United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, CENTRAL WESTERN MASSACHUSETTS HEALTH CARE SYSTEM, Leeds, MA, Employer	)	**Docket No. 14-0522** **Issued: November 9, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2013 appellant, through counsel, filed a timely appeal from a November 21, 2013 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 a traumatic injury in the performance of duty on January 22, 2013.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 25, 2013 appellant, then a 55-year-old education specialist, filed a traumatic injury claim (Form CA-1). He claimed that he injured his back on January 22, 2013 at 11:48 a.m. when he lost his footing and fell to the floor.

The employing establishment controverted the claim and asserted that appellant's injury was caused by his own willful misconduct, intent to bring about injury to himself or another, or intoxication. It explained that he was witnessed placing himself on the floor and simulating a fall. The employing establishment asserted that appellant could not specifically explain how he fell and only stated that "[appellant's] feet were all of a sudden above him." It also noted that according to witnesses the floor was clean and dry. Appellant stopped work on January 22, 2013 and has not returned.

In a statement dated January 22, 2013, Brian Demer, a coworker, explained the events he witnessed relating to appellant's alleged fall. He reported that at approximately 11:50 a.m. on January 22, 2013, he saw appellant pacing in and out of room B060E at the employing establishment. Mr. Demer noted that appellant appeared to be unsettled. Appellant repeatedly looked to his left and right. Mr. Demer stated that he had observed the events from an adjacent room, B060B, without appellant's awareness. He saw appellant fill a cup with water in room B060E, almost immediately throw the water in the air, and then quickly lie down on the floor, without an audible "thud." Mr. Demer stated that it was his opinion that appellant acted purposefully. He wrote, "After the fall, I ran to [appellant's] attention and asked him if he was 'ok.' [Appellant] responded by quietly grunting. He did not speak any decipherable words." Mr. Demer then called 911 and requested an emergency team and notified his immediate supervisor of the situation.

In a narrative statement dated January 22, 2013, Sandy Diamond, a supervisor, reported that, at approximately 11:45 a.m. on January 23, 2013, she was called into the physical therapy clinic around the corner from her office by Mr. Demer. Mr. Demer told her, "[Appellant who was] working with us this morning is on the ground in the [employing establishment], I called a code." Ms. Diamond saw appellant on the floor, lying on his right side and holding his lower back with his left hand. When she asked him what happened, he stated, "I don't know, all of a sudden my feet were up in the air." On asking if appellant had slipped, if his knee had buckled, if his back had experienced spasms, or if he had been unconscious, he answered no to each question. He stated that he did not know why or how he ended up on the floor and also noted that he had not hit his head. Ms. Diamond stated that appellant mentioned service-connected back problems. Appellant told her that his coffee spilled when he fell and Ms. Diamond noted that there was a puddle of water on the floor away from where he lay. Ms. Diamond also noted that the surrounding floor was clean and free of debris or fluids.

In a statement dated January 25, 2013, Kelly Challet, a coworker, stated that, at the time of appellant's fall, she was in an adjacent room with the door open. She heard Mr. Demer ask appellant, "Are you okay?" Preceding Mr. Dermer's question to appellant, Ms. Challet noted that she had not heard any noise that would have caused her to respond to an adjoining room.

On January 31, 2013 OWCP informed appellant that the information submitted was insufficient to establish his claim. It requested additional information and evidence, including details surrounding the incident of January 22, 2013, witness statements and a narrative report from his physician with a diagnosis and an opinion as to the causal relationship between the diagnosed condition, and the alleged incident. OWCP also requested that the employing establishment provide information on any investigation it had conducted into the incident.

By letter dated January 29, 2013, Dr. Robert J. Banco, a Board-certified orthopedist, stated that appellant had been admitted in the last week for an injury to his lumbar spine. He stated that a magnetic resonance imaging (MRI) scan and a computerized tomography (CT) scan had been obtained. Dr. Banco concluded that appellant needed surgery for weakness in his left leg, disc degeneration, and a disc herniation. He noted that the surgery would occur on February 7, 2013 and that appellant would be out of work for approximately six weeks.

On February 11, 2013 the employing establishment stated that it had not conducted an investigation beyond obtaining the three statements of employees in the immediate vicinity of the alleged incident and that it had no reason to doubt the eyewitness accounts of events.

Appellant responded to OWCP's inquiries on February 22, 2013 with a more detailed account of the incident. He explained that at 11:45 a.m. on January 22, 2013, after he had cleaned a physical therapy apparatus on three separate occasions, he stood in the doorway of the physical therapy staff office. Ms. Diamond informed him that he could not stand around doing nothing. Appellant explained that he had cleaned the apparatus three times and that no one had used it since he had cleaned it. Ms. Diamond repeated that he could not just stand around. She suggested that appellant go to lunch and report to the occupational therapy clinic at 12:45 p.m. Appellant told Ms. Diamond that he would probably clean the apparatus again and then go to lunch.

Appellant stated that, at about 11:53 a.m., he was walking back and forth from the staffroom door and realized that he did not need to clean the apparatus again since he had already cleaned it. He filled his coffee cup with coffee from the thermos he had brought.

As appellant approached the office door to leave, he claimed his foot slipped, causing him to fall on his back. He heard someone yell that he had fallen and was immediately surrounded by people telling him not to move. Appellant's back was in pain and he was told again not to move. He asked what he had slipped on, but he did not receive an answer. Appellant stated that he heard someone ask for a towel, but stated that he was unsure if the towel was for something he had slipped on or if it was to wipe up the coffee he had spilled. He was taken to the radiology clinic, where x-rays were performed. Appellant was then taken to an urgent care clinic. Appellant's physician decided to move him by ambulance to another hospital under the care of Dr. Banco, (who had performed two prior surgeries on appellant's back).

In a letter dated February 20, 2013, Dr. Banco stated that appellant had been admitted on January 22, 2013 after a fall at work. He noted that appellant had significant back and right leg pain. An MRI scan on January 25, 2013 had demonstrated significant compression of his right L1 and L2 neural foramina, with significant gas in the disc space from adjacent-segment degeneration. Dr. Banco found a subluxation at L1 on L2. He noted that appellant had a

previous L2 to S1 fusion performed many years ago. On January 27, 2013 appellant was discharged with a walker and a knee immobilizer. On February 7, 2013 he returned for a posterior lumbar fusion procedure. The procedure was successful and appellant was discharged. Dr. Banco stated, "In my opinion, [appellant's] fall at work stimulated the weakness in his right lower extremity, which required the performance of the above-noted surgical procedure. His prognosis for recovery is excellent."

By decision dated March 14, 2013, OWCP denied appellant's claim for compensation. It found that the evidence did not establish that the traumatic incident of January 22, 2013 occurred as described, such that he had failed to establish the factual component of his claim.

On March 25, 2013 counsel requested a telephonic hearing before an OWCP hearing representative.

In a report dated January 22, 2013, Dr. Iris Foley, a Board-certified radiologist, noted that hardware from the level of L3 through S1 did not appear significantly changed and that there appeared disc fusion material at L2-3, L3-4, L4-5, and L5-S1. He recommended clinical correlation of these and other findings and an MRI scan if indicated.

On January 24, 2013 Dr. Kee Chung, a Board-certified radiologist, examined the results of a CT scan of appellant's lumbar spine. He noted that appellant's fusion screws and hardware were unchanged in position, with no evidence of device failure, migration, or loosening. Dr. Chung offered a number of other opinions and findings concerning appellant's back condition.

In another diagnostic report dated January 25, 2013, Dr. Daniel Silverstone, a Board-certified radiologist, examined the results of an MRI scan of appellant's lumbar spine. He diagnosed postsurgical anterior lumbar interbody fusion changes and mild adjacent segment discogenic degenerative changes with a right paracentral and lateral intraforaminal disc protrusion at L1-2.

A hearing was held before an OWCP hearing representative on July 17, 2013. Appellant agreed that Mr. Demer had observed him pacing in and out of a room on the date of the incident. He stated that he was pacing because he was undecided as to whether he should take a lunch break or whether he should stay to do more work. Appellant had only been in the clinic for a few hours. He decided to go to lunch, but to save money, he filled his cup with coffee from his thermos. As appellant exited the room, he slipped and fell to the floor. He stated that he was unsure where his coffee went. Appellant stated that he brought his coffee from home and that he had not filled up his cup with water at a faucet. He stated that he had no idea what caused him to slip.

In response to a witness statement that appellant had lain down on the floor without a fall, appellant testified, "Well, I just say it's one heck of a way of laying down. I remember walking and then seeing my feet up in the air, whatever it is, I was losing balance. And I came down hard. I was in extreme pain." Appellant fell flat on his back.

Counsel asked whether anyone had entered the room other than Mr. Demer. Appellant responded, "All I can remember -- like I said, I was in a lot of pain. But I remember hearing

somebody say something about a code and then there was -- a number of people came in. I'm not sure how many people came in. I just -- a number of people came in." He denied that the incident was staged.

Appellant noted that discs in his back had been replaced and that, prior to the incident, he had been scheduled for additional back surgery in April 2013. The surgery was moved up to February 7, 2013, because he had lost feeling in his leg and had fallen "a couple of times" in the hospital. Appellant acknowledged two previous back surgeries with Dr. Banco and testified that there had been no other incidents involving his back before January 22, 2013.

Counsel contended that the only item of odd behavior referenced in the witness statements was Mr. Demer's observation that appellant had paced in and out of the room and appeared unsettled. Appellant's counsel asserted that appellant had provided a logical explanation for that behavior. Counsel also argued that the difference between coffee and water on the floor was not determinative of the issue at hand. Appellant had suffered a slip and fall on an unidentified substance. He received immediate medical treatment and saw Dr. Banco on the same day.

In a report dated January 22, 2013, Dr. Owen McGonigle, an orthopedic surgeon, reviewed appellant's history of injury and stated that appellant presented with an acute onset of worsening back pain after slipping and falling on that date. Appellant submitted emergency department notes from Dr. Frank Carrano, Board-certified in emergency medicine, dated January 22, 2013. Dr. Carrano diagnosed back pain and stated that appellant had arrived for treatment in the emergency department after slipping and landing on his lower back. He also submitted notes from registered nurses.

By decision dated November 21, 2013, an OWCP's hearing representative affirmed the decision of March 14, 2013 finding that appellant had not presented sufficient evidence to establish that the incident occurred as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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[3] was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

[2] *Id*.

[3] OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events of 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. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

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.[6] 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.[7] 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.[8] 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.[9] 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.[10]

It is a well-settled principle of workers' compensation law and the Board has so held, that an injury resulting from an idiopathic fall -- where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment -- is not within coverage of FECA.[11] Such an injury does not arise out of a risk connected with the employment and is, therefore, not compensable. The Board has made equally clear, the fact that the cause of a particular fall cannot be ascertained or that the reason it occurred cannot be explained, does not establish that it was due to an idiopathic condition.

This follows from the general rule that an injury occurring on the industrial premises during working hours is compensable unless the injury is established to be within an exception to

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[5] *Id*. *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

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

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

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

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

[10] *D.B.*, 58 ECAB 464, 466-67 (2007); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

[11] *See Carol A. Lyles*, 57 ECAB 265, 268 (2005).

such general rule.[12] If the record does not establish that the particular fall was due to an idiopathic condition, it must be considered as merely an unexplained fall, one which is distinguishable from a fall in which it is definitely proved that a physical condition preexisted and caused the fall.[13]

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty, unless the injury is caused by an intent to injure oneself or another.[14] An allegation of intent to injure oneself or another is in the nature of an affirmative defense. The adjudicating agency has the burden, if it makes such an allegation, to prove that there was intent to injure oneself or another and that such intent caused the injury. If the adjudicator believes that the evidence in the case record justifies a finding of the injury being caused by intent to injure another or oneself, he or she has the responsibility of making such a finding in the original adjudication of the case.[15] If OWCP does not invoke this affirmative defense in the original adjudication of the claim, it is precluded from doing so on appeal.[16]

ANALYSIS

On January 25, 2013 appellant filed a traumatic injury claim alleging that he sustained a low back injury on January 22, 2013 as the result of a fall. OWCP denied his claim on March 14, 2013, finding that he had not established that the incident had occurred as described and a hearing representative affirmed this decision on November 21, 2013.

The initial question presented is whether appellant established that the January 22, 2013 employment incident occurred as alleged. The burden of proof rests upon him.

OWCP did not adjudicate the issue of willful misconduct or injury caused by intent to injure oneself in the original adjudication of March 14, 2013. As noted above, it has the responsibility to adjudicate allegations of willful misconduct or intent to injure oneself or another when alleged by an employing establishment in the original adjudication.[17] Because OWCP adjudicated only whether appellant had established the factual component of fact of injury in the original decision of March 14, 2013, without making specific findings regarding alleged misconduct or an intent to injure, this affirmative defense is not at issue in this case.

[12] *N.P.*, Docket No. 08-1202 (issued May 8, 2009); *Dora J. Ward*, 43 ECAB 767, 769 (1992); *Fay Leiter*, 35 ECAB 176, 182 (1983).

[13] *John R. Black*, 49 ECAB 624, 626 (1998); *Judy Bryant*, 40 ECAB 207, 213 (1988); *Martha G. List*, 26 ECAB 200, 204-05 (1974).

[14] 5 U.S.C. § 8102(a)(1).

[15] *See Brenda J. Bouette*, Docket No. 05-1477 (issued December 14, 2005); *Barry Himmelstein*, 42 ECAB 423, 434 (1991); *Paul Raymond Kuyoth*, 27 ECAB 498, 505 (1976), *reaff'd on recon*, 27 ECAB 253 (1976).

[16] *See Allan B. Moses*, 42 ECAB 575, 583 (1991).

[17] *Id*.

The Board finds that appellant has not met his burden of proof to establish that the fall of January 22, 2013 occurred as alleged. A claimant does not meet his or her burden of proof to establish an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. A claimant's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. There is no substantial inconsistency between his account of events and the accounts of his coworkers and supervisor with regard to the time and place of his alleged injury. The record establishes that he was on the property of the employing establishment during his regular work hours at the time of the incident.

There is an inconsistency, however, surrounding the manner in which appellant was allegedly injured. He stated that he did not know what caused his fall. A lack of knowledge alone is, generally, not fatal to a claim for compensation.[18] It is understood that the victim of an accident may not remember or may not have known the relevant facts.

The Board must consider whether the statements of appellant's coworkers and supervisor cast serious doubt on the validity of his claim, and overcome the probative value generally afforded to his own statement of how he was injured.[19]

Mr. Demer's statement that he observed appellant throw water in the air and quickly lie down upon the floor, coupled with his opinion that appellant had acted to stage a fall, casts serious doubt on the credibility of appellant's version of events. In fact, the record shows that appellant was already scheduled for serious back surgery just prior to this incident. Mr. Demer is a disinterested witness and there is no reason to discount his unbiased version of the incident. Appellant was unaware of Dr. Demer's observance of appellant's behavior.

The statement of Ms. Diamond, appellant's supervisor, corroborates Mr. Demer's statement that appellant had water in his cup which was thrown into the air. She noted that there was a puddle of water on the floor away from the area where appellant lay and that the floor surrounding him was clean and free of debris or fluids.

In her statement, Ms. Challet, a coworker, reported that she was in an adjacent room with the door open when she heard Mr. Demer ask appellant if he was "okay," without having heard any noise beforehand suggestive of a fall. She did not witness the actual fall, but only noted that she had not heard a loud noise beforehand that would have caused her to respond. Ms. Challet's not hearing a loud noise before Mr. Demer arrived to ask appellant if he was "okay" tends to confirm Mr. Demer's statement that appellant did not fall, but rather placed himself on the floor.

Although generally if there is an unexplained fall on employment premises, it is generally considered to have occurred in the performance of duty,[20] appellant first must meet the burden of proof to establish his claim and the question of credibility remains. For these reasons, the Board

[18] *See supra* note 13.

[19] *See supra* note 10.

[20] *Supra* note 13.

finds that he has not established by a preponderance of the reliable, probative, and substantial evidence that the traumatic event of January 22, 2012 occurred as described.

CONCLUSION

The Board finds that appellant has failed in his burden of proof to establish that an alleged January 22, 2012 fall at work occurred as described.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.[21]

Issued: November 9, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[21] Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.