report also listed an “onset/exacerbation date” of October 17, 2012. Appellant reported to the therapist that he woke up on October 17, 2012 but was unable to get out of bed due to back and left leg pain. No specific precipitating event was mentioned. The record contains additional physical therapy notes dated between October 2012 and January 2013, but none of the reports describes an October 16, 2012 work incident.³

In a November 5, 2012 report, Dr. McDevitt was advised by appellant that he had been having sciatica for five weeks. Appellant reported that he felt 40 percent better than the prior week noting that he was engaging in twisting activity in his garage at home, felt a pop, and had 24 hours of complete relief. Dr. McDevitt stated that straight leg testing reproduced back and left leg pain, but that the remainder of the motor and sensory examination was normal. He diagnosed lumbar syndrome with left radiculopathy and recommended light-duty work. On January 21, 2013 Dr. McDevitt noted that appellant reported having sciatica for 16 weeks and indicated that his back and left leg condition had improved. He did not mention an October 16, 2012 work incident.

In a letter dated February 7, 2013, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It noted that the evidence was not sufficient to establish that he actually experienced the incident or employment factor alleged to have caused injury.

Appellant submitted additional physical therapy reports and reports of Dr. McDevitt which were similar to those already submitted. Lumbar x-rays from October 18, 2012 were normal as was the computed tomography scan of his brain. Other medical forms also contained the diagnosis of left sciatica. Appellant began treatment on January 28, 2013 with Dr. Lawrence Saez, a chiropractor, who noted that appellant reported that on October 16, 2012 he felt left hip, buttock, and back pain after stepping off a truck at work. Dr. Saez summarized the prior medical

² It is noted that the date three weeks prior to November 5, 2012 is October 1, 2012.

³ Some of the reports list an October 17, 2012 date of injury without providing any account of the injury.

treatment, discussed findings, and diagnosed post-traumatic lumbosacral radiculitis, post-traumatic lumbar strain, and post-traumatic hip pelvic pain. There is no evidence x-rays were taken. Dr. Saez discussed therapy he would provide for appellant's conditions. He opined that the work accident was the cause of appellant's conditions.

In an undated statement received on March 11, 2013, appellant noted that he was loading and unloading a truck on an unspecified date when he stepped down from the truck and felt a pinch in his left hip area. He stated that he continued to work and that there were no witnesses to the event. Appellant noted that the following morning the pain increased, so he attempted to seek medical treatment, but was unable to find an available physician. He indicated that the pain worsened and he was taken by ambulance to the hospital on the third day after the incident. Appellant advised that he had no other injuries. He stated that he was off work for two and a half weeks and filed a claim following his return to work.

In a March 15, 2013 decision, OWCP accepted an incident but denied appellant's claim that he sustained a work-related injury on October 16, 2012 finding that he had not submitted sufficient medical evidence to establish that his claimed condition was causally related to the work incident on October 16, 2012.

In an April 24, 2012 report, Dr. McDevitt described his continued provision of conservative treatment for lower back pain and left sciatica, but he did not mention any specific work incident or provide an opinion relating the diagnosed condition to a work incident.

On May 2, 2013 Dr. Zvezdomir Zamfirov, an attending physician Board-certified in physical medicine, noted that appellant had reported experiencing a work-related injury in October 2012 when he was stepping out of a truck and felt a sharp pain in his left leg and lower back which worsened. He discussed his findings, summarized the results of a magnetic resonance imaging (MRI) scan test of the lumbar spine, and diagnosed acute left lower extremity radiculitis and L5-S1 disc herniation. Dr. Zamfirov opined that appellant's symptoms were caused by the disc herniation, but did not offer an opinion relating the diagnosed condition to the work incident.

An undated attending physician's report completed by a physician whose signature is illegible indicated that appellant began treatment on October 22, 2012. The report listed the date of injury as appellant's date of birth, and did not discuss a mechanism of injury. This physician provided a "yes" check mark that the diagnosed condition of sciatica was causally related to the work activity, but did not list the work activity or explain how this was related to the work incident.

An April 18, 2013 MRI scan test of appellant's lumbar spine showed left paracentral disc extrusion with associated free fragment at L5-S1 level displacing the thecal sac on the right and contacting the left S1 nerve root which the physician opined likely contributed to his symptoms.

Appellant requested a hearing with an OWCP hearing representative regarding his claim. During the July 18, 2013 hearing, he testified that the truck he was unloading on October 16, 2012 had two steps approximately 16 inches apart to get to the ground. Appellant stated that he was stepping down out of the truck and felt symptoms in his left hip area. He indicated that he

thought he just stepped down wrong or maybe twisted his leg. Appellant stated that he continued to load and unload the truck. He noted that he continued to experience a sharp pain in his hip area which progressively worsened until he was unable to move. Appellant advised that he stopped work and eventually was taken by ambulance to the emergency room. He asserted that he had no previous similar symptoms. Appellant stated that he had difficulty finding a physician and scheduling a follow-up appointment as everyone was booked. He advised that he was eventually examined on October 22, 2012 by Dr. McDevitt. Appellant stated that he received injections from Dr. Zamfirov and also was treated by a Dr. Saez, a chiropractor, for his continued symptoms. He noted that Dr. Saez did take x-rays which did not show “anything.” Dr. Saez diagnosed lumbosacral radiculitis, lumbar strain, and pelvic hip pain. Appellant advised that he returned to work in November 2012 and continued to work with time off for medical treatment.

Following the hearing, OWCP received an undated attending physician’s report from Dr. McDevitt. The report indicated that on October 16, 2012 appellant was unloading a truck and the next day his condition worsened, reported that the MRI scan testing found disc herniation, diagnosed sciatica and disc herniation, and included a “yes” check mark indicating that his condition was caused or aggravated by the employment activity.

By decision dated September 9, 2013, the hearing representative affirmed OWCP’s March 15, 2013 decision. She found that appellant’s claim for an October 16, 2012 work injury should be denied because he did not establish the fact of injury. There were such inconsistencies in the factual evidence as to cast doubt on the occurrence of the October 16, 2012 work incident.

Appellant submitted additional medical reports from 2013 and 2014. Some of the reports mentioned that he sustained an injury on October 16, 2012.

In an October 27, 2014 decision, OWCP denied modification of its September 9, 2013 decision denying appellant’s claim for a work related October 16, 2012 incident. It again found that he had not established the occurrence of an October 16, 2012 work incident due to inconsistencies in the factual evidence.

LEGAL PRECEDENT

An employee who claims benefits under FECA 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.⁴ 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 or her subsequent course of action.⁵ 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.⁶ Such

⁴ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁵ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁶ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

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.⁷ 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.⁸

ANALYSIS

On November 20, 2012 appellant filed a claim alleging that on October 16, 2012 he sustained a "pulled left sciatic nerve" at work loading and unloading a truck and pulling pallets up and down a hallway.

As noted, fact of injury cannot be found if there are such inconsistencies in the evidence as to cast serious doubt as to whether the specific event or incident occurred in the time, place, and manner alleged or if the evidence establishes that the specific event or incident to which the employee attributes the injury was not in the performance of duty. 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 the claim has been established.⁹

The Board finds that the evidence reveals that there are sufficient discrepancies in the factual evidence to cast doubt as to whether the incident occurred as alleged on October 16, 2012.

Appellant stopped work on October 16, 2012 and asserted that he sought treatment at the emergency room on October 18, 2012. He did not submit a copy of an emergency room report which provided a history of his condition. Appellant was treated by Dr. McDevitt, an attending Board-certified orthopedic surgeon, on October 22, 2012, *i.e.*, seven days after the alleged October 16, 2012 incident. Dr. McDevitt stated that for three weeks appellant had suffered from low back pain and left sciatica and that the pain had recently worsened, but the physician did not mention a work incident or specific duties on October 16, 2012. Appellant submitted a statement on March 3, 2013 to the effect that he was stepping down from a truck when he felt a pinch in his left hip. He denied any similar injuries or disabilities. Dr. McDevitt continued to provide treatment noting that appellant had low back pain and sciatica, but he did not provide a history of an October 16, 2012 work injury until many months after that October 2012. The initial physical therapy treatment note after the claimed October 16, 2012 injury noted that appellant woke up on October 17, 2012 and was unable to get out of bed. The note made no mention of stepping out of a truck or pulling pallets to load and unload a truck. There was no evidence from a health provider with this history of injury until January 28, 2013 when appellant was treated by Dr. Saez, an attending chiropractor.

⁷ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

⁸ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

⁹ *See supra* notes 6 and 7.

The Board notes that the medical evidence of record does not mention an October 16, 2012 work injury until more than three months after that date. In addition, the reports of record show that appellant had reported back pain and left sciatica for weeks prior to October 16, 2012. Appellant was asked to clarify these discrepancies, but failed to adequately do so. The claim of an October 16, 2012 work incident has been refuted by strong and persuasive evidence. As appellant has not established an October 16, 2012 work incident, OWCP properly denied his claim.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 injury in the performance of duty on October 16, 2012.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *supra* notes 4 and 8.